Date: 20030513
Docket: 02-00531, 02-10121
Registry: Whitehorse
Heard: Watson Lake

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Judge Faulkner)

REGINA

v.

THOMAS STEWART

Kevin Drolet — Appearing for Crown

Gordon Coffin — Appearing for Defence

REASONS FOR SENTENCING

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[1] FAULKNER T.C.J. (Oral): Thomas Stewart was convicted, after trial, on a charge of sexual assault. He has also entered guilty pleas to two charges of breach of recognizance; the first being a breach of a no contact order and the second being a breach of curfew. As well, he has entered a plea of guilty to a charge of criminal harassment.

[2] The accused in this case has a very extensive criminal record, including numerous crimes of violence. That has an impact both with respect to what should be done about the sexual assault, and also with respect to the charge of criminal harassment, because it indicates why there would be good reason for the victim of the harassment to be seriously concerned by the activities of this offender.

[3] There has been a pre-sentence report prepared, but the information provided therein by Mr. Stewart is of such doubtful veracity that it is not of particular assistance in dealing with this matter.

[4] On the charge of sexual assault, I was referred by the Crown to the case of *G.C.S.*, [1998] Y.J. No. 77 (C.A.) (Q.L.). That resulted in a sentence of 16 months, I believe. But it must also be recalled that in that case the offender had spent four and one half months in custody prior to the imposition of sentence. So the effective sentence was certainly more than 16 months and arguably at, if not above, the penitentiary threshold. There are, however, some obvious distinctions between the *S., supra*, case and this, in that in the *S., supra,* case, there was a completed act of sexual intercourse.

[5] In this case, it could not be shown that matters had progressed any further than the removal of clothing from the victim of the offence, who was essentially in a comatose state from the consumption of alcohol. So there is a substantial disparity in the facts.

[6] On the other hand, it must also be noted that G.C.S. was a young man with a much less extensive record, as near as I can gather from the report, and had expressed remorse through a guilty plea and otherwise for his offence.

[7] With respect to the charge of criminal harassment, I was referred to the *R. v. Kostiuk,* [1997] Y.J. No. 80 (S.C.) (Q.L.) decision. The facts are not really set out in the decision of Mr. Justice Goodwin so it is difficult of compare. But if I am not incorrect, this is a case that did arise in Watson Lake and in which I was the trial judge. I do recall the circumstances of that case and I think it must be said that they were more egregious than in the case at bar given that Mr. Kostiuk's conduct was much more persistent and over a much more significant period of time.

[8] With respect to the criminal harassment charge, the Crown has submitted that a sentence of six months would be appropriate. It seems to me that that would be excessive given that the Crown proceeded by summary conviction. That would be the maximum sentence that could be imposed and I think that it has not been shown that this was an offence which should attract the maximum.

[9] The other principle that needs to be kept in mind, of course, is the matter of the global effect since there are a number of sentences to be imposed today.

[10] Having regard to the background of this accused and noting the distinctions between this case and the *S., supra,* case, I am still persuaded that a substantial period of imprisonment is called for. Had there not been pre-trial custody, I would have imposed a sentence on that charge of 16 months.

[11] With respect to the charge of criminal harassment, not taking into account the pre-trial custody, I would have imposed a sentence of three months consecutive.

[12] With respect to the breach charges, I would have imposed a sentence of one month consecutive on each count. That is a total of 21 months.

[13] The accused has been in custody now for a period of five months and I see no reason not to give him credit for that at the usual rate of double time. He, therefore, is entitled to ten months credit for time already spent. In the result, he will be imprisoned for a further period of eleven months.

[14] Following his release from imprisonment, he will be subject to a probation order for a period of 18 months with conditions, that he keep the peace and be of good behaviour. That he report to the Court as and when required. That he report to a probation officer forthwith upon his release from imprisonment and thereafter as directed.

[15] He will advise the probation officer forthwith of any changes of name or address, and promptly notify him of any change of occupation or employment.

[16] He will reside at such a place as the probation officer will approve in writing.

[17] During the first six months that the probation order is in effect, the accused will be subject to a curfew between the hours of 11:00 p.m. and 7:00 a.m. except with the permission of the probation officer.

[18] The probationer will not attend any place where alcohol is sold or kept for sale, other than a restaurant. He will not possess or consume any alcohol and he will submit to a breathalyzer test upon demand by a peace officer or his probation officer if either believes that the accused has alcohol in his body contrary to the terms of the probation order.

[19] He will have no contact directly or indirectly with Merillee Horesay, Jessie Dawson or Sheila Sutherland.

[20] He will take such alcohol assessment treatment and counseling as he may be directed to take by the probation officer.

[21] He will attend the sex offender risk management program if so directed by the probation officer.

[22] He will take any psychological assessment counseling as the probation officer directs.

[23] In the circumstances, the surcharge is waived. Is the Crown seeking a DNA order?

[24] MR. DROLET: Yes, this a primary designated offence pursuant to s. 487.051 and it is an offence for which the court must consider -- no, I

believe it's mandatory under s. 109*,* and for firearms prohibition as well.

[25] THE COURT: With respect to the DNA order, do you have any submissions?

[26] MR. COFFIN: No, sir.

[27] THE COURT: I direct that the accused provide samples of bodily substances for the purpose of DNA analyses and banking.

[28] Do you have any submissions with respect to the matter of the firearms prohibition?

[29] MR. COFFIN: If I could just have a moment. No, I have no submissions.

[30] THE COURT: The defendant will be prohibited from having in his possession, any firearm, ammunition or explosive substance for a period of ten years following his release from imprisonment. He is directed to surrender forthwith to the R.C.M.P. in Watson Lake any such items now in his possession.

[31] MR. DROLET: Your Honour, for the clarity of the record, then, will the offence contrary to s. 271 show six months imprisonment having regard to five months spent in remand, and then the other offences as you have indicated; consecutive terms of imprisonment as you have indicated, or do you wish to attribute it between the offences?

[32] THE COURT: That is fine. Thank you.

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FAULKNER T.C.J.