

Citation: *R. v. Kinney*, 2012 YKTC 31

Date: 20120322
Docket: 10-10132
10-10132A
11-10131A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

DONALD ROBIN KINNEY

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

Appearances:
Terri Nguyen
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Donald Kinney was convicted after trial on a charge of sexual assault. He has subsequently entered guilty pleas to a charge of forcible entry and two charges of breach of undertaking.

[2] The circumstances of the sexual assault are, regrettably, all too familiar. A woman drank to excess, passed out, and the offender used the opportunity to have sexual intercourse with his unconscious victim. For such crimes, the courts have, primarily for reasons of deterrence and denunciation, imposed substantial custodial sentences, generally in the range of 12 months to 30 months (see *R. v. White*, 2008 YKSC 34).

[3] In this case, the circumstances cannot be said to be at the low end of the range since the offender succeeded in having sexual intercourse with his victim. However, Mr. Coffin nonetheless urged that I should nonetheless impose a sentence well below the normal range, either a suspended sentence or a very brief custodial sentence.

[4] The finding at trial was that the possibility of some prior consensual intimacy between Mr. Kinney and his victim, C.G., could not be excluded. There was evidence tending to show that the offender and Ms. G. went to the bedroom, where the offence occurred, together and hand in hand. This does not mean that there was intimacy between the parties that was consensual, but said possibility, on the record before me, could not be excluded. However, it was clear that whatever occurred after the parties went into the bedroom, that eventually G. passed out and that the offender had intercourse with her when she was unconscious, and, therefore, incapable of consenting.

[5] In my view, and contrary to the argument of the defence, the fact, if it is a fact, that there was a prior sexual relationship between the parties is, at best, a neutral factor in sentencing. To suggest, in effect, that having once given her consent, a later violation of the woman's sexual and personal integrity is a relatively minor matter is simply wrong. Indeed, it should be noted that in the leading case of *R. v. White* itself, there was evidence that prior to the victim passing out, she had been willingly in the offender's bed and that they had been kissing. All that having been said, I accept that the proven facts of this case do not warrant placing the matter at the higher end of the range, either.

[6] The defendant is also to be sentenced with respect to the other offences for which he has entered guilty pleas. Obviously, in fixing the quantum of sentence for all matters, the Court needs to take account of the global effect of all sentences to be imposed.

[7] The circumstances of the forcible entry are that Mr. Kinney, having been refused entry to a home, kicked in the door and entered the residence. The residence was that of Mr. Kinney's sometimes common-law partner and it is clear that he was often there with the householder's leave. But on this occasion, Mr. Kinney was drunk and his spouse had made it quite clear that she did not want him in the house when in that condition. He responded to her refusal to admit him by kicking in the door, and the police were summoned.

[8] The first breach offence relates to Mr. Kinney's consumption of alcohol in disregard of an Undertaking condition that he abstain from consuming alcohol. This particular breach was aggravated by the fact that Mr. Kinney was found grossly intoxicated while he was supposed to be babysitting a four-year-old child.

[9] The remaining breach, a failure to keep the peace, is part and parcel of the forcible entry offence and circumstances.

[10] Mr. Kinney has a prior criminal record and it appears from that record and from other material before the Court that most or all of it relates to his battle with alcohol addiction. The present offences continue that trend. The evidence is that he was drunk during the commission of all of them.

[11] Mr. Kinney is an Aboriginal offender and is, of course, entitled to consideration under s. 718.2(e) of the *Criminal Code*. However, in my view, there does not appear to be any sanction other than imprisonment which would be reasonable in all the circumstances of these crimes. The crime of sexual assault, in particular, requires a custodial sentence in order to denounce and deter, as well as for the protection of the vulnerable. Moreover, Mr. Kinney's prospects of successfully abiding a non-custodial sentence appear to be poor, judging by, amongst other things, his record, the current crop of breach charges, and the defendant's prospects and attitude as outlined in the Pre-Sentence Report.

[12] In the result, with respect to the two charges of breach of undertaking, I was advised, and the parties were agreed, that the sentence for those matters could be dealt with by taking account of 40 days which the offender has already served. So on those charges, on each of them, one day and time served of 40 days.

[13] With respect to the charge of sexual assault, Mr. Kinney, you are sentenced to a period of imprisonment of 16 months, and on the charge of forcible entry, two months consecutive to any other sentence.

[14] After your release from imprisonment you will be subject to a probation order for a period of 18 months. The terms will be that:

1. Keep the peace and be of good behaviour;
2. Report to the Court as and when required;
3. Report within two working days to a Probation Officer, thereafter as, when, and in the manner directed;

4. You will advise your Probation Officer in advance of any change of name or address; and promptly notify him of any change of occupation or employment;
5. You will take such substance abuse assessment and counselling as the Probation Officer directs;
6. You will have no contact directly or indirectly by any means whatsoever with C.G., the victim of the sexual assault; and I further direct that you have no contact with her while you are in prison.

[15] In the circumstances, I will waive the surcharge, but you are required to comply with the provisions of the *Sex Offender Information Registration Act*, SC 2004, c. 10, for a period of twenty years. You are further required to provide samples of DNA for the purpose of forensic analysis and banking.

[16] The remaining counts?

[17] MS. NGUYEN: Withdrawn, sir.

FAULKNER T.C.J.