Citation: *R.* v. *Stewart,* 2007 YKTC 88 Date: 20071116
Docket: T.C. 06-00319
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

CHARLES ROBERT STEWART

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the *Criminal Code.*

Appearances:
John Phelps Counsel for Crown
Nils Clarke Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Mr. Stewart has entered guilty pleas to a number of serious offences. These include sexual assault with a weapon, unlawful confinement, theft of a motor vehicle, dangerous driving and breach of a recognizance. There is a joint submission before me which includes an agreement that Mr. Stewart be designated a long-term offender. The sole issue in dispute is the length of the community supervision order to be attached. In terms of the circumstances of the offences, a detailed agreed statement of facts has been filed as Exhibit 1 in these proceedings.

[2] A brief summary of the facts is as follows: On August 15, 2006, Mr. Stewart approached the house in which the complainant, E.P. was house-sitting, indicating his vehicle had broken down and seeking a ride. Once on the highway, Mr. Stewart pulled a knife, pointed it at Ms. P.'s stomach and demanded money. He then had her stop the vehicle, bound her using a bungee cord, removed her sweat pants, struck her in the face when she resisted, and ultimately had forcible sexual intercourse with her against her will. Mr. Stewart then took control of the vehicle, driving at speeds up to 180 kilometres per hour, and telling Ms. P. that he did not think they were going to make it. When Mr. Stewart slowed the vehicle somewhat for the turn onto the Alaska Highway, Ms. P., who had been able to free her hands, managed to escape by throwing herself out of the moving vehicle which was then travelling at about 80 kilometres per hour.

[3] Sometime later, the police encountered Mr. Stewart, deployed their emergency equipment and began pursuit. Mr. Stewart did not stop but instead continued to travel at speeds up to 160 kilometres per hour, driving erratically and aggressively, including travelling in the wrong lane towards oncoming traffic. Mr. Stewart eventually stopped the van and ran away on foot. The police pursued him, making use of the police dog unit, and finally located him some 500 metres from the vehicle. At that point, Mr. Stewart began throwing rocks and sticks at the members, indicating that he had a knife and would kill the police dog if it approached.

[4] Mr. Stewart was arrested by the police at 10:32 p.m. At the time of this incident, Mr. Stewart was bound by a recognizance requiring him to abide by a curfew of 7:00 p.m. to 7:00 a.m.

[5] I have had the benefit of reviewing both the pre-sentence report and a psychiatric assessment on Mr. Stewart, as well as hearing oral testimony via videoconferencing from Dr. Lohrasbe, the author of the psychiatric assessment.

[6] In terms of background, Mr. Stewart is 23 years of age and of First Nations decent. He denies any abuse or violence in the family home when he was a child, and further indicates that he was not really exposed to alcohol in the home. Although it should be noted that in the psychiatric assessment, Mr. Stewart is noted to be very reluctant to discuss his family. The reports further suggest that Mr. Stewart's paternal family is noted to have significant involvement in the criminal justice system, including a history of sexually offending behaviour. Conversely, his mother and her family are noted to be a potentially important source of support and guidance for Mr. Stewart.

[7] Mr. Stewart has a grade 10 education, having been expelled from school due to fights with other students. His employment history is limited, but as Dr. Lohrasbe points out, he "has shown that he can be an efficient and reliable worker, and takes some pride in the fact that he has been good with his hands." Mr. Stewart began to use alcohol and to a lesser extent, drugs, around the age of 15. He describes himself as an alcoholic, and alcohol appears to have played a significant role in much of his offending behaviour.

[8] He comes before the Court with a lengthy criminal record given his young age. Indeed, the pre-sentence report indicates that over the last four and a half years, he has spent three years incarcerated, and the remaining year and a half on bail conditions or on probation.

[9] While this is Mr. Stewart's first sexual offence, he does have an extensive history of violent offences dating back to 2001. These include a robbery, three common assaults, three assaults causing bodily harm and one uttering threats. His record also demonstrates a history of failing to comply with court orders and some driving offences. Extensive materials were filed regarding Mr. Stewart's criminal history. For the purposes of this decision, it is unnecessary to canvas the details but it is important to note that when taken through the circumstances of his prior offences of violence by Dr. Lohrasbe, Mr. Stewart's standard responses were either a lack of recollection, a denial or an indication that he was unfairly treated by the system.

[10] Mr. Stewart's attitude with respect to the current offences is no exception. He indicated to Dr. Lohrasbe that he had no recollection of the events due to his level of intoxication. In subsequent meetings with Mr. Hyde, who prepared the pre-sentence report, however, he appears to indicate that he does recall what happened but is not ready to talk about it.

[11] In terms of remorse for his actions, Mr. Stewart has accepted responsibility for his actions by entering guilty pleas, which has resulted in the victim not having to take the stand, and he is certainly entitled to some credit for that. However, there is no expression of remorse before me beyond his guilty pleas. This may in part be due to his unwillingness or reluctance to discuss the circumstances of these offences, but one must also consider his attitudes towards his own criminal history. Dr. Lohrasbe noted that:

> Mr. Stewart's perspective is that it is not really he who does bad things, rather, alcohol makes him do bad things, and most of those bad things, the exception being his assault on

> his most recent victim, are made out to be worse than they actually were. Hence, he continues to have minimal insight and engages in denial, minimization, with continued projection of responsibility which feeds his sense of entitlement.

[12] Having discussed Mr. Stewart's attitudes and responses to his offences, it is important not to lose sight of the impact his behaviour has had on his victim. E.P. has filed a victim impact statement, detailing the overwhelming effects this incident has had on her life. She speaks eloquently of her physical injuries suffered, the financial losses and, perhaps most poignantly, the emotional injury she has suffered and continues to suffer. One cannot overstate the devastating impact, and it is perhaps best described in her own words. In her statement she writes:

> I feel violated in so many ways. First because I thought I was helping some one who needed help and then had it thrown back in my face. My trust for people is no longer there, I feel that I shouldn't help people any more. I was violated not only sexually but physically and emotionally as well. I am shocked and hurt that another human being is capable of so much violence and hatred towards a total stranger. Especially some one who was doing them a favour…
> I have so much hate for this guy, as he has taken away a huge part of me and that is my independence. I am so angry and frustrated, I now do not like to be left alone…
> …I am angry that a single person can change my life so much as he has. To change me from an easy going, trusting person, who is not afraid of much. To some one who now will not even walk out the door with out someone else with me.

[13] Mr. Stewart's actions have forever altered Ms. P.'s life. There is no way now to go back to change it, and very little that I can do to repair the damage, beyond passing sentence on Mr. Stewart in the faint hope that it will provide Ms. P. with some small measure of comfort.

[14] In terms of sentence, as noted, there is a detailed joint submission before me. It is clear to me that counsel have put a significant amount of effort into resolving these matters. In doing so, they have demonstrated a great deal of tact and sensitivity, for which they have the thanks of this Court.

[15] Essentially, counsel are jointly suggesting a global sentence of seven years, less credit for time spent in remand, coupled with a long-term offender designation. They have also indicated their agreement with respect to a number of additional orders.

[16] Counsel have filed a number of cases with respect to the appropriate range for cases of this nature, and having reviewed those cases, I am satisfied that the joint submission as proposed falls well within that range. I am further satisfied that it is an appropriate sentence, considering the facts of the offence and of the offender.

[17] Accordingly, the sentence will be as follows: On the s. 272(1)(a) offence of assault with a weapon, there will be a sentence of five years, and I would ask that the record reflect that he is being given credit for two years in remand. On the s. 279(2) offence of forcible confinement, there will be a sentence of five years concurrent. On the s. 249 offence of dangerous driving, there will be a sentence of six months concurrent. On the s. 334(a) offence of theft of a motor vehicle, there will be a sentence of six months concurrent. On the s. 145 offence of breaching the terms of his recognizance, there will be a sentence of 60 days concurrent.

[18] In addition, I make the following orders: Firstly, that Mr. Stewart provide such samples of his blood as are necessary for DNA testing and banking. Secondly, that Mr. Stewart comply with the provisions of the *Sex Offender Registration Information Act*

for a period of 20 years. Thirdly, Mr. Stewart is prohibited from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for life, pursuant to s. 109. Fourthly, Mr. Stewart is prohibited from driving a motor vehicle for a period of 18 months, such period to commence upon the expiration of his jail sentence. Finally, I make the requested forfeiture order with respect to the weapon in the custody of the RCMP.

[19] The only remaining matter relates to the long-term offender designation. As previously stated, counsel are jointly agreed that this is an appropriate case in which to make the finding, but disagree as to the appropriate length of the community supervision order to be attached.

[20] The long-term offender provisions are set out in Part XXIV of the *Criminal Code*. Section 753.1(1) sets out the test to be applied. It reads:

> 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.

[21] In Mr. Stewart's case, having already determined that a seven-year global sentence is appropriate, the first criteria is met.

[22] The second criteria, risk to reoffend, is addressed in the assessment and testimony of Dr. Lohrasbe. Dr. Lohrasbe employed a tri-partite approach to assessing

the risk posed by Mr. Stewart. This included an actuarial assessment for which Dr. Lohrasbe relied on the calculations done by Dr. Boer and Dr. Sigmond in previous assessments, both of which assessed Mr. Stewart to be at high risk to re-offend violently. Secondly, Dr. Lohrasbe applied the HCR-20, a structured clinical guideline attempting to combine clinical findings with research-based correlatives of risk.

[23] Dr. Lohrasbe summarized his findings with respect to the application of the HCR-20 as follows:

> There is a clear majority of risk factors present, including those most clearly associated with future acts of violence. The only risk factors clearly absent are those related to major mental disorder, which has an indirect and relatively minor relationship to risk. This 'profile' on the HCR-20 strongly suggests a high risk for future acts of violence.

[24] Thirdly, Dr. Lohrasbe conducted a clinical risk assessment, concluding:

> …the risk of future acts of violence is extremely high. Of great concern is that the risk for future acts of violence now includes the risk of future acts of sexual violence, even if the sexual violence is purely opportunistic rather than predatory.

[25] I am satisfied that Dr. Lohrasbe's thorough assessment of risk clearly satisfies the second criteria of the long-term offender test, namely that there is a substantial risk that Mr. Stewart will re-offend.

[26] The third criteria, regarding the eventual control of the risk presented within the community, is also addressed in the evidence of Dr. Lohrasbe. He notes that Mr. Stewart, due to "his lack of insight, rejection of responsibility and extreme self-centredness, is highly unlikely to muster the internal motivation required to bring about fundamental change, and is therefore an extraordinarily poor candidate for any known

form of therapeutic intervention." However, Dr. Lohrasbe notes three potential external sources of motivation, including the fact that the seriousness with which his behaviour is viewed by the system may signal to him that he has run out of chances, such that he may now take concrete steps to stay out of trouble in the future; the fact that Mr. Stewart's employment potential could be used as a source of satisfaction, meaning and stability in his life; and the fact that Mr. Stewart's attachment to his family could provide him with a source of motivation to change his behaviour.

[27] Considering all these factors, Dr. Lohrasbe concludes as follows:

> My opinion is that although the prospects for effective treatment do not appear to be encouraging, it cannot be said that there is no reasonable possibility that risk cannot be systematically lowered, through treatment, to the point where he can then be managed safely within the community in the foreseeable future. Mr. Stewart is a young man and has yet to be exposed to a comprehensive set of treatment programs. It would be unreasonable to conclude that there is no realistic possibility of reduction of risk without attempting to engage him in the programming that is available in the federal correctional system.

[28] Dr. Lohrasbe's somewhat guarded opinion that there is potential for the risk presented by Mr. Stewart eventually to be managed within the community is sufficient to satisfy the third and final criteria of the long-term offender test. Thus, having found that each of the three pre-conditions to a long-term offender designation have been met, I am satisfied that it is appropriate to make, and do make, the finding that Mr. Stewart is a long-term offender.

[29] This leaves my determination of the one contentious issue in these proceedings: the appropriate length of the community supervision order. The Crown argues that the maximum ten-year supervision order is appropriate. In taking this position, the Crown

relies heavily on the testimony and assessment of Dr. Lohrasbe. Dr. Lohrasbe was steadfast in his opinion that the longest possible period of supervision be imposed. In the psychiatric assessment he noted:

> I would recommend, without any hesitation whatsoever, that the longest period of parole be imposed following his incarceration, and with strict and rigidly enforced conditions. No matter how effective treatment is when it is delivered, experience tells us that the benefits of treatment tend to decline, often rapidly, once follow-up is terminated. With many, if not most offenders, the crucial element in managing risk in the community is the power to monitor compliance with risk management principles, along with the power to revoke parole if these conditions are breached.

[30] Dr. Lohrasbe reiterated this opinion in his testimony, noting that, ideally, Mr. Stewart should have a slow process customized to his needs, which would begin with intensive supervision, and would gradually taper off as he demonstrates that he has internalized the necessary changes.

[31] It was also noted by Crown and by Dr. Lohrasbe that the long-term offender provisions do allow for an application to reduce or terminate the period of supervision if the risk posed has been reduced.

[32] Based on the opinion of Dr. Lohrasbe, the Crown argues that a ten-year community supervision order is appropriate for Mr. Stewart, and necessary for the protection of the public.

[33] Defence counsel argues that a five-year supervision order is appropriate in all of the circumstances. In support of this submission, defence counsel asks that I consider the following factors: Mr. Stewart's youth and the consequent importance of

rehabilitation, his guilty plea, and the fact that most of his offending behaviour has occurred over a relatively brief, albeit intense, period of time, that being six years.

[34] Defence counsel further argues that an overly lengthy period of supervision would have the undesired effect of de-motivating Mr. Stewart with respect to his rehabilitation. With the rigorous monitoring of such sentences in the Territory, defence counsel maintains that five years is a sufficient period of supervision. Finally, defence counsel argues that I must consider the totality of the sentence, and that a ten-year community supervision order would offend the totality principle. He suggests that the maximum supervision order should be reserved for the worst offender and the worst case scenario, and that Mr. Stewart does not fall into that category.

[35] Counsel have filed a number of cases in these proceedings, some of which speak to the issue of assessing totality where there is a combined sentence of custody and a community supervision order. Defence counsel argues that, factually, the closest case of those filed to the case at bar is the decision of my brother Judge Lilles in *R*. v. *Schafer*, [2003] Y.J. No. 120 (QL), in which he ordered an effective sentence of seven years, plus a five-year supervision order. Unfortunately, there does not appear to have been a similar argument put before His Honour Judge Lilles in *Schafer*. While he ultimately makes a five-year order, there is no discussion in his reasons as to the rationale for the length of the order, or the relationship between the length of the order and the risk posed by Mr. Schafer.

[36] In *R*. v. *Archer*, [2005] O.J. No. 241 (QL), the Ontario Court of Appeal considered whether the combined effect of an eight-year custodial term, and an eight-year

community supervision order was excessive in light of the fundamental principle of proportionality in s. 718.1. While finding that a community supervision order constituted a "sentence" for the purposes of 718.1, the Court went on to say:

> It is necessary to recognize that the custodial sentence for the predicate offences and the Community Supervision Order each serve a discrete purpose. Therefore, in considering the appropriateness of the length of the appellant's community supervision, it must be considered in the context of the purpose of the dangerous and long-term offender regime, which is to protect the public.

The Court held that the combined effect of the custodial sentence and the supervision order was not excessive in the circumstances.

[37] In *R*. v. *Blair*, [2002] B.C.J. No. 656 (QL), the B.C. Court of Appeal considered whether a combined sentence of seven years imprisonment and a ten year community supervision order was unduly long or harsh. Defence counsel has relied heavily on the minority judgment of Madam Justice Southin, who finds that both custodial sentences and community supervision orders are about the risk of reoffending. She concludes that the combined sentence would result in a deprivation of the offender's liberty, particularly in light of the breach provisions, that would be unduly long or harsh, and she would have reduced the supervision period to five years.

[38] However, in the majority decision, Madam Justice Huddart concluded that the ten-year period of supervision was not unreasonable. In coming to this conclusion, she notes:

> The fixed sentence and supervision orders focus on two different goals: the former on punishment for the predicate offence, the latter on prevention of future criminal conduct. In the latter, the predicate offence plays a relevant role as an indicator of risk.

She goes on to say:

> …it appears the question for this Court is whether the trial judge's order that the appellant be supervised for the maximum permitted period is reasonable having regard to the risk he poses. Into that analysis must be factored the ability of the Supreme Court to reduce the length of the period of supervision on application by the accused or the parole authorities upon proof of reduced risk. So too must be taken into account the ability of the National Parole Board to set conditions it deems appropriate from time to time for the protection of society. These are important provisions to protect an offender from any incursion on his liberty greater than is necessary to achieve the protection of society from the substantial risk the offender poses to the community, which is the purpose of the long term offender provisions.

[39] Determining the length of supervision required to ensure that the public is protected by the risk presented by an offender requires, in my view, an assessment of the prospects of managing that risk in the community, which, in turn, is closely connected to the prospects for rehabilitation. Logically, where an offender is motivated to get treatment, and there is a likelihood that treatment will substantially reduce the risk presented by the offender, a shorter period of community supervision would be required to ensure the protection of the public.

[40] In Mr. Stewart's case, the evidence is clear that he presents a significant risk to re-offend violently. The evidence is equally clear that the prospects for managing that risk in the community and for his eventual rehabilitation are both extremely poor. Dr. Lohrasbe does not say that there is indeed a reasonable possibility that Mr. Stewart's risk can be systematically reduced through treatment to the point where he can be managed safely within the community; he says instead that he cannot say that there is no such reasonable possibility. His conclusion with respect to risk management in the community is guarded at best. In addition, he notes that the prospects for

effective treatment do not appear to be encouraging, and that Mr. Stewart "is an extraordinarily poor candidate for any known form of therapeutic intervention".

[41] Defence counsel strenuously argued that the impact of a ten-year order could de-motivate Mr. Stewart with respect to his rehabilitation, a fact Dr. Lohrasbe conceded could well be the case. This is a factor which would cause me concern in a case where there was evidence of some motivation, however, in this case there does not appear to be any indication that Mr. Stewart has any motivation at the present time to pursue treatment, or otherwise address the risk he presents.

[42] Defence counsel has suggested that Mr. Stewart's demonstrated reluctance to engage with Dr. Lohrasbe could well be culturally based. Dr. Lohrasbe agreed that, based on his experience in dealing with First Nations individuals, that could indeed be a possibility. Unfortunately at this time, Mr. Stewart's motivation for choosing to behave as he has, is simply unknown. A culturally-based component is simply one of many possibilities. It is not concrete enough for me to conclude that the prospects of him ultimately engaging in treatment are any better than has been described by Dr. Lohrasbe.

[43] Should Mr. Stewart become motivated to change his behaviour and become willing to engage in treatment such that his risk is substantially reduced for whatever reason, the *Code* provides for an avenue to revisit the length of the order to reflect any material change in the nature and character of the risk he presents. Until such time, and based on what information I do have before me regarding treatment prospects, I am of the view that the only way to ensure the protection of the public from the substantial

risk posed by Mr. Stewart is to impose the maximum ten-year community supervision order, and I do so impose.

[44] Anything further?

[45] THE CLERK: Remaining counts.

[46] MR. PHELPS: Your Honour, yes, with respect to the counts that weren't -- don't have guilty pleas attached, I would direct a stay of proceedings.

[47] THE COURT: Thank you.

[48] MR. PHELPS: Throughout the decision, you have actually named the victim in this proceeding. There is a publication ban. I would just like to get confirmation that the publication ban continues and the decision will have initials and such.

[49] THE COURT: Yes. Yes, so any reporting should refer to initials, and when the decision is ultimately released, it will include initials, yes.

[50] MR. PHELPS: Thank you, Your Honour.

[51] THE COURT: Okay.

[52] THE CLERK: I just have one matter, Your Honour. The DNA, do you remember what count it is supposed to be?

[53] THE COURT: I believe it would attach to the 272(1)(a).

[54] MR. PHELPS: The count -- yes, the Count 1.

[55] THE CLERK: And the firearms one?

[56] THE COURT: Would attach to that as well.

[57] THE CLERK: That one as well? Thank you.

[58] THE COURT: I believe it would attach to -- would it attach to the 279 as well, the firearms prohibition?

[59] MR. PHELPS: Yes, it would.

[60] THE COURT: Yes, so to both Counts 1 and 3. Thank you.

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RUDDY T.C.J.