

Citation: *R. v. Joe*, 2010 YKTC134

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10-00304A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

SHELDON DEAN JOE

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:
Bonnie Macdonald
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Sheldon Dean Joe was convicted after trial on a charge of sexual assault. Sentencing was adjourned to permit the preparation of a Pre-Sentence Report. On the date fixed for disposition Mr. Joe entered guilty pleas to six additional offences.

[2] Mr. Joe was released from custody on an undertaking after being charged with the sexual assault of which he was eventually convicted. He has today entered guilty

pleas to three breaches of the undertaking, as well as a guilty plea to a single breach of a recognizance, which sometime later replaced the undertaking. There were two curfew breaches and two breaches of clauses that forbid him to consume alcohol or drugs.

[3] In addition, Mr. Joe has today pleaded guilty to possession of stolen property and mischief in connection with a breaking and entering that occurred at the Selkirk Store in Pelly Crossing. Entry had been gained by damaging and removing a grate over a window in the store. A large quantity of cigarettes and lottery tickets were taken.

[4] The sexual assault occurred in late December of 2009. The 19-year-old victim of the offence became grossly intoxicated after a night of partying and heavy drinking. The offender, Mr. Joe, was amongst the revellers. Eventually the victim retired to bed at the home of the woman where she had last been partying and where she had received permission from C.E., who was the occupant of the house, to spend the night. The victim may have thought that she had some degree of protection since she retired to bed clothed and in a bedroom also occupied by C.E. Both women were in the same bed.

[5] Mr. Joe had entered the room at one point, but had been told to leave. Later, as the victim lay comatose on the bed, Mr. Joe again entered the room, removed some of the victim's clothing and had sexual intercourse with her. He was discovered in the act by C.E. and quickly left. C.E. encountered considerable difficulty in rousing the victim to advise her of what had happened.

[6] Needless to say, the young woman was extremely distraught at the time, and her victim impact statement indicates that despite counselling and the passage of time, she

still struggles with feelings of helplessness and depression arising from this incident. She believes that the stress of the incident and the subsequent court proceedings contributed to a miscarriage that she suffered recently.

[7] I have had occasion to observe before that assaults of this kind are all too prevalent in this jurisdiction. Regrettably, nothing has changed. The sentencing in such cases must seek both to denounce and deter such reprehensible conduct. The leading case in this jurisdiction is the recent decision of Mr. Justice Gower in *R. v. White*, 2008 YKSC 34. That judgment, in addition to restating the principles of sentencing in such cases, establishes a range of 12 to 30 months for sexual assaults of this nature.

[8] The Crown seeks a sentence of 20 to 22 months for the sexual assault, and some 24 to 28 months globally, after taking into account the other six offences. Defence counsel submits that a sentence of 16 months would be adequate for the sexual assault.

[9] In aggravation, Crown counsel points to the fact that Mr. Joe succeeded in forcing sexual intercourse on his victim. Crown counsel also points to the persistent breaches of Mr. Joe's release conditions and his subsequent commission of serious, substantive offences. As well, Crown counsel notes that Mr. Joe has severe and untreated problems with alcohol and drug abuse, making him at high risk to reoffend.

[10] For its part, the defence points, quite properly, to the fact that Mr. Joe lacks any prior criminal record, and refers as well to Mr. Joe's indication to the author of the Pre-Sentence Report that he feels bad about what happened and regrets that he hurt his victim and lost her as a friend. This expression of remorse, of course, must be

considered in context. Mr. Joe put his victim through the ordeal of a trial and, in testifying himself, claimed that the intercourse was consensual. Defence also noted that Mr. Joe has taken some steps towards obtaining treatment and counselling, since he did attend a healing camp at Tatlmoin Lake for six days and sometime later completed the White Bison program while incarcerated at the Whitehorse Correctional Center.

[11] At the end of the day, I find that Mr. Joe's crime, which included sexual intercourse on an unconscious, unwilling and extremely vulnerable victim, is an extremely serious offence. It should attract a lesser sentence than those handed out in such cases as *White, supra*, and *R. v. Clark*, 2010 YKTC 61, primarily because the offender is still a young man and has no prior record.

[12] In my view, a fit sentence for the sexual assault would be 20 months. With respect to the remaining offences, a sentence in the order of three months for the property crimes, and a total of three months for the various breaches of release orders would be fit.

[13] It remains to consider what account to take of the 120 days that Mr. Joe has now spent in remand. In that regard, there are two factors of note; firstly, is the fact that his incarceration has been entirely of his own making owing to his repeated flaunting of his release orders. The second matter which requires consideration is the fact that the sexual assault and the first two breaches were committed prior to the coming into force of certain recent amendments to the *Criminal Code*, popularly titled, *the Truth in Sentencing Act*. As a result, Mr. Joe is entitled to consideration of at least some of his

remand time under the old rules, wherein credit for pre-trial custody was generally allowed at a rate of 1.5 to one. I am going to allow credit as follows: With respect to the charge of sexual assault, I impose a sentence of 20 months, but allow a credit for two months time served, leaving a remanet of 18 months. With respect to the charges of breach of undertaking arising from January 15 and February 19, 2010, I impose sentences of 30 days on each count for a total of 60 days, but allow a credit of 60 days, leaving a remanet of one day in addition to time served. To be clear, then, Mr. Joe is receiving, thus far, four months credit for three months actually served.

[14] With respect to the breach of undertaking charge arising from the 5th of March, 2010, I impose a sentence of 30 days consecutive, and on the final breach charge, 30 days concurrent.

[15] With respect to the possession of stolen property and mischief charges, I impose a sentence on each of three months, less credit for one month actually served on remand, leaving a remanet of two months to be served consecutively to any other sentence.

[16] The remaining portion of the sentence thus is 21 months with five months allowed in total for pre-trial custody.

[17] Following Mr. Joe's release from imprisonment he will be subject to a probation order for a period of 18 months, and I will return to the terms of that order.

[18] In addition, Mr. Joe will comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 20 years.

[19] Additionally, he will provide samples of bodily substances for the purpose of DNA analysis and banking, and additionally he is prohibited from possessing any firearm, ammunition or other items more compendiously described in s. 109(2)(a) of the *Criminal Code* for a period of ten years following his release from imprisonment. He is prohibited from possessing for life any of the items enumerated in s. 109(2)(b) of the *Criminal Code*.

[20] The surcharges are waived.

[21] The terms of the probation order will be that:

1. Mr. Joe will keep the peace and be of good behaviour;
2. He will appear before the Court when required to do so;
3. He will report to the Probation Officer within two working days after the order comes into force and thereafter as, when, and in the manner directed by the Probation Officer;
4. He will notify the Probation Officer in advance of any change of name or address, and promptly notify her of any change of occupation or employment;
5. He will reside where the Probation Officer will approve and not change the residence without the prior written permission of the Probation Officer;
6. He will abstain from the possession or consumption of alcohol or controlled drugs or substances, except in accordance with a prescription given to him by a qualified medical practitioner;
7. He will not attend at any place where alcohol is sold, except a restaurant

- which might be incidentally licensed for the sale of alcohol with meals;
8. He will have no contact, directly or indirectly, with S.S. and he will not attend at her residence or place of employment or education;
 9. He will take such alcohol or substance abuse assessment, counselling and programming as directed by the Probation Officer;
 10. He will take any other assessment, counselling and programming as directed by the Probation Officer;
 11. He will make reasonable efforts to find and maintain suitable employment and provide his Probation Officer with all necessary details concerning his efforts in that regard.

[22] The remaining counts?

[23] MS. MACDONALD: Your Honour, before we leave the probation order, would it be possible to address the issue of consents to release information to the Probation Officer?

[24] THE COURT: Mr. Coffin?

[25] MR. COFFIN: I have no comment on that.

[26] THE COURT:

12. He will provide the Probation Officer with consents to release information with respect to his participation in any programming, counselling, employment or educational activities.

[27] MS. MACDONALD: Your Honour, with respect to any charge where there was not a finding of guilt or the entrance of a guilty plea, the Crown enters a stay of proceedings.

[28] THE COURT: Thank you.

FAULKNER T.C.J.