

SUPREME COURT OF YUKON

Citation: *H.M.Q. v. Field*, 2010 YKSC 19

Date: 20100423
S.C. No. 09-01508
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

BILLY EDWARD FIELD

Before: Mr. Justice L.F. Gower

Appearances:

Jennifer Grandy
Kim Hawkins

Counsel for the Crown
Counsel for the accused

REASONS FOR SENTENCING

Introduction

[1] Gower J. (Oral): This is the sentencing of Billy Edward Field for offences of administering a stupefying drug for the purpose of committing a sexual assault contrary to s. 246(b) of the *Criminal Code*, and sexual assault upon K.F., contrary to s. 271 of the *Criminal Code*. Both offences were committed on or between October 25 and 26, 2008, in Whitehorse. Mr. Field was found guilty on both offences on March 26, 2010, following a trial by judge and jury, and was remanded into custody. Sentencing was adjourned to today's date.

Circumstances Of The Offence

[2] Pursuant to s. 724(2) of the *Criminal Code*, I find that the essential facts underlying the jury's verdicts are as follows. Mr. Field and the victim had an on again off again relationship over a number of years. The victim invited Mr. Field to come to her home on October 25, 2008. When Mr. Field first arrived, the victim and her nine year old daughter, B.F., were just finishing a Halloween party involving a number of B.F.'s friends. The victim asked Mr. Field to come back later and suggested that he bring some red wine for the two of them. Mr. Field did so, and returned to the victim's residence at about 10:30 p.m. with some movies and two bottles of red wine. At around 11 p.m., Mr. Field opened the first bottle of wine and poured each of them a glass. Before drinking her wine, the victim went to the washroom briefly, leaving her wine in the kitchen or living room area. I find as a fact that it was during this period of time when Mr. Field put the drug zopiclone into the victim's glass of wine.

[3] Zopiclone is a drug prescribed for the short term treatment of sleeping disorders. It can have a negative effect on one's mental facilities, as well as causing difficulty with standing up, walking, and manual dexterity. If the sleep of a person who has consumed zopiclone is interrupted, such that the person is walking around, they could appear to be very confused. Also, while under the influence of the drug, such persons who remain awake would have an impairment in the laying down of memory, such that they would have amnesia, and be unable to remember their experience while under the influence of the drug. Such persons would have a clouded recollection from the time that the drug was ingested. Some patients experience a paradoxical effect and may become very alert under the influence of the drug. When combined with alcohol, the effects of the

drug can happen very dramatically, within 15 minutes or so. Those effects begin to wear off in about eight hours.

[4] When the victim began drinking her wine, she was on the couch in the living room with Mr. Field and the two of them were about to watch a movie. She did not finish her first glass of wine. The next thing she remembered was awaking up the next morning on the living room floor, on her back with her robe opened.

[5] B.F. woke up at about 3 a.m., heard a crash and some yelling, laughing and crying. She heard her mother say "take off your pants". She said that her mother and Mr. Field came to the victim's bedroom, where B.F. was sleeping, and that her mom was wearing B.F.'s robe with nothing underneath. She said that she saw Mr. Field standing right behind her mom and that he was naked. She said that she had never seen her mom like that before and that her mom was kind of mumbling and she did not understand her words. She described her speech as really bizarre. Later, her mom came back into the bedroom where B.F. was sleeping and banged into the lamp beside the bed. B.F. said her mom was walking kind of wobbly from side to side and was not really herself.

[6] B.F. then heard the front door slam and her mom calling her name. She went to the living room and saw her mom on the couch with B.F.'s robe on. She sat on the couch and asked her mom what she was doing. She said her mom told her that she was in love with Mr. Field. B.F. asked her why her robe was opened and her mom replied "You've seen me naked before". B.F. said her mom was usually someone who liked to keep things private. She said that Mr. Field walked into the room and sat beside

her and put his arm around her, saying that everything was going to be okay. She stood up quickly and went back to her mom's bedroom, cried for awhile and fell asleep.

[7] B.F. woke at about 7: 30 or 8:30 in the morning. She thought she heard her mom making coffee and went out into the hallway. She saw that Mr. Field and the victim were still under the blankets on the floor in the living room. She said Mr. Field flinched and kind of "freaked out". She saw his bare bottom as he was getting up and trying to collect his clothes. She said he seemed like he was in a hurry to get out of the house.

[8] B.F. and her mom returned to the victim's bedroom and talked for a while. B.F. told her mom what she had seen and heard during the night and observed a shocked look on her face. She said that her mom sounded really disappointed in herself. In particular, she was surprised to hear that she had said she loved Mr. Field, because she did not.

[9] Mr. Field estimated that he had unprotected sexual intercourse with the victim about three or four times that night.

[10] The victim was incapable of consenting to the sexual intercourse because of her unknowing consumption of the zopiclone. I find as a fact that she was unable to understand the risks and consequences of the sexual activities she engaged in, that she was unable to understand the sexual nature of the acts and unable to realize that she could choose to decline to participate. Indeed, the victim denied having any knowledge of having sexual relations with Mr. Field that night and early morning.

Circumstances of the Offender

[11] The circumstances of Mr. Field are as follows. He is 38 years of age and is a member of the Tr'ondek Hwech'in First Nation. He was raised primarily in Dawson City,

Yukon, and grew up in a close Catholic family. His father died about seven years ago and his elderly mother now lives in Whitehorse. Mr. Field is the youngest member of his family and has a number of siblings residing in the Yukon Territory.

[12] Mr. Field graduated from high school and began working almost immediately with the Yukon Liquor Corporation in Dawson City. He continued that employment for about 10 years, then moved to Whitehorse and worked for the same employer for about one year. While working for the Yukon Liquor Corporation, Mr. Field received training and volunteered as a medical technician. He moved to Whitehorse in 2001 and worked for three years as a warehouse technician. He then returned to Yukon College and received a certificate in criminology and took some courses in pipefitting. He returned to Dawson City and worked for three years with Chief Isaac Inc. doing property maintenance and security until 2006. He had also worked as a firefighter for about four seasons in total. At the time of trial, Mr. Field had been employed as a yard man at Igloo Building Supplies in Whitehorse for about five months, until he was remanded into custody.

[13] Mr. Field was married at age 24, although that relationship broke down in 2001. He has two daughters from that relationship, aged 14 and 13, who are presently in care and living with foster parents. However, Mr. Field has visitation rights and says that his daughters spend time with him two or three days a week. He also has a five year old son from a different relationship who is presently in British Columbia.

[14] Mr. Field filed two letters relating to his employment history, one from his mother, one from Edward Taylor, the Chief of the Tr'ondek Hwech'in, one from his current partner, Rebecca Thomas, and four from various friends.

[15] Mr. Field has been assisting his mother who resides at an elders' complex in Whitehorse, for the past several years. The assistance includes house work, checking on her daily, and helping her out financially with food and other expenses.

[16] The various letters of reference describe Mr. Field as someone who is a responsible and caring individual, someone who is hardworking and generous, trustworthy, kind-hearted, well-spoken and educated. His current partner, Ms. Thomas, described an incident where Mr. Field essentially saved her life, following a mishap about 48 kilometres outside of Whitehorse during a canoe trip. She seems very committed in her relationship with Mr. Field and promises to be a constant and positive support for him while he serves his sentence.

[17] Mr. Field has a criminal record from June 2002 for criminal harassment of a former girlfriend with whom he had an intimate relationship. He received a sentence of nine days in jail and probation for one year for that offence. As this was Mr. Field's first criminal conviction, I infer from the fact that he received a short jail term that the circumstances of the offence were relatively serious. The other offence on his criminal record is failing to comply with a recognizance, for which he received a 30-day conditional sentence order.

Victim Impact Statement

[18] A victim impact statement was filed by the victim. While I am paraphrasing, she described her fear both for herself and on behalf of her daughter of running into Mr. Field in Whitehorse while awaiting trial. She says that she now finds it more difficult to trust people. In particular, her daughter is afraid that her mother could be sexually assaulted again if she has a male friend in her home. She said that her daughter is now

fearful of being in the bathroom by herself. The victim is upset that her daughter's innocence was stolen from her that night. She said that has she tried to keep her relationships with men secret and has never even lived with a man because of her daughter. She said that what Mr. Field did that night destroyed all that she has tried to do to make her daughter feel safe and secure. In particular, she stated as follows:

“He took away my control over my mind, my body, and house that night. He gave me no choice, and he didn't care how it would affect my daughter”

Case Law

[19] Crown counsel seeks a jail term of three to four years. She has relied on a total of five case authorities, although neither counsel were able to discover any precedents involving the use of a stupefying drug from any Yukon courts. Defence counsel concedes that jail is required, but seeks a term of two years to 30 months.

[20] *R. v. White*, 2008 YKSC 34, was a sentencing decision of mine for a sexual assault following a trial by judge and jury. The victim in that case had been drinking heavily and knew the offender as a fellow student at Yukon College. She agreed to return to the offender's residence at the College. She sat on the bed with the offender and began blacking out and coming to. She remembered kissing the offender on the bed, but became tired and said that she wanted to lie down and sleep. The offender told her that was okay and told her not to worry. She woke up with the offender on top of her trying to force sexual intercourse with her. She said “no” and “I don't want to”, three or four times, but the offender kept attempting intercourse for about 10 minutes.

[21] At the request of Crown counsel in that case, I undertook of review of a number of sentencing authorities involving “passed out” or unconscious victims who had been

subjected to non-consensual sexual intercourse. In the result, I concluded that the range of sentence in the Yukon for such cases is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months at the higher end. However, with reference to the British Columbia Court of Appeal decision in *R. v. Bernier*, 2003 BCCA 134, which held that ranges are general guidelines and not hard and fast categories, I did not suggest that this range was conclusive. Rather, that greater or lesser sentences would be justified where circumstances warrant.

[22] The sentence I imposed on Mr. White was a period of 26 months, less credit for remand time.

[23] In *R. v. Bell*, [2004] O.J. No. 4046, Archibald J. sentenced an offender convicted of two counts of administering a noxious substance and two counts of sexual assault, following a trial. The offender there went out for dinner with a female companion and her female friend. After dinner the three people went back to the female companion's apartment where they were joined by her boyfriend. The offender put a stupefying substance into the drinks of the female companion and her boyfriend which caused them both to become unconscious. He then sexually assaulted both victims a number of times in each other's presence. At one point, the male victim testified that he recalled watching as his girlfriend was raped by the offender, but was incapable of doing anything to stop him.

[24] The sentencing judge listed a number of aggravating circumstances, which he described as "egregious". Those included the following:

- The offender had no reason to believe that either of the two victims were interested in him in a sexual way.

- Although the criminal activity that night did not involve any significant planning or premeditation, the offender had to at least formulate a basic plan to place the drugs surreptitiously into the drinks of the two victims.
- The offender sexually assaulted both victims in the presence of each other.
- The victims suffered a tremendous long term impact.
- The crimes took place in the female victim's home, where she should have felt most comfortable and safe from such violation.

[25] The mitigating circumstances were that the offender was relatively youthful, at age 25, and had no criminal record. He was also assessed by forensic psychologist to have a low to moderate risk of reoffending.

[26] The court imposed a sentence of four years.

[27] In *R. v. Goodliffe*, 2003 BCSC 2025, Macaulay J., sentenced a 30-year old offender for sexually assaulting a 17-year old victim, while she was passed out or asleep in her own apartment. The victim has been administered a date-rape drug known as GHB, to the offender's knowledge, but the Crown could not prove that the offender had administered the drug. The offender was 33 years of age and had no criminal record. He was a high school graduate and had pursued a number of educational and training programs for about 10 years. He admitted to having an addiction in the past to GHB, which was related to the commission of the offence. The aggravating circumstances noted by the court included the offender's presence in the victim's home as a guest and his knowledge of her vulnerability and lack of awareness due to drug

and alcohol use. The offender was also lacking in remorse. The court imposed a sentence of 30 months in jail.

[28] In *R. v. Saadatmandi and Tayyebi*, unreported, May 28, 2008, Docket No. X068912-2, Fisher J. of the Supreme Court of British Columbia sentenced two offenders for sexually assaulting an 18-year old victim. Mr. Saadatmandi had made initial contact with the victim on the Internet and arranged to meet her near her home. Once in the offenders' car, Mr. Saadatmandi put the drug GHB into a drink that the victim consumed. The offenders then took her to Mr. Saadatmandi's home where, in his bedroom, the three engaged in various sexual acts, which were recorded on a DVD. After, they took the victim to a park, where they left her alone, without her purse, at about 3 o'clock in the morning.

[29] Mr. Saadatmandi was 19 years old at the time of the offence. He had completed high school and had no criminal record. He expressed remorse and apologized to the victim in open court. He presented five letters written in his support.

[30] Mr. Tayyebi was 23 years old at the time of the offence, had completed his GED when he was 19 and had taken some post-secondary courses. He had been in a committed relationship for about two years and had a four year old son. He provided letters of support from some 57 individuals who described the offence as being completely out of character. He was also described as having remorse and an awareness that what he had done was wrong. He had no criminal record.

[31] Included among the aggravating factors found by the sentencing judge was the fact that both offenders had unprotected sex with the victim. At paras. 67 and 68, Fisher J. said:

“... The use of date-rape drugs is very serious. To surreptitiously add a potentially dangerous drug such as GHB to anyone’s drink is a serious violation of a person’s autonomy and to do so for the purpose of rendering that person susceptible to engaging in sexual activity is reprehensible conduct.

As I stated in my reasons for judgment, the complainant had the right to make an informed decision as to whether or not she wished to consume a drug and whether or not she wished to engage in sex. Mr. Saadatmandi’s act of administering GHB to her without her knowledge or consent took away these rights and completely undermined her ability to consent to sexual activity. Mr. Tayyebi was aware of this. Both of them took advantage of the complainant’s intoxicated state for their own selfish purposes and their own sexual gratification, and in doing so they violated her most intimate self and personal dignity. ...”

[32] The court imposed a sentence of four years in jail on Mr. Saadatmandi and three years in jail for Mr. Tayyebi.

[33] *R. v. Dycko*, [1997] B.C.J. No. 1502, is a case from the British Columbia Court of Appeal and is very similar in its circumstances to the case at bar. There, the offender had been a guest in the home of the victim and her children. He was allowed to stay with them while he received psychological counselling for emotional trauma suffered by him when his fishing boat exploded and sank. He administered a date-rape type drug to the victim and, while she was unconscious, had sexual intercourse with her on three occasions. In her victim impact statement, the victim said that she was frightened and unable to speak to or touch a male person without difficulty. The offender had a criminal record, but the two previous offences were not related.

[34] The trial judge noted there that the range of sentences in British Columbia for such offences was three to seven years in jail. The Court of Appeal made no comment about that range, but reduced the sentence from four years to three because the trial

judge had erred by taking into account the failure of the offender to plead guilty, and making the comment that the offender had “put the victim through the agony of a trial”. Otherwise, the Court of Appeal referred to the offender as a person who was steadily employed and apparently a man of good character.

Aggravating Circumstances

[35] The aggravating circumstances in the case at bar are as follows:

1. Mr. Field has a criminal record, which although somewhat dated, is related in the sense that it involves criminal conduct towards another woman with whom Mr. Field had a previous intimate relationship.
2. There was some element of planning in the commission of this offence, as distinct from offences which are committed impulsively and because of a momentary lapse in judgment. See *R. v. Bell*, cited above, at para. 18.
3. Once the victim was under the influence of the drug, Mr. Field essentially had his way with her from some time after 11 p.m. until 7:30 or 8:30 the next morning, including having sexual intercourse three or four times. In other words, he took full advantage of the incapacity and lack of awareness of the victim while she was under the influence of the drug for the purpose of satisfying his sexual desires, with callous disregard for her personal dignity and her right to choose whether or not to participate.
4. There is an element of breach of trust in the commission of this offence in the sense that Mr. Field took advantage of the trust that the victim had in him as a result of their on again off again ongoing relationship. Given the victim’s tendency towards privacy and secrecy regarding her relationships

with men vis-à-vis her daughter, I find as a fact that it would be highly unlikely she would have invited Mr. Field to her home that evening to drink wine and watch movies if she did not have a significant degree of trust in him. This is a statutory aggravating factor pursuant to s. 718.2(a)(iii) of the *Criminal Code*.

5. Mr. Field sexually assaulted the victim three or four times throughout the early morning hours knowing that the victim's daughter was awake and aware of their presence for a good portion of that time. While there was no evidence that B.F. actually witnessed Mr. Field and the victim having sexual intercourse, she did see her mother was naked underneath B.F.'s robe and she also saw Mr. Field in a state of undress at different times. Once again, I find that this exhibited a callous disregard for the potential confusion that this might cause in the mind of a nine-year old girl at the time, not to mention the possibility of longer term trauma.
6. Mr. Field exposed the victim to potential health risks both by the administration of Zopiclone and by the fact that he had unprotected sex with her.

Mitigating Circumstances

[36] The mitigating circumstances are as follows:

1. Mr. Field has managed to reach the age of 38, with only two criminal convictions on his record, which are now somewhat dated. However, as I noted above, the conviction for criminal harassment appears to have involved relatively serious circumstances.

2. Mr. Field continues to be involved in the lives of his two teenage daughters, who apparently reside or spend time with him two or three days each week. Mr. Field has also expressed an intention to resolve the conflict which has temporarily separated him from his five-year old son in British Columbia. According to Ms. Thomas, she and Mr. Field also appear to have long range plans to have a child of their own together.
3. Mr. Field has a steady work history in a variety of jobs. He has also demonstrated an intention to improve his employment qualifications by attending for some post-secondary education at Yukon College and also by becoming trained and volunteering as a medical technician.
4. Mr. Field has been a caring and attentive son towards his elderly mother and has made a positive impression upon a past employer, the Chief of his First Nation, and a number of family friends. But for the prior conviction for criminal harassment from 2002, I would have been inclined to say that Mr. Field's conduct in committing these two offences was out of character for him. Nevertheless, subject to that singular past blemish, I do credit him with having previous good character.

CONCLUSION

[37] I agree with Crown counsel that the common thread in the case law for these offences is that general deterrence and denunciation are the paramount sentencing objectives. That is not particularly surprising given that the maximum punishment for administering a stupefying drug is imprisonment for life. However, having said that, I must still have regard to the purpose and principles of sentencing set out in ss. 718

through 718.2 of the *Criminal Code*. In particular, the facts that Mr. Field has maintained a steady employment record since graduating from high school, has pursued post secondary education and other training, and has apparently made a good impression upon his family and friends, all indicate that he should be able to successfully rehabilitate himself and reintegrate into society after serving his term of punishment.

[38] The other sentencing principle which I have particularly taken into account is that under s. 718.2(b), which states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[39] Lastly, as Mr. Field is a person of aboriginal background and a member of the Tr'ondek Hwech'in First Nation, I am directed by s. 718.2(e) to consider all available sanctions other than imprisonment that are reasonable in the circumstances. However, there has been little or no evidence from Mr. Field as to the extent to which his aboriginal background should have a bearing on this sentencing. Fortunately, he appears to have had a stable family upbringing and continues to be close to his mother and other siblings. In any event, there was no suggestion from his counsel that the case law would support an alternative form of punishment which does not involve jail.

[40] I am satisfied that because Mr. Field has been found guilty of the offence of administering a stupefying drug *in addition to* the offence of sexual assault, the offence of administering is more than simply an aggravating circumstance in the sexual assault. Rather, it is a separate criminal offence for which Mr. Field can be sentenced to life imprisonment. For that reason, I conclude that the range I discussed in *R. v. White* for the offence of sexual assault alone, albeit in circumstances where the victim is unconscious or asleep, is not appropriate for the case at bar. Rather, I agree with

Crown counsel that a jail term of three to four years is justifiable for these offences in these circumstances. I am also aware of the caution from the British Columbia Court of Appeal in *R. v. Bernier*, cited above, that sentencing is an inherently subjective and individual process and that each case has its own unique aspects. As I said earlier, the Court of Appeal also suggested there that ranges should be used as general guidelines and not as hard and fast categories.

[41] Having said that, I find the case of *R. v. Dycko*, cited above, to be the closest in terms of its similarities with the circumstances with the case at bar. In both cases:

- the offender was a guest in the home of the victim together with the victim's child or children;
- the offender administered a stupefying drug rendering the victim unconscious or unaware;
- the offender had sexual intercourse with the victim in that state on not less than three occasions;
- the offender had two offences on his criminal record; and
- the offender was otherwise a person who was steadily employed and a man of apparently good character.

In the result, I sentence Mr. Field to a prison term of three years concurrent on each count. In doing so, I have taken into account that Mr. Field has been remanded in custody for a little less than one month since being found guilty. I will make a recommendation on the Warrant of Committal that he be allowed to serve his time in the Whitehorse Correctional Centre or, alternatively, in a federal penitentiary in the lower mainland of British Columbia.

[42] I also make the following collateral orders:

1. a mandatory firearms prohibition under s. 109 of the Criminal Code, for a period of ten years;
2. an order that Mr. Field provide samples of bodily substances for DNA analysis, under s. 487.051 of the *Criminal Code*; and
3. an order that Mr. Field comply with the *Sex Offender Information Registration Act* for a period of 20 years, pursuant to s. 490.012 of the *Criminal Code*.

GOWER J.