IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *John*, 2006 YKSC 64 Date: 20061205
Docket: S.C. No. 06-01515
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ERIC LOGAN JOHN

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:
John Phelps For the Crown
Jamie Van Wart For the Defence

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is the trial of Eric Logan John on charges of sexual assault, breach of probation, times two, and possession of a concealed weapon.

[2] The sexual assault contrary to s. 271 of the *Criminal Code* is alleged to have occurred in Ross River on July 21, 2006. The complainant testified that during the day on July 21st she had been drinking with her sister, B., at the bar in Ross River. She then returned to her home where she lives with her boyfriend, W.J., and periodically her brother, R. The complainant has been in a relationship with W.J. for about six or seven months.

[3] When the complainant returned to her home on the evening of July 21st, she was alone. She continued drinking beer and waited for W.J. to come home. Eventually W.J. arrived with the accused. The complainant says that she, W.J. and the accused sat in the living room and continued to drink beer for a period of time. The complainant described the furniture in the living room as including a couch, an armchair and a coffee table. Eventually, the complainant passed out. In direct examination, she said that she passed out in the armchair. She acknowledged that she does not normally sleep in the armchair but did so because she had been drinking heavily. Normally, she said that she would sleep on the couch if she was in the living room.

[4] The complainant testified that she woke up in the morning to find the accused on top of her. The complainant was lying with her head back on the armchair and her feet on the ground, facing upwards. The accused was allegedly lying on top of her face-to-face. Her jeans and underpants were down to her knees and the accused had his jeans down to his knees. The complainant says that the accused was having sexual intercourse with her. She immediately said to the accused, “What the fuck are you doing?” She said she was shocked because there was no prior discussion or agreement with the accused that she would have sex with him. When she asked him what he was doing, the accused got off her, pulled up his pants and left the house.

[5] The complainant then says that she went to W.J., who was passed out on the couch in the living room, and told him what had happened. She said she was crying and she thinks she and W.J. started drinking beer again while they were talking about what had happened to her. This was the only time that the complainant talked with W.J.

about the alleged sexual assault. The complainant did not attend the nursing station in Ross River after the alleged assault.

[6] The complainant also says that she told her sister B. and the accused's mother, K.J., about the alleged sexual assault. On July 27, 2006, the accused's mother allegedly assaulted the complainant, which resulted in the complainant attending the nursing station for medical treatment. The RCMP also went to the nursing station to investigate the assault by K.J., and in the course of doing so, the complainant told the police about the alleged sexual assault by the accused a few days earlier.

[7] The following day, on July 28th, the complainant provided a sworn KGB statement to the police. The RCMP requested that the complainant provide the clothing that she was wearing at the time of the alleged sexual assault but she failed to do so.

[8] She explained that she did not report the alleged sexual assault to the RCMP until July 28th because, prior to that, she was too ashamed, too hurt, and too much in denial about what had happened. She also explained that she was drinking heavily over the next few days because of what had happened. She explained that was the reason she did not attend at the nursing station after the alleged sexual assault. While she did not specifically testify about it, her heavy drinking would also explain why she failed to provide her clothing to the RCMP as requested.

[9] The accused denies any sexual contact with the complainant. He says that on July 21, 2006, he had just been released from prison on a conviction for breach of probation by consuming alcohol. He met W.J., who is and remains one of his best friends, in the mid-afternoon. The two of them played some videogames at the home of

the accused's grandparents. The accused had a shower, following which he and W.J. went to the bar in Ross River, where they purchased about 36 beer and some whiskey. The accused then said the two of them went to Ashley Charlie's place where they drank some beer. They then went to Alan Ready's place. There, they met some others and continued drinking beer until about 5:00 pm. Then, he and W.J. left to go to Lash Ladue's house, taking some of the remaining beer with them as well as the whiskey. The two of them watched a movie at Lash Ladue's, continuing to drink the beer and whiskey.

[10] Then the accused and W.J. left and went over to the accused's grandparents' home, so that the accused could pick up a sweater. They continued to walk around Ross River. They went to Pat Atkinson's house and had some beer there. On W.J.'s suggestion, they then decided to go to the complainant's house.

[11] According to the accused, when they arrived, the complainant was in the living room, passed out on the couch. W.J. tried to wake her, but was unsuccessful. The accused says that he and W.J. then sat around listening to music, drinking whiskey and the remaining beer for about one hour. The accused says that he passed out on the armchair, which was beside the couch, and at that point, W.J. was on the floor of the living room beside the stereo, awake.

[12] The accused then recalls the complainant yelling at him and telling him to get out of her house. She was standing right beside the couch at that point. The accused looked for W.J. and noticed that he was still on the floor, but now passed out. He called

out W.J.'s name in an effort to wake him, but was unsuccessful. The accused then went to the back door of the house, put on his shoes, and left.

[13] The accused says that the first time he heard of the alleged sexual assault was about two days later when his mother told him that she had heard from the complainant that he sexually assaulted her.

[14] The accused was arrested on July 28, 2006. He admits that he had been drinking on that day with his mother. The two of them had been at the airport in the afternoon attempting to snare gophers. He and his mother consumed a 26 ounce bottle of whiskey plus two mickey bottles of whiskey during that afternoon. The accused had a hunting knife with a 16 centimetre blade in a sheath in his possession at the time of his arrest. It was concealed in the waistband of his pants. He volunteered the hunting knife to the officer, who seized it. The accused was noted to be cooperative during the arrest, but curiously the police officer said he only detected a "very, very slight smell" of alcohol, and not necessarily from the accused's breath.

[15] During his arrest, the accused made a number of voluntary and spontaneous statements, including the following:

- "You are just arresting me now? Why has it been so long?"
- "Fuck, I have to go through the humiliation of this shit, that's fucking bull."
- "Then why after six days did she finally tell? That's fucking stupid."

He also admitted to the officer that he had been at the complainant's place that night and that he had passed out in a chair. He said that the complainant and W.J. were passed out on the sofa. He said that he was woken up by the complainant yelling at him.

[16] The remaining civilian witness in this trial was W.J. He is 21 years old and considers himself to be the complainant's boyfriend. He recalled drinking and walking around Ross River with the accused on July 21, 2006. He said that the accused was and remains one of his best friends. He recalled that he and the accused bought about 36 beer and a bottle of whiskey that day. He testified that they consumed the beer throughout the day and later that night began drinking the whiskey straight. He remembers being at Lash Ladue's house at around 11:00 p.m. or 12:00 midnight with the accused. He then recalls that he and the accused left the Ladue residence and continued walking. At that point, he said that the two of them had finished most of the beer and each had consumed about half of the bottle of whiskey. He does not remember anything after that, as he was too drunk. He recalls waking up the next morning at the complainant's home on the couch. He said that the complainant had told him something about the accused raping her.

[17] On cross-examination, he acknowledged that he had given an earlier statement under oath that his conversation with the complainant about the alleged rape took place not the day after, but the following day after the alleged incident. However, on re-examination, he acknowledged that when he woke up in the morning after the alleged sexual assault, he was still drunk and that he started drinking again. He said that the complainant could have told him about the alleged rape by that night, which would have

been a Saturday night, or the following Sunday (July 21, 2006 was a Friday). He said that when he woke up, both he and the complainant were sleeping on the couch.

[18] It is now becoming trite to observe that, where the case turns entirely, or almost entirely, on the credibility of the complainant and the accused, the issue is not which version of the matter is true or whether I am to believe the complainant or the accused. Rather, the issue is whether the Crown's case has been proven beyond a reasonable doubt. If I believe the accused, I must acquit. If I do not believe the accused, I may still find myself with a reasonable doubt as a result of his testimony. Finally, even if the accused's testimony does not raise a reasonable doubt, there may be a reasonable doubt on the basis of the evidence that I do accept. See *R.* v. *W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

[19] I will deal first with whether I believe the testimony of the accused. I agree with defence counsel that the accused was remarkably candid and forthright about certain matters in his testimony. For example, he not only readily admitted his criminal record, but also volunteered that he has two additional breaches of probation convictions from February and May 2006 respectively, for which he received sentences of three months each. Both were for breaching no alcohol conditions. Secondly, he volunteered that he consumed a large quantity of alcohol with his mother on the day of his arrest, July 28, 2006, when the evidence of the arresting officer on this alleged breach of probation by consuming alcohol was quite weak. Thirdly, he was quite candid about acknowledging that when he drinks, he often has little or no respect for the police or the courts and often engages in assaultive behaviour. When asked whether he intends to

comply with the no alcohol condition on his probation order in the future, he replied, “Not really, no.”

[20] On the other hand, there are some inconsistencies and frailties in the accused’s testimony. Firstly, while he acknowledges that he and W.J. drank, “a flat and a half” of beer, which would be about 36 cans, he said that the whiskey they consumed was limited to a half bottle in total. That conflicts with W.J.’s evidence that the two of them shared a full 26 ounce bottle of whiskey. Secondly, on a related point, the accused says that although he was drunk, he was not so drunk that he did not know what he was doing and that he never blacked out. He also said that, as he had just got out of jail, he was not drinking that much. The implication here was that, as he had sobered up in jail, he was taking it easy with the alcohol consumption upon his release. However, drinking approximately 12 to 18 beer and at least a portion of a bottle of whiskey on July 21st does not strike me as an attempt to be moderate in his consumption of alcohol. Furthermore, only a few days later, on July 28th, the accused readily admitted to drinking a 26 ounce and two mickey bottles of whiskey with his mother.

[21] Thirdly, the accused told the arresting officer that the complainant and W.J. were passed out on the sofa (couch) and that he, the accused, was passed out on the chair. However, in his direct examination, he said that W.J. was still awake on the floor beside the stereo when he, the accused, passed out in the armchair, and that W.J. was still in that position on the floor passed out when the accused was awoken by the complainant the next morning.

[22] Finally, the most troubling aspect of the accused's testimony was his failure to take any steps to correct or respond to the allegation of the sexual assault, which he heard about from his mother about two days later. Although the accused admitted he was "concerned" about that allegation, he did not take any steps to rectify it. Rather, he simply said that he stayed home. In particular, he made no effort whatsoever to try and discuss the situation with W.J., who, on the accused's own evidence, was still awake on the floor when the accused passed out. While I acknowledge the accused's right to remain silent and to rely on the presumption of innocence, that fact nevertheless strikes me as being contrary to common sense. If the accused thought that he had been unfairly accused by the complainant of having raped her, one logically would expect him to try and correct the allegations by speaking to his best friend, W.J., who would have been in the most likely position to help refute the allegations.

[23] His failure to react is even more difficult to understand, given the accused's statements to the police officer on his arrest. Those statements confirm the accused's evidence that he was quite concerned about the allegations. Indeed, he was complaining to the officer that he now has to go through the "humiliation of this shit". It seems as though he was half expecting the police would be coming after him yet took no steps whatsoever to deal with the issue.

[24] For these reasons, I do not believe the testimony of the accused.

[25] On the other hand, if I am wrong in discounting the accused's evidence because of his failure to seek the assistance of W.J. in his defence, on the basis that this is an impermissible inference, if I did not draw that adverse inference, I would still be left with

a reasonable doubt as a result of his testimony. Accordingly, I would have to acquit him of the sexual assault in any event.

[26] Finally, even if the accused's testimony did not raise a reasonable doubt, I would still have a reasonable doubt on the basis of the evidence of the complainant. Having said that, I want to make it clear that I do not disbelieve her evidence. However, as I said at the outset, this is not a credibility contest over whether I believe the complainant or the accused. The issue at the end of the day is whether the Crown's case has been proven beyond a reasonable doubt. Although I do not disbelieve the complainant, I am left with a reasonable doubt after carefully considering her evidence. In direct examination, she said that she passed out in the armchair in the living room. She was quite clear in noting that she does not normally sleep in the armchair, but that she did so on this occasion because she had been drinking heavily. She further acknowledged that she generally sleeps on the couch when she is in the living room. Therefore, this was not a detail that she simply failed to pay attention to.

[27] However, in cross-examination, the complainant acknowledged that she remembered falling asleep on the couch and had no explanation for how she got from the couch to the chair. She also testified that W.J. was passed out on the couch. While this point may seem trivial at first glance, it becomes more troubling when I consider the evidence of the accused, because the complainant's evidence that she was passed out on the couch then corroborates the accused on this point. Further, W.J. testified that, when he awoke, both he and the complainant were sleeping on the couch. Incidentally, that does not necessarily conflict with the accused's testimony, that W.J. was still awake on the floor when the accused passed out, because W.J. could still have made his way

to the couch later on when he went to sleep. Yet, despite this apparently significant discrepancy about where the complainant fell asleep in the early hours of that morning, there was no attempt by her to explain or clarify the inconsistency. Therefore, I am left with a reasonable doubt after hearing the rest of her testimony, even though I generally found her to be believable.

[28] In the result, I find the accused not guilty of Count 1 on the Indictment.

[29] The charge of possession of a concealed weapon arises from the accused's possession of the hunting knife upon his arrest on July 28, 2006. He testified that he had the knife that day because he was hunting for gophers with his mother. He intended to use the knife to skin the gophers and also to cut sticks to use for the gopher snares. As he did not have a belt on him that day, he stuck the knife in the waistband of his pants. As I said, the accused volunteered the knife to the arresting police officer and was otherwise generally cooperative upon his arrest. To establish the offence of carrying a concealed weapon under s. 90 of the *Criminal Code*, it must be proved beyond a reasonable doubt that an accused was carrying a weapon, as defined in s. 2 of the *Criminal Code*, and that the weapon was concealed. See *R.* v. *Constantine*, [1996] N.J. No. 4 (Nfld. C.A.).

[30] Clearly, the latter has been proven. However, the definition of weapon includes anything which is intended to be used, "in causing death or injury to any person" or anything intended to be used, "for the purpose of threatening or intimidating any person". I find that there was no intent on the part of the accused to use or possess the

knife for either of those purposes. Rather, he possessed it for the legitimate purpose of hunting gophers. I therefore find the accused not guilty of Count 4.

[31] The accused concedes that the two charges of breach of probation by violating the no alcohol conditions on July 21st and 28th, 2006, respectively, have been proven. I therefore find him guilty of Counts 2 and 3 on the Indictment.

[32] Counsel, what would you propose with respect to sentencing?

(Submissions on sentencing)

[33] THE COURT: Eric Logan John is before me for sentencing on two charges for breach of probation, which occurred on July 21st, and 28th, 2006 respectively. in Ross River. Both are for drinking in violation of a probation order that was made November 3, 2005, which is to be in force for a period of 18 months. That probation order included the usual condition that Mr. John abstain absolutely from the possession or consumption of alcohol.

[34] Mr. John admitted on this trial that he has already been convicted for breaching that condition in February 2006, receiving a jail sentence of 90 days. Shortly after being released from that prison term, he was charged and convicted again and sentenced in May 2006, also to a sentence of 90 days.

[35] It is relevant that Mr. John testified in this trial, which included other charges for which he was acquitted. When asked about whether he intended to comply with the no alcohol condition on his probation order in the future, Mr. John testified, “Not really, no.”

He also acknowledges that when he drinks he often has little or no respect for the police or the courts and often engages in assaultive behaviour.

[36] Mr. John has a considerable and lengthy criminal record, by my count, including at least six directly related charges of breaching a probation order, and there are also other additional charges of violating various forms of court process. Going backwards in time from the convictions in the spring of 2006, he was last convicted in March 2005, for two counts of breaching a probation order. It is significant that, again, on each of those counts he received sentences of three months.

[37] He was further convicted in 2004 for breaching a probation order and for failing to comply with a recognizance; in 2001 for breaching a probation order, receiving one month; in 2000 for failing to comply with a recognizance; in 1999 for failing to comply with a Youth Court disposition; in 1998 for failing to comply with a recognizance (there were four charges of that nature, and also a charge of failing to appear); and in 1996 for failing to comply with a probation order. As I say, those are only the process related offences. There are numerous other offences ranging from 1995 through to 2005.

[38] Clearly, the dominant sentencing principle here is specific deterrence for Mr. John. He is a 25-year-old Kaska male who grew up in Ross River, raised by an aunt. He has a grade 10 education, has had limited employment, mostly in mines and various labouring jobs. He acknowledges having had an alcohol problem since his early teens and now acknowledges that he is addicted to alcohol. Notwithstanding that knowledge, I have heard nothing from Mr. John or his counsel to indicate that he is interested or inclined or taking any steps towards dealing with his addiction. If anything, he seems to

feel that it is not an issue, as he has testified under oath that he does not particularly plan to abide with the no alcohol condition of his probation order in the future.

[39] I recognize that Mr. John has been in custody for some 131 days since his arrest on July 28th. That would compute to about 4.3 months. If I were to give him credit at one and a half times for his time in remand, that would be approximately six and a half months. However, I am inclined to give Mr. John more than the usual 1.5 credit for his remand time because, since July 28th, he has been unable to intermingle with general population, in a 23 hour a day lockdown situation. The only programs that have been available to him have been, for the last six weeks, meetings with a psychologist, and, this past November, taking some schooling. In my view, it would be fair to credit him with 1.75 times for each month spent in custody. That would result an effective sentence of about seven and a half months.

[40] As for whether the sentences should be consecutive or concurrent, defence counsel urged me to consider that the two breaches over a period of one week, in the context of a failure to abstain situation, can be seen as one breach because of the nature of the addiction. Ordinarily, I would be sympathetic to that submission, but there was an intervening event here in that after the first breach on July 21st, Mr. John became aware that there was an allegation circulating that he had committed a sexual assault on a young woman in Ross River. Logically, he must have known that it was probable that he would be coming to the attention of the authorities in the very near future. Notwithstanding that knowledge, he was publicly drinking fairly copious amounts of alcohol with his mother and others on July 28th.

[41] In my respectful view, it is appropriate for the sentences to be consecutive. On the other hand, I am prepared to give Mr. John full credit for the time that he has spent in remand, which, as I say, is approximately seven and a half months. I would be inclined to impose sentences of approximately three months plus one week for each of the two offences, but in the circumstances, after having given Mr. John credit for time served, I will impose a sentence of one day, which is served by his attendance here in court today.

[42] Are there any questions, counsel?

[43] MR. PHELPS: I apologize, is it going to be endorsed three months one week or is it going to be endorsed one day? Just for clarity for the criminal record.

[44] THE COURT: I do not know, counsel, you help me with that. I mean, the effective sentence is one day in jail deem served by his attendance here in court. I have not been clear in terms of the wording of how that is to be dealt with on the record. Can you assist me with that?

[45] MR. PHELPS: I believe if the endorsement reflects that he receives a credit of three months and one week on each offence, then that would go into the record.

[46] THE COURT: All right. Mr. Van Wart, do you have any submissions on that?

[47] MR. VAN WART: No submissions.

[48] THE COURT: All right. The record can reflect that just indicated by the Crown.

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GOWER J.