SUPREME COURT OF YUKON

Citation: *R. v. M.T.L.*, 2015 YKSC 9

Date: 20150227
S.C. No. 14-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

M.T.L.

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

Before: Mr. Justice L.F. Gower

Appearances:

Susan E. Bogle — Counsel for the Crown
André W.L. Roothman — Counsel for the accused

REASONS FOR SENTENCING

INTRODUCTION

[1] GOWER J. (Oral): This is the sentencing of M.L. on the charge of sexual assault upon G.C. between August 30 and 31, 2013, in Whitehorse, contrary to s. 271 of the *Criminal Code,* R.S.C. 1985, c. C-46, *(*the "*Code*"*)*.

[2] The trial took place before me, sitting as a judge alone, from December 3 through 5, 2014. On December 19th, I rendered my decision finding M.L. guilty of the offence of

sexual assault. A pre-sentence report was ordered and sentencing was adjourned. M.L. was released in the interim on a recognizance with conditions.

[3] The Crown is seeking a jail sentence of 26 to 28 months. Defence counsel submits that an appropriate jail sentence would be between 14 and 18 months.

CIRCUMSTANCES OF THE OFFENCE

[4] In my reasons for finding M.L. guilty, I indicated that I found G.C. to be a credible and impressive witness. Based on her testimony, which I largely accepted, I made the following findings of fact.

[5] M.L. and G.C. were good friends before the incident. M.L. had been introduced to G.C. through G.M., also a good friend whom he had known for several years. G.C. and G.M. had been in a relationship since September 2010 and were engaged at the time of the incident.

[6] G.C. is presently 22 years old, but was 21 at the time of the sexual assault. She is a high school graduate and is employed as a waitress. She had been living with G.M. and his family in a residence in the Whitehorse subdivision of Riverdale, but on August 25, 2013, she moved into a residence in the Mountainview subdivision, where she lived with two other friends.

[7] In August 2013, G.C. spent time with M.L., who is 23 years old, almost on a daily basis, often also in the company of G.M. On August 30, 2013, M.L. picked up G.C. at her Mountainview residence in his vehicle at about 8:30 PM. He drove her to Fish Lake, where they met a group of other friends, made a fire, roasted hot dogs, drank beer and smoked marijuana. The party lasted from about 9 PM until about midnight. G.C. drank two Budweiser beer at Fish Lake, and also smoked some marijuana from two or three

joints passed around the group, which totalled six young people. M.L. drank six beers over the three hour period.

[8] M.L. then drove G.C. back to Whitehorse, together with another friend. G.C. asked M.L. to take her home to her residence in Mountainview. However, M.L. ignored this request and told her to come downtown with him and the other friend. M.L. parked his vehicle at his residence, a four-plex on Wheeler Street, where the group coordinated with the other friends from Fish Lake. Five of the friends then walked together to the Boiler Room pub, in the Yukon Inn.

[9] G.C. did not feel she had the option of spending that night with G.M. in his Riverdale residence, as he had previously indicated that he wanted some space from her in the relationship. Although she had been texting him back and forth that evening, she had not seen him in a couple of days. Further, it would have taken G.C. more than an hour to walk back to her Mountainview residence.

[10] Outside the Boiler Room, M.L. grabbed G.C.'s arm to hold her back while the others went ahead. M.L. told her that she could stay at his place and that she could sleep in his bed with him, back to back. G.C. got angry with M.L. over this suggestion, told him no, and walked away from him briefly.

[11] Eventually, G.C. joined the group in the Boiler Room. M.L. purchased a mug of beer for himself and one for her. G.C. drank about half of her beer. M.L. was talking intensely to her and pulled her chair towards his. He was saying things which she found upsetting. For example, M.L. told her that G.M. was cheating on her; that G.M. did not appreciate her or deserve her; that G.M. was probably with another girl that very evening; and that she should consider leaving the relationship. While he was telling her these

things, M.L. was leaning towards G.C. and was grabbing her legs, knees and hands. At one point, G.C. pushed his hands off of her and was crying.

[12] M.L. told G.C. that if she wanted a place to sleep that night, she had to go with him right away. G.C. had previously been inside M.L.'s bedroom several times, mostly while also in the company of G.M., and on one such occasion, slept on the floor of the bedroom. She got up and followed M.L. While walking towards his residence, M.L. told G.C. that, if she and G.M. broke up, he would want to go out with her. G.C. told M.L. that she needed him to be her friend and not to put pressure on her like that. M.L. said that he thought the two of them were meant to be together. G.C. did not take him seriously and resisted his attempts to put his arm around her and to hold her hand. She thought he was joking because he had been drinking and that when he was sober he never tried to be physical with her.

[13] The two arrived at M.L.'s residence just before 2 AM. M.L. asked for a hug, which G.C. gave him willingly, but when he tried to kiss her, she pushed him away and angrily said "You know I don't want that." M.L. apologized, said he would not touch her, that he would leave her alone and that she could crash on his couch. G.C. accepted the invitation and went into M.L.'s residence. Once in his bedroom, G.C. told M.L. that he should not make passes at her and that he should respect her relationship with G.M. M.L. again apologized for his behaviour.

[14] M.L. slept on a high bed, somewhat like the second tier of a bunk bed. There was also a two-seater couch in the bedroom, to the side and below the bed, with the back of the couch against the bed frame. G.C. received a blanket and pillow from M.L., took off her sweater, but kept the remainder of her clothing on, including her shirt, full-length

pants, bra, underwear and socks. G.C. is only 5'2" and weighed 102 pounds at the time. She fell asleep on the two-seater couch on her back.

[15] G.C. woke up to find M.L. on top of her. She was unable to move. Her shirt was still on, but her pants and underwear were down around her ankles and M.L. was pushing his penis into her vagina. She said to M.L. "What the fuck man? What you doing?" G.C. pushed on M.L.'s chest to get him off of her, but he bit her on the side of the neck, which left bruises. She asked him why he was doing what he was doing and M.L. said that he could not help it. While he continued the intercourse, he kept saying he was "sorry", over and over again, and said that G.C. was "too cute". G.C. continued unsuccessfully to try and push M.L. off of her. When she began hitting his chest, he grabbed her arms and held them down. M.L. continued the intercourse for several minutes. G.C. was crying and told M.L. that she was going to tell G.M. about what was happening. At that point, M.L. got off of her, threw her phone at her and told her to call G.M. He grabbed her, shook her by the shoulders and demanded that she tell G.M. that they had slept together, that she was in love with M.L. and that she was M.L.'s girlfriend now. Frightened, and not knowing what else to do, G.C. complied with these demands and made the call. When M.L. let go of her, she pulled up her pants, grabbed her phone and her remaining clothing and left M.L.'s residence.

[16] G.C. ran to G.M.'s residence in Riverdale and eventually told him what happened in M.L.'s bedroom. Later that day, which was now August 31, 2013, G.C. went back to her residence in Mountain- view to shower and change clothes. She then attended at the Whitehorse General Hospital between 3:30 PM and 4:45 PM, where she was examined by a nurse and Dr. Sally MacDonald.

CIRCUMSTANCES OF THE OFFENDER

[17] As I noted, M.L. is 23 years old and is a high school graduate. He is 5' 11" and at the time of the incident he weighed 310 pounds. He was raised by his now 60-year-old mother, J.L., and resides with her in the four-plex on Wheeler Street. He has a half-brother, L., who is seven years older, and resided with him and J.L. while growing up. M.L. has never met his biological father. He has some extended family in Washington State.

[18] M.L. informed the author of the pre-sentence report that he was really close growing up with his mother and half-brother. He described the family relationship as safe and secure. J.L. described M.L. as generous, nurturing, kind and helpful.

[19] M.L. performed generally well in school. In grades 10, 11 and 12, he attended primarily non-academic courses in which he achieved A and B grades. In his academic courses he achieved C- to C+ grades.

[20] M.H. is one of M.L.'s best friends and has known him since grade 4. He does not recall M.L. having ever done anything particularly wrong while in school. M.H. also does not recall M.L. ever being involved in any violence. He has never seen anything in M.L.'s past to suggest that he would commit a sexual assault. M.H. described M.L. as someone with a big heart, who is a good problem solver with kids and who demonstrates patience.

[21] A.H., a former Big Brother of M.L. for three years, described him as a "good, bright kid with good social skills."

[22] A.C. and M.L. were formerly sexually intimate, and presently are best friends. A.C. is a childcare worker, who is the same age as M.L. She said that M.L. is always

happy and energetic and she has never seen him angry. She had no concerns about how he behaves towards women.

[23] M.L. has a limited employment history. He worked for five summer seasons in a Whitehorse hotel, until he was 18 years old. M.L. also began volunteering to work with a friend who had autism. That eventually led to paid part-time work with another child with disabilities as part of an initiative entitled “Social Inclusion”, which involved situational and relational role modeling. The mother of one such child, D.S., described M.L. as reliable, patient and someone with ideas. However, she also indicated that he did not appear to be particularly motivated.

[24] M.L. has not had an income since November 2014, when he stopped working with D.S.’s son. He stated to the author of the pre-sentence report that he has not spent money in months and “does not do anything”. He explained that he did not want to get a job, if he is just going to go to jail.

[25] M.L. does not belong to any clubs or organizations. He likes to throw a football around, play catch, play basketball, go swimming, and work out. He misses attending a children’s leisure and gaming center called “Fraser’s”, which he used to attend with his Big Brother, but has since closed. M.L. also enjoys playing video games.

[26] According to a self-reporting questionnaire on problems related to drinking alcohol, M.L.’s score of zero indicates that he reported no such problems. M.L. admits to consuming alcohol two to three times per month. Once per month, he will drink a 15-pack of beer over the course of three or four hours.

[27] According to a similar self-reporting questionnaire regarding drug abuse, M.L.’s score of one indicates that he feels he has a low level of problems in this area. M.L.

admits to smoking a joint with a friend about three times per week and occasionally will drive a motor vehicle while high on marijuana.

[28] M.L. undertook several risk assessment measures with the author of the pre-sentence report. The combined result of all of these assessments places him in the "moderate-low" category for supervision and intervention in comparison to other sexual offenders assessed using the same measures.

[29] M.L. has no criminal record.

[30] M.L.'s attitude towards the offence is that he continues to feel G.C. is lying about the non-consensual sex. He denies doing anything wrong. M.L. feels the Crown prosecutor at the trial was sexist and biased against men. The author of the pre-sentence report described him as demonstrating "repeated instances of ruminative hostility towards the victim, the system and women in general…beyond what would reasonably be expected in the circumstances."

[31] M.L. made some statements to the author of the pre-sentence report which simply appear to be untrue. For example, he told the author that he had "made the honour roll for grade ten (10)". However, M.L.'s school records indicate that was not the case. Further, M.L. indicated that he had lived with a girlfriend, H.S., for 13 months in her parent's basement. However, both H.S. and M.L.'s mother indicated that this did not happen.

[32] The author of the pre-sentence report also referred repeatedly to M.L.'s apparent lack of motivation and his boredom. M.L. reported to him that there was nothing to do in Whitehorse but drive around to the bars and smoke marijuana.

[33] Finally, the pre-sentence report states, at p. 23:

> [ML] does not appear to have grown up and his transition to a pro-social adult lifestyle is perhaps delayed. He seems to demonstrate a lack of awareness and insight into his behaviour and his life; for example, he reported that his family is like the others around him in his community and then said that they were not. [ML] informed this writer that his mood is good and normal and then rated himself as a six (6) out of 10 for mood stating that he "feels shitty" because he is being judged in the community. He said that he went from being one [of the "most loved" to one] of the most hated people in Whitehorse.

VICTIM IMPACT STATEMENTS

[34] Victim Impact Statements were provided by G.C., her mother and her sister, C.H.

[35] G.C. states that, since the offence, she has experienced medical problems with her uterus, urinary tract and vaginal canal. She reports that this makes sexual intercourse and urination very painful. This in turn makes it very hard for her to be intimate with her partner. G.C. claims that she requires daily medication to be able to function normally. I pause here to note that G.C. also testified about these medical issues during the trial.

[36] Emotionally, G.C. states that she has experienced significant trust issues and fear of being in public. She says that she has become more antisocial and feels very insecure as a woman. She claims that she has lost wages in order to attend counselling, doctor's appointments and court. She states that she will never have the life she used to have before the offence.

[37] G.C.'s mother states that the family has suffered the emotional pain of seeing G.C. struggle to accomplish day-to-day tasks and routines, especially having to go into public places. Personally, the mother has also been affected by the breach of trust element of the offence, which has made her generally suspicious of others.

[38] G.C.'s sister states that this offence has deeply affected herself and her immediate family. She notes that Whitehorse is a small community, and that her family has suffered from encounters with others who have had harsh things to say about their opinions on what happened. Personally, she has had trouble sleeping and has felt helpless seeing how fragile her mother and sister have become at this difficult time. Nevertheless, she indicates that her family has chosen to deal with their pain through forgiveness.

AGGRAVATING CIRCUMSTANCES

[39] The aggravating circumstances in this case are as follows:

1) As I noted above, there is clearly a breach of trust element in this offence. Section 718.2 (a)(iii) of the *Code* requires me to take this factor into consideration as an aggravating circumstance for which the sentence should be increased. G.C. would not have accepted M.L.'s offer for her to spend the night in his bedroom if she had not trusted him as both her good friend and the good friend of her fiancé, G.M. Further, she had been in M.L.'s bedroom several times before without any incident. Finally, when G.C. made it clear to M.L. that she was not interested in his romantic advances, he apologized for his behaviour and said that he would not touch her, that he would leave her alone and that she could crash on his couch. G.C. trusted M.L.'s word in that regard and he breached that trust.

2) M.L. took advantage of G.C. while she was sleeping and unable to resist or confirm her consent.

3) M.L. did not stop immediately upon G.C. awakening and telling him in no uncertain terms that she did not want to have sexual intercourse with him.

Rather, he continued on for several minutes and at one point restrained G.C.'s arms as she tried to resist him.

4) M.L. caused bruising to G.C.'s neck by biting her, as well as some injury to G.C.'s perineal and labial areas which were tender and red and painful upon examination within 12 hours of the offence.

5) The sexual assault involved full and protracted vaginal penetration, which can logically be expected to cause heightened physical and emotional trauma in the victim.

6) M.L. had unprotected sexual intercourse with G.C. knowing that there was a risk of pregnancy or a resulting sexually transmitted disease. Again, this can logically be expected to have added to G.C.'s fears and concerns following the offence.

MITIGATING CIRCUMSTANCES

[40] The mitigating circumstances are:

1) M.L. has no criminal record and appears to be a first offender.

2) Prior to this offence, according to the sources interviewed in the pre-sentence report, ML appears to have been a person of generally good character.

3) M.L. has good support from his family and several friends.

4) M.L. has maintained good behaviour throughout the duration of these proceedings. He was charged on December 18, 2013 and was initially summonsed to appear on the offence. On June 20, 2014, he was placed on an undertaking to have no contact directly or indirectly with G.C. Finally,

> after I found M.L. guilty of the offence of sexual assault, I released him on a recognizance with conditions pending this sentencing.

NEUTRAL CIRCUMSTANCES

[41] I view M.L.'s absence of remorse and his denial of responsibility as a neutral factor. He is not to be penalized for exercising his constitutional right to a trial or pursuing an appeal of this conviction.

[42] G.C. has testified about other medical complications following the offence, as well as noting them in her victim impact statement. She said she has experienced scarring to her uterus, urinary tract and vaginal lining. She also said that she has continuing bladder problems for which she is on daily medication. However, Dr. MacDonald's evidence was that she performed a full cervical and vaginal examination on August 31, 2013. While she did observe redness in the cervix, Dr. MacDonald's opinion was that this was "clearly due to hormonal effects" and that it was a "normal finding and not related to trauma". That is the medical evidence of G.C.'s condition on the day of the offence. That is not to say that G.C.'s medical condition remained static in the weeks and months following the offence. However, I have no further medical evidence in that regard. While I may be satisfied on a balance of probabilities that G.C. is currently suffering from the complications she testified about, that is not the standard of proof required to take this into account as an aggravating circumstance. Rather, the onus is upon the Crown to prove these facts beyond a reasonable doubt, and that has not been done.

ANALYSIS

[43] I begin my analysis by simply observing the following sentencing principles. Section 718 of the *Code* provides:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> a) to denounce unlawful conduct;
> b) to deter the offender and other persons from committing offences;
> c) to separate offenders from society, where necessary;
> d) to assist in rehabilitating offenders;
> e) to provide reparations for harm done to victims or to the community; and
> f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[44] Section 718.2 of the *Code* further provides:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders…

These provisions are a codification of the common law principle of restraint which requires that, even if imprisonment may be imposed, it should be the lightest possible in the circumstances. Clayton Ruby, et al., in his text *Sentencing,* (7th ed.), (Markham: LexisNexis, 2008) notes that, in many cases, it is the mere "clang of the prison gates" which is likely to keep the offender from crime in the future (p. 492). This is because it is the fact of going to prison which has the deterrent effect, not the length of the prison sentence. Thus, generally speaking, particularly for young people, the first prison term should be as short as reasonably possible (p. 493). Further, except for very serious

offences involving violence, such as sexual assault, the primary objectives in sentencing a first offender are usually individual deterrence and rehabilitation (p. 494).

[45] As a result of a relatively recent amendment to the *Code* in s. 742.1(f) (iii), it is no longer possible for a court to consider imposing a conditional sentence for the offence of sexual assault contrary to s. 271 of the *Code*.

[46] The Court of Appeal of Yukon in *R. v. Rosenthal*, 2015 YKCA 1, recently confirmed that, given the prevalence in the Yukon of sexual assaults on sleeping or unconscious victims, the sentencing principles of denunciation and deterrence are especially important (para. 12). The Court further determined that these principles were not served by the imposition of a suspended sentence and two years' probation. Rather, the Court imposed a jail sentence of 14 months.

[47] The circumstances in *Rosenthal* are instructive, and some are similar to the case at bar. The offender was convicted following a trial. He had no prior criminal record. The offender and the victim were socializing and consuming alcohol with others at a home where the offender often stayed. The victim asked to stay over and share the offender's bed, rather than go home late at night. The offender agreed. The victim later woke to find the offender'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. The Court of Appeal agreed with the trial judge that this was a serious and invasive sexual assault.

[48] In *R. v. White*, 2008 YKSC 34, I determined that the range of jail sentences in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the

vicinity of 30 months, at the higher end. That decision was recently approved by the Court of Appeal in *Rosenthal*, cited above, at para.5.

[49] *White* is similar in many respects to the case at bar. The victim was a young woman attending Yukon College, where the offender was also a student. The two knew each other. On the date of the offence, the victim had been drinking and dancing at a bar in Whitehorse, where the offender was also present. After the bar closed, the victim and the offender were driven to the Yukon College, where the offender had a room in the adult dorm residence. The victim went with him to his room. They sat together on the bed and talked about college matters. They kissed for a while. Eventually, the victim became tired and said that she wanted to lie down on her own side of the bed. The offender said that was okay and told her not to worry. When the victim went to sleep she was wearing her pants and the offender was wearing his shirt and pants. She woke up to find that her pants and underwear had been removed and the offender was on top of her trying to force sexual intercourse. She said “No, I don’t want to” several times, while the offender tried to put his penis inside her vagina. The offender weighed about 220 pounds at the time and the victim was just under 5 feet and weighed 115 pounds. The offender stopped after about 10 minutes. The victim suffered an abrasion in her perineal area.

[50] Mr. White was a 39-year-old First Nations male who came from a dysfunctional family and an abusive upbringing. He had a criminal record of 10 offences, including an aggravated assault. He was also an admitted cocaine addict and an alcoholic, but refused to seek treatment. The offender’s risk assessment was high for general and violent offences and moderate for future sexual violence. He was described as a good

worker, a good volunteer and a model tenant. At the time of the offence, the offender was attempting to upgrade his education, notwithstanding a severe learning disability.

[51] I determined that, in those circumstances, the paramount principles were denunciation and deterrence and I sentenced Mr. White to 26 months in jail.

[52] While denunciation and deterrence are the most important sentencing principles in this case, given M.L.'s relatively young age and his status as a first offender, I must not overlook the prospect of his rehabilitation. Having said that, there are issues arising in the pre-sentence report which make me somewhat pessimistic about the prospect of M.L. successfully rehabilitating himself in the long-term.

[53] First, although M.L.'s cumulative risk assessment for future offending is described as moderate to low, it must be remembered that he was intoxicated when he committed this sexual assault. Although M.L. does not admit to having any alcohol problems, his admission that once a month he will binge drink up to 15 beers over a 3 to 4 hour period is concerning.

[54] M.L.'s counsel stressed that his client's previous good character is as different as night from day to the character he exhibited during the sexual assault. He further seeks to explain this radical change by M.L.'s state of intoxication. While I can accept that as an explanation and not an excuse, I am nevertheless concerned about that position in the context of the fact that M.L. does not think he has any alcohol problem at all. If he continues to maintain that attitude, then the risk remains that he may repeat this type of behaviour in the future the next time he is intoxicated in the presence of another woman in similar circumstances. Finally, my concern here is heightened further by M.L.'s

apparent general hostility towards women beyond what would reasonably be expected in the circumstances, as a result of these proceedings.

[55] I am also bothered by the fact that M.L. was untruthful with the author of the pre-sentence report in two respects - the grade 10 honour roll and living with H.S. for 13 months. No explanation was provided by his counsel for either inconsistency.

[56] Another worrisome theme in the pre-sentence report are the repeated references to M.L.'s lack of motivation, doing the bare minimum and being bored because there is nothing to do in Whitehorse but to drive around to the bars and smoke marijuana.

[57] Finally, my expectations of M.L.'s successful rehabilitation are also diminished by his apparent lack of maturity and his inability to have insight into his behaviour and his lifestyle.

CONCLUSION

[58] I give significant weight to the Court of Appeal's very recent decision in *Rosenthal*, where the offender was sentenced to 14 months in jail for a brief digital penetration of the victim's vagina, which stopped immediately upon the victim waking up and moving over. Further, there was no mention of any injury and no specific evidence of psychological harm. Indeed, the victim had not provided a victim impact statement or engaged with Victim Services.

[59] The circumstances of the offence in this case are more serious than those in *Rosenthal*. Thus, a sentence of more than 14 months in jail is called for. The circumstances are also very similar to those in *White*, although there are some distinctions. On the one hand, in the case at bar, there was full penile penetration, whereas in *White* there was only attempted penetration. On the other hand, White had a

significant criminal record of 10 convictions, one of which was for aggravated assault. He was also assessed as a “high” risk for general and violent offences. On balance, these last two circumstances make White a more serious case than the one at bar. Thus, the sentence should be less than 26 months.

[60] In the result, I must balance the need for denunciation and deterrence with: (a) the fact that M.L. is a relatively young first offender; and (b) his relatively dim prospects of rehabilitation. I impose a sentence of 22 months, which I expect M.L. will serve in the Whitehorse Correctional Center, as opposed to a southern penitentiary.

[61] I also make the following ancillary orders:

1) an order under s. 487.051 of the *Criminal Code*, requiring M.L. to provide samples of bodily substances for DNA analysis;

2) an order under s. 490.013 requiring M.L. to be listed with the Sex Offender Registry for a period of 20 years; and

3) an order under s. 109(2)(a) prohibiting M.L. from possessing any firearms, ammunition and explosives for a period of 10 years; and

4) an order prohibiting M.L. from having any contact, direct or indirect, with G.C., while serving his prison sentence.

[62] In the circumstances, the victim surcharge is waived.

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GOWER J.