

Citation: *R. v. Schafer*, 2003 YKTC 77

Date: 20031017
Docket: T.C. 02-00403
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

Christopher Schafer

Appearances:

Kevin Drolet

Nils Clarke

Counsel for Crown
Counsel for Defence

Publication of information that could disclose the identity of the complainant or witness has been prohibited to section 486(3) of the *Criminal Code*.

REASONS FOR SENTENCING

[1] Mr. Schafer has pled guilty to the following charge:

On or about the 29th day of September, 2002, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did break and enter a certain place, to wit: a dwelling house situated at #19-5025-5th Avenue, Whitehorse, Yukon Territory and did commit therein the indictable offence of sexual assault with a weapon, contrary to Section 348(1)(b) of the Criminal Code.

The Facts

[2] I have had the benefit of an agreed statement of facts reduced to writing and filed with the court. The two victims in this case, Ms. A. and Ms. E. had been downtown with friends and returned to Ms. A.'s home at approximately 11:30

p.m., along with Ms. A.'s cousin, C.B. As Ms. A. had been drinking, she went to bed immediately. Ms. E. retired at approximately 12:30 a.m. to the same bed occupied by Ms. A. They were both fully clothed in jeans and shirts.

[3] C.B. left shortly thereafter, closing the apartment door and assuming it locked automatically. It did not.

[4] Around 2:00 a.m., the accused appeared in their bedroom completely naked and started taking off Ms. E.'s pants. She struggled and fought back. Mr. Schafer then ripped her pants and panties off. He held a knife to her stomach and throat and told her to shut up and stop struggling.

[5] Mr. Schafer attempted sexual intercourse, but because of the struggle, no penetration occurred.

[6] At this point, Ms. A. woke up and saw Ms. E. being choked by Mr. Schafer. Ms. A. attacked Mr. Schafer and this allowed Ms. E. to escape and go for help. Mr. Schafer grabbed Ms. A. by the neck and dragged her into the living room. By that time, there was a lot of commotion in the apartment building as a result of Ms. E. going for help. Mr. Schafer fled the apartment.

[7] The accused was arrested in his own apartment at approximately 4:45 a.m. He was found hiding in a closet completely naked and was bleeding from a cut on his arm.

[8] The knife used by Mr. Schafer was found in Ms. A.'s apartment. It was a kitchen knife with a blade of seven and one-half inches.

[9] Mr. Schafer provided a breath sample with a relatively low reading of 40mg. in one hundred milliliters of blood.

[10] Ms. E.'s injuries included bruising to her face, groin and right knee area. She also had rub marks on her neck and hips. The accused's blood was noted on many parts of her body, including her groin and inner thigh area.

[11] Ms. A.'s injuries included a swollen upper lip with bruising, a bruise on her neck and left shin and a sore bump on the back of her head. She also had the accused's blood on her face, upper chest and arms.

Criminal Record

[12] Mr. Schafer has a significant criminal record with 29 entries going back to 1990 when he was a youth. It includes an assault, an assault with a weapon and a sexual assault with a weapon. The circumstances of the sexual assault, which took place in 1999, were not dissimilar to the facts of the charge before the court. In addition, he has a robbery conviction in 1998 and a drinking and driving conviction in 1996. Mr. Schafer's record also includes an assortment of property and process offences.

Personal History

[13] Mr. Schafer is a 26 year-old First Nations man from the community of Old Crow, Yukon Territory. Mr. Schafer did not do well academically, and has only a grade nine education but excels in traditional skills such as hunting and fishing. He had a difficult childhood, growing up in a violent, alcoholic home. When a young teenager, his parents stopped drinking. About that same time, Mr. Schafer started to drink. He has been abusing substances ever since.

[14] A more detailed personal history can be found in the Reasons for Judgment in his sentencing for sexual assault in 2000: *R. v. Schafer*, 2000 YTTC 0506.

The Psychiatric Assessment

[15] Dr. Vijay Singh conducted a detailed psychiatric examination of Mr. Schafer on the morning of June 14, 2003 at the Whitehorse Correctional Centre. Prior to the preparation of his report, he reviewed a binder of legal and clinical documents, substantially the same as filed with this court by the Crown.

[16] Dr. Singh reviewed Mr. Schafer's family history and concluded:

Taking a longitudinal perspective of this case, it becomes quite obvious that Mr. Schafer's life was marred with drugs, alcohol and criminality with no genuine hopes of habilitation or rehabilitation on the part of this man. Over the years, it is quite evident that he has been involved in the psychiatric and legal systems increasingly and has not responded to any treatment efforts to date. There has been little disagreement of mental health professionals involved in his case regarding diagnosis and Mr. Schafer has been uniformly seen as suffering from a personality disorder with prominent antisocial traits as well as indomitable addiction to street drugs and alcohol.

[17] Dr. Singh notes Mr. Schafer's escalating criminal behaviour and that he will continue in activities that will lead to further arrests and incarceration. Dr. Singh states that the primary concern at this time should be the protection of the public, "given his complete inability to control his behaviour for any length of time in the foreseeable future" ... "There is little doubt that Mr. Schafer continues to present an ongoing risk to the community in the absence of any foreseeable restructuring and reshaping of his aggressive and violent behaviour patterns". Dr. Singh recommends long-term treatment in a secure setting like the Regional Psychiatric Centre (Prairies).

[18] Dr. Singh concludes as follows:

In a summative clinical explication, it can be said that Mr. Schafer has a seriously abnormal personality with faulty judgments, lack of foresight, a failure to learn from experience, and on occasion reckless behavior which has proved dangerous to others around him.

His current offence does raise serious concerns for the future risk of sexual deviancy, especially in the presence of addictive propensity as well as unbridled aggression.

The Fit Sentence

[19] The offence before the court is one of the most serious in our society, short of homicide. It involves breaking into the apartment of a young woman and the use of both violence and a weapon, a knife, to commit a sexual assault. Had one of the women not escaped and called for help, there is no telling what would have happened. It would have been worse, but how much worse would be mere speculation.

[20] Mr. Schafer is a young aboriginal man with a lengthy related record. The conviction in 2000 for a remarkable similar offence is an aggravating factor. In that offence, Mr. Schafer was high on drugs, including cocaine. He used a knife. The attack was a prolonged one, extending the victim's terror. On sentencing, Mr. Schafer received the benefit of his youthful age, his aboriginality, the strong support from his family and his remorse. Mr. Schafer received a sentence of two years less a day, followed by three years of probation. Mr. Schafer incurred a number of probation breaches during the interval. The current offence was committed while he was still on probation for the earlier sexual assault.

[21] Mr. Schafer has a severe substance abuse problem, including alcohol, hard drugs and prescription drugs. These drugs act as a disinhibitor or trigger for his violent offending. Until he learns to avoid alcohol and drugs, he will be a threat to the safety of the community.

[22] Mr. Schafer is also at high risk to re-offend sexually. The programming required to assist him is not available within the Yukon Territory. I am satisfied that for treatment to be effective, he will need a lengthy period of treatment within a secure facility outside the Yukon.

[23] In this case, the aggravating factors are:

1. The offence involved breaking into a dwelling house and using a weapon in the course of a sexual assault, for which the maximum punishment is life imprisonment. It was, in fact, a home invasion, which is an aggravating factor by virtue of s. 348.1;
2. Two young women were attacked in their bed while asleep;
3. At the time, Mr. Schafer was high on alcohol and a variety of other chemicals, including cocaine. As a result of a previous experience, he knows that these substances are significant risk factors for him;
4. The attack was a persistent one. Both women fought with Mr. Schafer. One escaped to get help. Only then, did he stop the assault;
5. Mr. Schafer has a criminal record of 29 prior convictions, including both violent and sexual offences. Moreover, it appears that the degree of violence is escalating; and
6. Mr. Schafer had opportunities to engage in treatment while in custody. He declined. While on probation, he attended only 10 of 40 sessions with the sex offender treatment program.

[24] The mitigating factors in this case are:

1. The plea of guilty and acceptance of responsibility that accompanied the plea;
2. Mr. Schafer's expression of remorse;
3. The weapon (knife) was not used to injure the victims;
4. Sexual intercourse did not take place;
5. Mr. Schafer has experienced a troubling childhood, having been exposed to domestic violence and substance abuse;
6. A number of grief issues remain unresolved;
7. Mr. Schafer's limited education (Grade 9) reflects some cognitive delays; and

8. Mr. Schafer has support from his family and some elders in the community.

[25] I have considered s. 718 of the *Criminal Code* dealing with the purpose and principles of sentencing, including s. 718.2(e), which requires a sentencing judge to pay particular attention to the circumstances of aboriginal offenders. However, where the offence is a serious repeated one, as in this case, the accused's aboriginality will have little, if any, impact on the sentence. In this case, the primary purpose of sentencing is to denounce this kind of conduct and to separate Mr. Schafer from society for an extended period of time during which he can receive treatment in a secure facility. As Crown counsel has pointed out, Mr. Schafer will be returning to the community some day. For that reason, his rehabilitation is of considerable importance.

[26] Counsel have filed and reviewed a number of related cases from the Yukon and British Columbia. The citations for these cases are set out in Appendix A, attached hereto. Based on these authorities, I am satisfied that the appropriate range of sentence is between four and eight years imprisonment, taking into account and giving double credit for the period of pre-trial detention, which is one year.

The Long-Term Offender Designation

[27] The Crown has filed a notice to have Mr. Schafer designated as a long-term offender. Section 753.1(1) is the provision that applies to long-term offenders:

753.1(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

- (b) there is a substantial risk that the offender will reoffend; and
 - (c) there is a reasonable possibility of eventual control of the risk in the community;
- (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
- (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), ... subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and
 - (b) the offender
 - (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
 - (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
- (3) Subject subsections (3.1), (4) and (5), if the court finds an offender to be a long-term offender, it shall
- (a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and

(b) order the offender to be supervised in the community, for a period not exceeding ten years, in accordance with section 753.2 and the *Corrections and Conditions Release Act*.

[28] I have already indicated that the appropriate range of sentence in this case is between four and eight years incarceration, in addition to Mr. Schafer's remand time. The condition set out in s. 753.1(1)(a) is met.

[29] I am also satisfied beyond a reasonable doubt that there is a substantial risk that Mr. Schafer will re-offend, as required in s. 753.1(1)(b). I rely on his criminal record and the numerous assessments filed with court. In his April 18, 2000 report, Dr. Karl Williams concludes:

... Unfortunately, and despite his being strong-willed in certain respects, he is at very high risk for a resumption of substance misuse over the medium and long-term. Furthermore, an examination of static and dynamic risk factors indicated that he is at high risk for sexual recidivism. ...

[30] Dr. Williams confirmed this assessment in his December 5, 2002 report:

... His current offence would cause me to rate his risk of serious sexual relapse as very high and give grounds for the belief that he has a considerable distance to travel before he could be viewed as representing anything less than a high risk for further acts of sexual violence. ...

[31] In any event, s. 753.1(2) deems me to be satisfied that the conditions set out in s. 753.1(1) have been met. The predicate offence falls within the category of "serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted", as set out in paragraph (a). As this is Mr. Schafer's second conviction involving a sexual assault with a weapon, the condition set out in 753.1(2)(b)(ii) has also been met.

[32] The third requirement, that there is a “reasonable possibility of eventual control of risk in the community” is more problematic. It is problematic in part because it requires an evaluation projected into the future. On the other hand, the standard to be met is a low one, namely “a reasonable possibility” that his risk can be controlled in the community.

[33] Dr. Singh’s report dated July 8, 2003 is the least optimistic. Nevertheless, he does not rule out treatment as being ineffective. He states:

... Mr. Schafer is likely to re-offend should his behaviour not be re-shaped or re-modeled through rigorous treatment programs within a very secure setting....

[34] Dr. Karl Williams’ reports dated April 17, 2000 and December 5, 2002 are premised on the effectiveness of treatment for Mr. Schafer’s sexual offending behaviour. Dr. Williams also notes the relationship between Mr. Schafer’s substance abuse and his sexual offending:

... His use of intoxicants has been associated with his offending and evidently it is a variable that intensified his potential for antisociability ... were he able to remain substance-free his potential for future problematic behaviour could be significantly reduced....

[35] I note, as well, the evidence of Eleanor Velarde, a volunteer counselor and Larry Kwiat, the Chaplain at Whitehorse Correctional Centre who report positive changes in Mr. Schafer over the past year. These include remorse for his victims and taking responsibility for what he did. Mr. Schafer also has the community support of his family, including his parents, who were present in court and addressed the court.

[36] Based on the evidence before me, I am satisfied beyond a reasonable doubt that there is a reasonable possibility of eventual control of risk in the community. My finding is based on the availability of appropriate treatment for

Mr. Schafer while he is in custody and on the fact that he will be subject to conditions and supervision for an extended period of time upon his release from custody.

[37] In conclusion, I find Mr. Schafer to be a long-term offender, as defined in s. 753.1 of the *Criminal Code*.

[38] Taking into account the purpose and principles of sentencing, the relevant caselaw, Mr. Schafer's criminal record, the circumstances of the predicate offence, the evidence and submissions of counsel, I impose a period of incarceration of five years. I have credited Mr. Schafer with double-time for the one year of pre-trial custody. In effect, this is equivalent to a seven-year sentence.

[39] In addition, I order Mr. Schafer to be supervised in the community for a period of five years in accordance with s. 753.2 of the *Criminal Code* and the *Corrections and Conditions Release Act*.

Conditions of Supervision

[40] Part XXIV of the *Criminal Code* provides that after the custodial portion of a long-term offender's sentence has been served, the offender will be supervised in accordance with the *Corrections and Conditional Release Act*. The *Corrections and Conditional Release Regulations* associated with that *Act* provide in s. 161(1)(a) to (h) a number of statutory terms that apply to all long-term offenders. They include a prohibition against possessing any weapon, except as authorized by the parole officer. Section 134.1(1) of the *Act* enables the Board to establish additional terms of supervision "that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender".

[41] Although this court cannot prescribe supervisory conditions, it can, in my view, and in many cases should, recommend special conditions to the Parole Board. I say “should” because the sentencing court often has a good understanding of the offender, his family and the community he is returning to.

[42] I recommend these additional release conditions for the Board's consideration that:

1. Mr. Schafer abstain absolutely from the purchase, possession and consumption of alcohol;
2. Mr. Schafer not possess or have under his control, any substance described in the *Controlled Drugs and Substances Act* except under the authority of a medical prescription;
3. Should a peace officer have a reasonable suspicion to believe that Mr. Schafer is in breach of the foregoing conditions, that peace officer may demand and Mr. Schafer shall provide a breath sample or sample of bodily fluids suitable for analysis;
4. Mr. Schafer be subject to random drug testing and that he cooperate fully with the supervisor or designate in this regard;
5. Mr. Schafer have no contact directly or indirectly with the complainants, Ms. A. and Ms. E.;
6. Mr. Schafer attend and participate for counseling as directed, including but not limited to: sex offender counseling and programming, substance abuse programming and psychological counseling. In this regard, Mr. Schafer is to sign any necessary releases or authorization forms to permit his supervisor to receive all information concerning his progress in such programs;
7. Mr. Schafer not attend at any licenced bar or tavern or any other place whose primary purpose is the sale of alcohol or alcoholic beverages;

8. Mr. Schafer participate in a program of pharmaceutical intervention (such as Antabuse) designed to deal with his cravings for alcohol and/or illicit drugs, as recommended by a qualified physician; and
9. For an initial stabilizing period to be determined by the Board, Mr. Schafer abide by a curfew by remaining within his residence between the hours of 9:00 p.m. and 7:00 a.m. subject to such exceptions as provided by his supervisor in advance and in writing.

[43] In addition, as requested by the Crown and consented to by the accused, Mr. Schafer will be subject to the following orders:

1. Pursuant to s. 109 of the *Code*, Mr. Schafer is prohibited from possessing a firearm, cross-bow, restricted weapon, ammunition and explosive substance for life; and
2. Pursuant to s. 487.051 of the *Code*, there will be an order authorizing the taking of one or more bodily samples reasonably required for the purposes of forensic DNA analysis.

[44] The victim fine surcharge is waived. As agreed between counsel, there will be no recommendation regarding parole eligibility.

Lilles C.J.T.C.

Appendix A

1. *R. v. G.E.W.*, [1993] B.C.J. No. 1297 (B.C.C.A.)
2. *R. v. Kodwat*, [1989] Y.J. No. 121 (Y.K.T.C.)
3. *R. v. Priske*, [1994] Y.J. No. 181 (Y.K.T.C.)
4. *R. v. Priske*, [1994] Y.J. No. 67 (Y.K.T.C.)
5. *R. v. Jacob*, [2002] No. 15 (Y.K.T.C.)
6. *R. v. D.T.K.*, [2002] B.C.J. No. 589 (B.C.C.A.)
7. *R. v. T.M.N.*, [2002] B.C.J. No. 1890 (B.C.C.A.)
8. *R. v. D.R.M.*, [2002] B.C.J. No. 1171 (B.C.S.C.)
9. *R. v. Goodwin*, [2002] B.C.J. No. 2116 (B.C.C.A.)
10. *R. v. Blair*, [2002] B.C.J. No. 656 (B.C.C.A.)
11. *R. v. Johnson*, [2003] S.C.C. 46