COURT OF APPEAL OF YUKON

Citation: *R. v. Rosenthal*
2015 YKCA 1

Date: 20150108
Docket: 14-YU743
Whitehorse Registry

Between:

Regina

Appellant

And

Ashton Reed Rosenthal

Respondent

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Schuler
The Honourable Mr. Justice Goepel

On appeal from: an Order of the Territorial Court of Yukon, dated August 14, 2014 (*R. v. Rosenthal,* 2014 YKTC 41, Whitehorse Docket 13-00471).

Counsel for the Appellant:	Noel Sinclair
Counsel for the Respondent:	Lauren Whyte
Place and Date of Hearing:	Whitehorse, Yukon November 17, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 8, 2015

Written Reasons by:
The Honourable Madam Justice Schuler

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Goepel

Summary:

Crown appeal allowed from suspended sentence for sexual assault; sentence varied to 14 months' imprisonment.

Reasons for Judgment of the Honourable V.A. Schuler:

[1] This is a Crown appeal from a suspended sentence with two years' probation imposed on the respondent after trial and conviction on a charge of sexual assault.

[2] The respondent and the victim were socializing and consuming alcohol with others at a home where the respondent often stayed. The victim asked to stay over and share the respondent's bed rather than go home late at night. The respondent agreed. The victim later awoke to find the respondent's finger in her vagina. She moved over and he removed his hand. She told him that she was not interested in having sex and went home.

[3] The appellant sought a jail sentence of 14 to 18 months. The respondent sought a suspended sentence. The trial judge imposed a suspended sentence with probation for two years on various conditions.

[4] The appellant argues that the trial judge erred in declining to take judicial notice that the offence would result in psychological harm to the victim and that the sentence is unfit and outside the usual range for the offence. The appellant also submits that the trial judge erred in not imposing a firearm prohibition order under s. 109 of the *Criminal Code*, R.S.C.1985, c. C-46, an error conceded by the respondent.

[5] The trial judge made no reference to psychological harm in his reasons for sentence. His only comments on that subject came during counsel's submissions on sentence. Crown counsel submitted that the offence will affect the victim's behaviour, her ability to relate with others and her sexual and psychological integrity (Transcript, p. 4). The trial judge described that as speculation and declined to take judicial notice of "psychology", noting that the victim had not provided a victim impact statement or engaged with Victim Services.

[6] The trial judge did not err in declining to take judicial notice of the specific psychological consequences Crown counsel submitted would occur. In sentencing for sexual assault it is, however, proper to consider the likelihood of psychological harm to the victim*: R. v. McDonnell*, [1997] 1 S.C.R. 948. That likelihood is a reason that the principle of general deterrence is significant in sentencing for sexual assault. To the extent that the trial judge refused to acknowledge the likelihood of psychological harm from a sexual assault, he erred.

[7] In submissions to the trial judge, the appellant relied on *R. v. White*, 2008 YKSC 34. In that decision, Gower J., after a thorough review of Yukon sentencing cases, concluded that the range was roughly 12 to 30 months' imprisonment in cases involving non-consensual sexual intercourse with a sleeping or unconscious victim. Although many of the cases referred to by Gower J. in *R. v. White* involved individuals with serious prior criminal records, not all did. None of the material before us suggests that the sentencing range in Yukon is other than as described by Gower J.

[8] There is no logical basis on which to exclude assault by digital penetration from the range, it being a serious and invasive form of sexual assault, as recognized by the trial judge.

[9] The trial judge appears to have interpreted the appellant's submission that the respondent's sentence should come within the range stated in *R. v. White* as a submission that the range identified in the case provides a starting point for sexual assault sentences. As recognized by the trial judge, *R. v. White* clearly does not adopt the notion of a starting point, rather it reflects the range of sentences actually imposed in Yukon. The appellant did not suggest that it established a starting point, but simply sought a sentence within that range.

[10] The Supreme Court of Canada has confirmed that sentencing judges are to pay heed to sentencing ranges. In *R. v. Nasogaluak*, 2010 SCC 6, the Court said (at para. 44):

> The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of

> sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[11] The trial judge recognized that the respondent's offence was a serious, invasive sexual assault. He did not identify any factors that would take the sentence outside the range identified in *R. v. White*. He departed from the range on the basis of cases from outside Yukon. These cases can also be differentiated on the basis that the accused in three of the cases entered a guilty plea, and the accused in the fourth case was partially successful at trial: *R. v. Aftergood,* (January 26, 2012), Victoria 145042 (B.C.S.C.); *R. v. A.A.F.,* 2014 BCPC 46; *R. v. Ingrey,* 2003 SKQB 300; *R. v. T.J.H.,* 2012 BCPC 115.

[12] A suspended sentence is a significant departure from the range identified in *R. v. White,* which is not made appropriate by the respondent's lack of a prior criminal record. A suspended sentence does not serve the principles of denunciation and deterrence, which are especially important given the prevalence in Yukon of sexual assaults on sleeping or unconscious victims: *R. v. White* at para. 51.

[13] In *R. v. Netro,* 2003 YKTC 80, the prevalence of sexual assault on sleeping victims in Yukon was one of the factors which led the judge to reject a conditional sentence and impose a 12-month custodial sentence:

> [22] The difficulty in considering a conditional sentence in this case arises from the circumstances not of the offender but of the offence. … [T]he crime must be viewed in its community context. Sexual assault on unconscious and helpless victims is … rampant in this jurisdiction and throughout the North.

[14] In my view, therefore, the trial judge erred in departing from the range with the result that the sentence he imposed is unfit. In the circumstances of this case, a sentence within the range requested by Crown counsel at the sentencing hearing is appropriate, taking into account the principles of sentencing, including that a sentence

should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, as enshrined in s. 718.2(b) of the *Criminal Code*.

[15] In the result, I would allow the appeal and vary the sentence to one of 14 months' imprisonment. I would also make a firearms prohibition order in the usual terms under s. 109 of the *Criminal Code*, which will commence on the date of this judgment and will expire ten years after the respondent's release from imprisonment. Any items in the respondent's possession that are prohibited by the order are to be surrendered to the RCMP forthwith.

[16] I would order that the respondent is to surrender himself into custody within 48 hours of a copy of this judgment being delivered to his counsel, failing which a warrant will issue for his arrest.

"The Honourable Madam Justice Schuler"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Goepel"