Citation: *R. v. Vanbibber*, 2016 YKTC 10

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Registry: Whitehorse and
Watson Lake
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

ABRAHAM DANIEL VANBIBBER

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

Appearances:
Jennifer Grandy — Counsel for the Crown
Malcolm E.J. Campbell — Counsel for the Defence

REASONS FOR SENTENCE

[1] LUTHER J. (Oral): The sentence hearing for Abraham Daniel Vanbibber took place on March 14, 2016. The Crown and defence proposed a joint submission of a jail sentence of 46 months less 23 months, credit for time served, plus a number of ancillary orders and a probation order for two offences under s. 271 of the *Criminal Code*. The Court has taken what time it had since Monday to review this submission and to prepare the decision.

[2] Back on the 6th and 7th of June 2014, a number of people were drinking too much alcohol, in conjunction with an after-graduation party at a campground located in the village of Pelly Crossing. L.S. was 16 years old at the time and she passed out in the offender's trailer. She woke up during the day in pain. The offender had violent, non-consensual sexual relations with her anally and vaginally and ejaculated inside her. There appears to have been some family relationship between her and the then 44-year-old offender.

[3] Several hours later that same afternoon, T.A. went to the offender's trailer and drank with him. She passed out twice. The offender sexually violated her by forcing her hand onto his penis many times and later attempting sexual intercourse. There was no evidence of ejaculation. Fortunately, her male friend arrived to hear her scream, "No, stop." The offender pulled the blankets over his head and attempted to hide himself in shame. Mr. Vanbibber claims now not to have remembered these dastardly crimes because of intoxication, but I doubt it. He certainly knew what he was doing at the time.

[4] I can only imagine how he, as a middle aged father, would feel if a loathsome, evil male person of similar age criminally and seriously abused his own 18-year-old twin girls. Not only that, but he will be in the delicate and awkward position of explaining to his girls why he is in jail and what he did. Even for all of that, we have his loving mother, who continues to be supportive of him and wrote a letter to the Court:

> With such a strong family upbringing a person has to wonder why Abe got in trouble with the law. Abe is dependent on alcohol. When he is sober he does not cause trouble. Abe needs alcohol treatment and counseling. With Abe's skills, training and work experience to build upon he will once

> again be a good, responsible citizen if he gets treatment and counseling.
>
> I hope you can use the justice system to help Abe get the help he needs. He is a good person with many strong capabilities and could, once again, take his place as a contributing member of society.
>
> I ask you for this help for my son, Abe.
>
> Sincerely, Eileen Van Bibber.

[5] Now, I will address the subject of joint submissions. This subject was canvassed extensively by Mr. Justice Gower in the case of *R. v. Nuyaviak*, 2015 YKSC 51. He quoted from the Manitoba Court of Appeal. I myself have quoted this Manitoba case many times.

[6] In *R. v. Sinclair*, 2004 MBCA 48, Steel J.A,, speaking for the Manitoba Court of Appeal, helpfully summarized the law with respect to joint submissions at para. 17, as follows:

> (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
>
> (2) <u>The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so</u>. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest. [emphasis added]
>
> (3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.

> (4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.
>
> (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like. [emphasis added]

[7] Both counsel stressed the fact that these two rather young victims would not now have to testify. That is important. In *R. v. Warren*, 2016 ONCA 104 (the decision came out just last month), there was a 13-year-old complainant who was thoroughly cross-examined. Also, her grandmother was called as a witness. In that case, the appeal court ordered a new trial as there was a deficiency in the instructions given by the trial judge. One can only imagine the trauma to that young girl in Ontario.

[8] That leads me to my next point on joint submissions, the certainty of punishment and the conclusion of the case. The victims clearly have been spared having to testify. The joint submission must never be so low as to cause reasonable people to wonder what is going on with the justice system wondering why did the Crown propose this and why was the court in agreement. In cases of sexual violence, we are far less concerned with saving time on the court docket and systemic problems than we are with saving victims yet another trauma by testifying in court.

[9] Next I would like to talk about the effect of the guilty pleas. In a recent decision of mine, *R. v. Menicoche*, 2015 YKTC 34, there was some discussion about the late guilty plea, which I held to be but a minor factor on sentence given that the victim had to be prepared on two occasions to testify. In this case, the guilty pleas were entered nine months after the offences were committed and one year before the sentence hearing. That is quite a difference. The guilty pleas in this case are a valid mitigating factor on sentence.

[10] It may be a mystery to the people not involved in the criminal justice system as to what goes on behind the scenes. I can state that there would be reasonable and serious discussions by senior counsel for both the Crown and defence and, of course, as the sentencing judge, I am not familiar with these intricacies. If a sentence here of just time served with no additional jail had been proposed or, indeed, any sentence less than the 23 months, I would have had to intervene according to the principles and procedures laid out in the *Sinclair* case. While I would have preferred a sentence in the range of five to six years in total, it cannot be said that the 46 months is either unfit or that it brings the administration of justice into disrepute. Certainty to the victim, the public and the offender is generally good, but it is not to be achieved at all costs; hence, we have the principles laid out in the *Sinclair* case.

[11] That these crimes have had a serious impact on the victims would be a gross understatement. I will now quote from the Victim Impact Statement of S.A. I want to remind everyone here that there is a publication ban and there shall be nothing printed, spoken or otherwise that would in any way identify the victims. I will quote from the penultimate paragraph of S.A. (as read):

> Not only has Abraham Vanbibber left me feeling anxious, depressed and humiliated he has also taken my pride and sense of safety. He was supposed to be my partner's friend and I trusted him, and now I feel like I will not trust people that easily again. I am worried that the emotional trauma caused by this will affect me for years to come.

[12] C.S., the mother of L.S., pointed out in very poignant language about how stressed out she was, to the point that in time, a few weeks afterwards, she was medevaced to Whitehorse with a mild heart attack and continues to be stressed by the events of June 2014 and the impact that she sees pretty well daily on her daughter.

[13] L.S. described the severe pain that she experienced because of the brutality of the rape and that she was drinking more and getting angry, and how this has affected not just herself and her mother, but also her two sisters.

[14] On a positive note, L.S. stated toward the end of her statement (as read):

> I made up my mind I am not going to let him, (Abraham Vanbibber) win. He took so much from me and the damage he has done to me and my family, everyone said “I changed so much” for the worse, not happy. I’m going to treatment to deal with this and try to get my life back. Abraham Vanbibber is a loser and I’m going to take back my power and life.

[15] Abraham Vanbibber is now 46 years of age. He is from the Selkirk First Nation and has had substantial employment over the years. He has many trade certificates and at the Whitehorse Correctional Centre (“WCC”), he was a model prisoner. He accomplished a lot there. There were no internal convictions. He worked hard and was productive. He attended AA and also sessions on substance abuse, career and

personal development, and various counselling, plus a number of other programmes. As I indicated before, Abraham Vanbibber is the father of 18-year-old twin girls.

[16] The offender does have a previous sexual assault on his record from Watson Lake, for which he was sentenced 16 months. After he was released on that sexual assault, it was only five years before the present offences occurred. Section 718.2(e) dealing with Aboriginal offenders is but a minor concern in this case because there is no significant evidence of all the turmoil we typically see in second generation residential school abuse survivors. Also, Mr. Vanbibber is quite capable of lucrative, productive work in many categories because of his training and his skill sets.

[17] In reviewing the cases, I would like to refer to perhaps five of them. *R. v. Tom*, 2003 YKSC 67, was a decision of Mr. Justice Veale. The offender there had a lengthy record, he was a First Nations man, the victim was intoxicated and, not surprisingly, the impact on that victim was very similar to that of the victims in this case. He also had a previous sexual assault conviction. The judge there rejected the defence request for a conditional sentence order, and I will quote from para. 25:

> I am also mindful of the fact that sexual assaults have their greatest impact at the emotional or psychological level, in the sense that a violation of this woman's personal integrity has taken place. It will clearly have an impact upon her for the rest of her life. Sexual assault obviously has a profound impact on a woman's health and well-being and particularly on this woman, as we heard her today.

[18] A sentence of 18 months was ordered followed by two years probation was imposed.

[19] In *R. v. J.G.C.*, 2013 YKTC 30, Judge Cozens ruled on a more serious case than the one that I am presently dealing with. There were two sexual assaults and guilty pleas. In addition to the forced sexual intercourse, there was even more severe violence in the form of choking. The offender was 23 years of age and he was a First Nations man originally from British Columbia. Unlike the present case, there were an abundance of *Gladue* factors there. Judge Cozens imposed a sentence of 52 months less the time served, which brought about a sentence of 16 months imprisonment at the WCC.

[20] In *R. v. Stewart*, 2012 YKSC 75, Mr. Justice Veale again talked about the dysfunctional family of the offender as both parents had been to residential schools. The victims in the case of *Stewart* were 19 years old and 13 years old, not too different than the ages of the victims in this case. Both were blacked out on account of alcohol. He had no prior convictions and was sentenced to a period of 38 months less credit of 33 months time served. That led to a sentence, of course, of five months imprisonment and three years probation.

[21] In the case of *Menicoche*, which I have already mentioned, at para. 6:

> The leading case on sentencing involving non-consensual sexual intercourse with a victim who was sleeping or unconscious is *R. v. Rosenthal*, 2015 YKCA 1, a very recent case from the Yukon Court of Appeal decided earlier this year...

— of course, that means last year —

> ...which accepts the scholarly, comprehensive and detailed analysis by Mr. Justice Gower in *R. v. White*, 2008 YKSC 34.

> The range of sentence in this type of case is roughly 12 to 30 months imprisonment.

[22] Mr. Justice Gower, at para. 87 of the *White* decision did state as follows:

> Further, as noted in *Bernier*, I am not suggesting this range is conclusive. Greater or lesser sentences will be justified where circumstances warrant. This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

[23] At para. 18 of *Menicoche*:

> Penile penetration without a condom involves the risk of a sexual disease. Also, in terms of psychological harm, it is my opinion that it is more likely that a victim of sexual assault will struggle more and for a longer time knowing that he or she has been violated by a criminal's sexual organ rather than his finger. The victim has already suffered enormously, as was clearly set out in the Victim Impact Statement. She talked about a downward spiral of depression and hatred. …

[24] Further, at para. 19 of *Menicoche*:

> The victim's mother was also greatly affected, writing of her physical, emotional, psychological and financial harm. …

[25] Paragraph 23, again from *Menicoche*:

> Nothing has been shown to me in this case or, indeed, in any previous cases since I have been residing in this jurisdiction since 1988 to suggest that the frequency of major sexual offences involving violating a sleeping or unconscious victim has been reduced over the years. Thus, denunciation and deterrence and separating offenders from society remain the primary purposes of sentencing, probably even more so.

[26] Judge Gorman from Newfoundland in *R. v. I.L.*, (2015),Nfld & P.E.I. R. 294 (P.C.), quoted from the case *R. v. Clifford*, [2014] EWCA Crim 2245:

> The Court of Appeal for England and Wales noted that sexual offending "will by its very nature cause harm at the time the offence is committed, but it is well recognized that for many victims significant harm persists for a considerable period afterwards."

[27] In *Menicoche*, I also examined the case of *R. v. Delchev*, 2014 ONCA 448, on the subject of the inflationary floor. At para. 19 of *Delchev*:

> ...the sentences for more culpable offenders are increased as well, so that the whole range increases. …

[28] As was stated in *Menicoche*, at paragraph 31 the inflationary floor, in my view, is a very real consideration in a case of this nature involving alcohol and a 15-year-old girl with an offender 12 years her senior.

[29] Mr. Vanbibber is a “more culpable offender” and the sentencing would increase for him.

[30] And at para. 36 from *Menicoche*:

> For a major sexual assault involving penile penetration on a sleeping teenager in these circumstances, the range of sentence might well be expanded in the upper level to as high as four years. Far be it from me to state that this is the new range. Rather, it is merely an observation that the range could be increased in a fact situation such as this.

[31] For repeat offenders, the appeal courts should seriously and realistically take a strong look at increasing the range of sentence for major sexual assaults. As stated,

these assaults persist in the north and scores if not hundreds of sleeping or unconscious women continue to be victimized with tragic consequences to them.

[32] For these totally reprehensible and heinous, very serious sexual assaults, the Court imposes a jail sentence of 46 months less 23 months credit for time served. Both victims were violated in a serious manner. It is my opinion that the crime on the 16-year-old is more serious by virtue over her younger age and the nature of the attack. The totality principle requires that I pay attention to the overall sentence. Thus, each will be slightly reduced from what they otherwise would have been.

[33] On Count #2, the sentence is fixed at 30 months less time served credit of 23 months, and on Count #1, the period of imprisonment is set at 16 months, for a total period of 23 months imprisonment. On Count #2 there will be a period of probation for three years. I will go through the details of the probation order in a moment. Other orders will include:

1. DNA, pursuant to s. 487.051.
2. A *Sexual Offender Information Registration Act* order for life pursuant to s. 490.013(3).
3. A s. 109 weapons prohibition for life.

[34] The offender will be serving his time at the WCC. In addition, there will be an order under s. 743.21(1) prohibiting him from communicating directly or indirectly with the two victims while serving his jail sentence.

[35] What has been shown to me in this case, primarily from submissions from the defence, is that Mr. Vanbibber is quite capable of earning a good living; therefore, he

will be paying the victim surcharge. The victim surcharges will be fixed at $200 per charge, but I will give him two and a half years to pay them rather than making them payable forthwith.

[36] One thing about a sentence which is just under two years, which permits him to serve the time in the Yukon, is that it enables me, as the sentencing judge, to impose probation, and I have no hesitation whatsoever in imposing the maximum period of three years. The probation conditions I believe have largely been agreed between the Crown and defence and they are as follows:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so;

3. Notify the Probation Officer in advance of any change of name or address and promptly of any change in employment or occupation;

4. Have no contact, directly or indirectly, or communication in any way with the two named victims, and to remain 50 metres away from any known place of residence, employment or education of the two victims;

5. Remain within the Yukon unless you obtain written permission from your Probation Officer;

[37] Now, Mr. Vanbibber that is not meant to keep you here in the Yukon. If you have a job somewhere else, you just have to make sure that you let the Probation Officer know in advance and that you have his or her permission.

6. Report to the Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;

7. Reside as directed by your Probation Officer and do not change that residence without the prior written permission of your Probation Officer;

8. Not to possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor and not to attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off-sales, bar, pub, tavern, lounge or night club;

9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer and complete them to the satisfaction of your Probation Officer for the following issues:

    - Substance abuse.

    - Alcohol abuse.

    - Psychological issues.

- Any other issues identified by your Probation Officer and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition.

[38] You have now been convicted and sentenced for three serious sexual assaults, one in 2008 and two now. You have shown yourself to be a vile man who, for his own gratification, has selfishly and opportunistically imposed a life sentence of hurt feelings on young women who are vulnerable and blameless. You shamefully had no regard for their emotional, physical and psychological well-being. It is essential for you that this never happen again to prevent any further victimization.

[39] Also, you are hereby warned by the Court of the provisions of s. 753 of the *Criminal Code* and the possibility in future of being declared a dangerous offender and serving an indeterminate sentence in a federal penitentiary.

[40] No judge enjoys sentencing someone to go to jail and it is something that has to be done. I mean, the crimes that you committed are reprehensible and we have to be very much aware of the harm that you have caused to the victims. I have taken into account all the principles of sentence set out in the *Criminal Code* and the sentence that I imposed, I have described it in some detail to you.

[41] Your mother has stood beside you. She has pointed out very clearly in her letter, through her motherly love, that you can be again a productive member of society. You have all kinds of qualifications and you just have to give up the drinking, absolutely one hundred percent.

[42] And, as I indicated at the end of my judgment, if you do not do that and you are ever again picked up for a sexual assault, you could find yourself for the rest of your life in a federal penitentiary, and that is definitely not somewhere you want to be.

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LUTHER T.C.J.