

Citation: *R. v G.W.S.*, 2004 YKTC 5

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Docket: T.C. 03-00170
T.C. 03-00302
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

G.W.S.

Restriction on publication:

PUBLICATION OF INFORMATION THAT COULD DISCLOSE THE IDENTITY OF THE COMPLAINANT OR WITNESS HAS BEEN PROHIBITED BY COURT ORDER PURSUANT TO SECTION 486(3) OF THE *CRIMINAL CODE*

Appearances:

Mr. François Lacasse

Mr. Nils Clarke

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] G.W.S. is charged with two counts of sexual assault. The circumstances are as follows.

[2] On June 7, 2003, G.W.S was attending a drinking party at the residence of a friend. N.L., who was 16 years old, was in attendance but was not drinking. When the party ended, N.L. went to sleep on the living-room couch. She woke up to find G.W.S fondling her vagina over her clothing. G.W.S. tried to take her pants off but she held on to them and resisted his advances. G.W.S walked away saying something about "finding rolling paper". Soon he came back and sat down and put his hand on her thigh. When she again resisted he left her alone.

[3] On June 22, 2003, G.W.S encountered N.M., his cousin, aged 44 years, and asked her if he could stay overnight at her place. N.M. invited him to her apartment, offered him some food and set up the couch for him to sleep on. N.M. then went to bed fully clothed and fell asleep.

[4] N.M. woke up during the night and found her clothing removed. G.W.S. was at her side fingering her vagina and her anus. His hand was on her throat so as to restrain her but he was not actually choking her. She felt his penis against her leg and believed he had his pants off.

[5] She reacted to the assault by struggling and kicking him in the testicles. G.W.S. got up, put on his clothes and left the premises.

[6] There are a number of aggravating factors in this case. G.W.S. has an extensive criminal record that starts in 1974. That record includes 10 assaults, and a number of breaches of court orders. It is evident that G.W.S has a predisposition to violence. In addition, it appears that the previous sentences imposed by the court have had no rehabilitative effect. If anything, these offences suggest an escalation of his anti-social behavior.

[7] Both sexual assaults occurred only one month apart. Although there was no intercourse, in the case of N.M., there was digital penetration and in the case of the younger victim N.L., there was touching on the vaginal area over her clothing.

[8] N.M. stopped the assault by kicking G.W.S in the groin area. If she had not woken up and resisted, I infer that the assault would have continued and possibly escalated.

[9] N.M. is a first cousin of G.W.S. She agreed to assist G.W.S by providing him with accommodation. He took advantage of her hospitality.

[10] The victim, N.L., was only 16 years of age at the time of the assault. Her youthful age is a significant aggravating factor, as G.W.S is 48 years old.

[11] It is evident from the victim impact statements that these assaults have had a very significant emotional and psychological impact on the victims. That impact was compounded in the case of N.M. by the fact that G.W.S is her first cousin. In the case of N.L., the assault has made her very distrustful of men.

[12] By way of mitigation, I am urged to consider the early guilty plea which spared both victims from having to testify. In cases involving sexual assault, early guilty pleas deserve significant credit.

[13] G.W.S. also indicates that he has a plan to reside with his daughter. She was present in court. She is prepared to have him serve his conditional sentence in her residence. She advised that her residence is alcohol free. She also indicated that she wanted G.W.S to take responsibility for what he had done and to take counseling and treatment so something like this would not happen again.

[14] G.W.S verbally expressed shame, guilt and remorse. However, he indicated that he had no recollection of the incidents that have brought him before the court. G.W.S. says that he had been drinking heavily and was suffering from alcohol-induced blackouts. As he was not in a position to contradict the victims, he accepted responsibility in both cases. He filed a letter with the court that expressed remorse and empathy for the victims. G.W.S. states in the letter that he is not using the blackouts or his substance abuse as an excuse. He also indicates a desire to involve himself in programming so that he can remain sober and lead a productive life.

[15] Both counsel are in agreement that an appropriate sentence in this case would be one of two years less one-day in jail followed by a period of probation. As G.W.S has been in custody prior to trial for five months, he should receive credit at the rate of two to one or 10 months in total. The joint submission then, is for an additional period of incarceration of 14 months. G.W.S asks to serve the sentence conditionally in the community, but this is opposed by the Crown.

[16] The Law The case of *R. v. G.C.S.*, [1998] Y.J. 77 (Yukon C.A.) is a benchmark for sentencing in cases of sexual assault. In that case, the accused was 18 years old at the time of the offence, the complainant was passed out from excessive drinking and he forced sexual intercourse on her while she was unconscious. Due to his age, rehabilitation was a significant factor in sentencing. After reviewing a number of related Yukon court decisions, the Court of Appeal imposed a sentence of 16 months' imprisonment after taking into account pre-trial custody of four and one-half months. If two for one credit were given for the pre-trial custody, this sentence would be equivalent to a two-year sentence.

[17] Recent research studies suggest that the offence of sexual assault can have very significant and adverse consequences to victims. The Ontario Women's Directorate published a report entitled *Sexual Assault Impact on Health* (www.gov.on.ca/citizenship/owd/english/publications/sexual-assault) and made the following observations:

Sexual assault can have profound effects on women's health and well-being. It can result in physical injuries as well as psychological and emotional trauma. Women who have a history of being abused are at high risk of developing lifetime mental health problems. The effects of sexual assault on women's health and well-being can be just as serious as physical injuries. Nine of 10 incidents of violence against women have an emotional effect on the victim. The most commonly reported effects are anger, fear and becoming more cautious and less trusting. The emotional and psychological effects of sexual assault can also include depression, confusion, sleep disturbances, including nightmares, erratic mood swings, eating disorders, anxiety, and flashbacks. A Toronto study shows that 83

percent of female psychiatric inpatients reported a history of physical or sexual abuse.

[18] In a landmark decision, *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 657, Madame Justice L'Heureux Dube states:

Perhaps more than any other crime, the fear and constant reality of sexual assaults affect how women conduct their lives and how they define their relationship with larger society. Sexual assault is not like any other crime. As women, we live our lives dictated by the fear of violence to the extent that we sometimes forget that we are acting as we do out of fear.

[19] The victim impact statements of both victims in this case are consistent with the above observations.

[20] Earlier cases often considered lack of the penile penetration or even incomplete intercourse as a mitigating factor. In my opinion, these factors have been given too much weight. The typical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. That invasion occurs even in the absence of sexual intercourse. It would be wrong to suggest that digital penetration is significantly different from penile penetration, from the perspective of the victim. Touching a vulnerable or sleeping victim in the genitals can generate strong feelings of victimization.

[21] Sexual assaults are much too common in this Territory. In almost all the cases that come before the court, alcohol is a significant operating factor, whether it is inhibiting the offender or increasing the vulnerability of the victim or both. Where the offender has a history of offending and alcohol abuse for which he has not sought treatment or assistance, self-induced intoxication is not a mitigating factor. On the facts of this case, I consider it an aggravating factor.

[22] The Sentence The sentence recommended by counsel is in the low end of the acceptable range, taking into account the criminal history of the accused, the fact that the offences were committed one month apart, and the actual circumstances of the offences, including the vulnerability of the victims.

[23] In particular, the incestuous aspect of the assault on N.M. after she offered G.W.S. food and shelter for the night, leads me to characterize this as a highly reprehensible offence. Sexually assaulting N.L., a 16 year-old girl, while she was sleeping, is equally reprehensible. The early guilty pleas entered by G.W.S have spared him from a penitentiary sentence.

[24] I accept the joint recommendation of counsel and impose a custodial sentence of 14 months. In so doing, I have given G.W.S credit for 10 months, in light of the five months of pre-trial custody already served.

[25] I have concluded, however, that a conditional sentence is not appropriate in the circumstances of these offences. Although Parliament has not seen fit to exclude sexual assaults from being eligible for conditional sentences, a number of factors preclude this option in this case. They include the following:

- G.W.S has a long history of criminal offending.
- His criminal record includes many breaches of court orders, including three recent breaches of conditional sentences and two breaches of probation.
- Alcohol has been a factor in all his previous offending and he continues to abuse alcohol.
- He is before the court on two sexual assaults and both involved taking advantage of vulnerable victims.

[26] In all of these circumstances, I am not satisfied that the community would not be endangered by allowing G.W.S to serve his sentence conditionally in the

community. Furthermore, a conditional sentence would be inconsistent with the main purposes of the sentence that I now impose, namely, specific and general deterrence, as well as denunciation.

[27] The behavior of G.W.S. has been that of a sexual predator, preying on women who are asleep and vulnerable. He has a long-standing and serious alcohol problem. These matters can only be addressed over a lengthy period involving close supervision and intensive programming. I accept the recommendation in the pre-sentence report and order that G.W.S be placed on probation for three years.

[28] In addition to the statutory terms, that probation order will contain the following conditions:

Report forthwith upon your release from custody to a probation officer and thereafter as and when and in the manner directed. Reside in such residence as directed by the probation officer or your risk management team (such residence may include the Yukon Adult Residential Centre) and abide by the rules of that residence.

For the first six months of your probation, abide by a curfew by remaining within your residence between the hours of 8:00 p.m. and 6:00 a.m. For the next six months, the curfew will be between 10:00 p.m. and 6:00 a.m.. Exceptions to the curfew will be if you have the prior written permission of your probation officer or you are in the direct company of a responsible third person approved by your probation officer. During reasonable hours of your curfew, you will answer the telephone or the door of your residence for the purpose of curfew checks. Failure to do so will constitute a presumptive breach of this order.

You will abstain absolutely from the possession, purchase and consumption of alcohol and nonprescription drugs and submit to a breathalyzer or urinalysis upon demand of any peace officer, probation officer or your risk management team who have a reasonable suspicion that you have failed to comply with this condition.

You will not attend any licensed bar, tavern or residence where alcohol is being sold, served or consumed.

You are not to be in the company of any woman who is or appears to be under the influence of alcohol or drugs.

You are to have no contact directly or indirectly with the two victims, N.M. and N.L., as identified in the charges to which you pled guilty.

You will attend for such assessment, counseling and treatment as directed by your probation officer, including but not limited to alcohol addictions.

You will attend and participate in such assessment, counseling and treatment as directed by your risk management team or your probation officer, including, but not limited to sex offender treatment.

[29] Pursuant to section 109 of the *Criminal Code*, I impose a 10-year firearms prohibition. You will have 48 hours upon your release from custody to dispose of all firearms ammunition explosive substances and crossbows.

[30] Pursuant to section 487 of the *Criminal Code*, I hereby make a DNA order in the usual form.

[31] The victim fine surcharges are waived.

Lilles, C.J.T.C.