

Citation: *R. v. MacIntosh*, 2012 YKTC 67

Date: 20120628
Docket: 11-00748
12-00330
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Hinds

REGINA

v.

TARENCE ROY MACINTOSH

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:
Keith Parkkari
David Christie

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] HINDS T.C.J. (Oral): The facts that I have heard are very, unfortunately, common to the criminal justice system in Canada, and of course there are cases out of the Yukon that have been cited by the Crown about when men sexually assault women who are unconscious or asleep, take advantage of those circumstances, as you did in this case. Now, I grant you that there was a lot of drinking going on, but it was obviously a non-consensual intercourse that took place between you and Ms. D., and as I say, you took advantage of that particular situation, which you admitted to today.

[2] There is a range of sentencing that has been established in decision of *R. v. White*, 2008 YKSC 34, which I think I have to follow, between 12 and 30 months for

such an offence, and the Crown has spoken of their desire for an 18-month sentence. Your own lawyer has spoken in his submission for a 12-month sentence on this particular offence.

[3] Now, I can say that in terms of the one issue that has certainly come forward, which is your remorse and whether you are sorry for having committed this offence, there are certainly different conclusions I could come to. Certainly, the Pre-Sentence Report writer spoke that you were not remorseful, and then there was also how you could make up for this offence, and there were discussions, I think, words to the effect that you could perhaps do some hunting and fishing for the community. But of course, this particular offence deeply affected a particular individual, a member of your community.

[4] The one thing that did help to understand and I think it was brought out, in part, in the report by the Kwanlin Dun First Nation and through submissions of counsel, is that, I believe that report, which says that you, Tarence, do not communicate particularly well. It may well be that you have had a limited understanding of the role of men in intimate relationships, although I would say that no man should have any doubt that they cannot take advantage of people, particularly women, when they are unconscious, by drug, by alcohol, or sleeping. I mean that is, I think, pretty basic understanding that you would have had, but you may not have a full ability to understand how you might make amends and express your remorse in the community, especially this happening on January 20th. So I accept your remorse, from the Court's point of view. It is up to Ms. D. whether she accepts your apology or not, and that, I expect, time will tell.

[5] The troubling aspect, as well, of course, of this case, is the fact that it is true that your criminal behaviour is progressing. We have, in a relatively short time, these assaults that are before the Court earlier, which are part of your criminal record, and then the one occurring in 2011 and then an assault with a weapon, a simple assault, and then another assault on March 2, 2012. Actually, that was after this particular offence, but one could certainly say that you have continued to be violent in the last number of years and this offence is a violent offence. That is troubling, and then also, I might add, it is troubling that while you were released from custody, of course, there is a breach before the Court, this of a curfew, and also, of course, at the very time of your offence, you should have been abstaining. That is not an offence before the Court, I appreciate, but it is a fact that I can consider, and you were clearly drinking a great deal of alcohol. Alcohol, I might add, seems to be a problem in your life, whether you recognize it or not.

[6] There is no doubt, Tarence, that, in your particular circumstances, there has been a lot of death in your family recently, that of your brother Brandon, and then of your sister more recently, which of course would, I am sure, have a great effect on you. When such things happen, with these sort of deaths, and deaths particularly of people close to you, that is a time when you will have to simply turn to something other than the bottle and drinking alcohol or using drugs to deal with that grief and the feelings that you have surrounding that.

[7] The other part of this, of course, I am speaking more now of the negative impacts of this offence and what I would call aggravating circumstances. There are some, of course, mitigating circumstances that have occurred here, but before I go to those, I

should say, I want you to be fully aware of the impact that you have had on your cousin, Ms. D. She talks about the depression that she had following this assault on her, and the physical discomfort that she experienced because of the assault, and then the anxiety that she expressed, simply walking down the street, and the negative effect it has had on your families. She spoke today as well about her own experiences getting over problems in her life, and, of course, each of us have our own problems which we have to deal with.

[8] In terms of, then, the mitigating circumstances, I can take into account that you have entered a guilty plea prior to a trial and, of course, sparing Ms. D. any requirement to testify or go through a trial itself. There is no doubt that you have experienced personal tragedy in your own life. On the residential school experience, I can say that certainly our Supreme Court of Canada in *R. v. Gladue*, [1999] S.C.J. No. 19, and a more recent decision, *R. v. Ipeelee*, [2012] S.C.J. No. 13, certainly recognize that the Court should at least recognize that. There is no question on the facts that your mother, her parents had attended residential school and likely she has experienced, and you, in turn, have experienced, some of the negative consequences of that whole experience. I do not downplay that for a minute. I also, of course, note that the person you assaulted is a member of your community that may very well have some of those issues in her background as well.

[9] In this instance, having taken into account all of those factors, I am of the view that incarceration is required in this instance, both to denounce your behaviour and to deter you and others from doing these things in the future, assaulting women in this fashion, and for that reason, I am prepared to sentence you to 16 months of

incarceration on the sexual assault charge.

[10] With respect to the breach, the charge of breaching your curfew, given all of the circumstances, I am prepared to add one month consecutive to that. That will be a 17 month sentence. Then, from that, I will be deducting one month, which I equate to the time in remand, which was 23 days, so I am just going to deduct the 23 days from that.

[11] MR. CHRISTIE: I'm sorry, it's 25 days.

[12] THE COURT: Is it 25?

[13] MR. CHRISTIE: Yes.

[14] THE COURT: I am sorry. I will deduct the 25 days from the 17 month sentence as being time served. So, then, you have, essentially, a 16-month and I will say, six day sentence, for this crime. Then, I will place you on probation for a period of two years and then looking at the conditions on pages 4, 5, and 6 of the Pre-Sentence Report -- well, one thing I will ask you, is it your desire to get some treatment or help for alcohol and drugs?

[15] THE ACCUSED: Yeah.

[16] THE COURT: All right. So I take that as your consent to obtaining some alcohol and/or drug assessment, counselling, and programming as directed by, in this case it will not be a Bail Supervisor, it would be by your Probation Officer, and that is clause 9.

[17] In terms of clause 6, which deals with the curfew, that will be in effect for the first

year following your release from incarceration; thereafter, there will not be a curfew. All right. The idea is that there is still a curfew for the one year, but not the full two years. Then, there was a couple of other conditions that the Crown asked for, and I just want to turn back to my notes, or if you could just refresh my memory.

[18] MR. PARKKARI: The spousal abuse programming, and grief and trauma counselling.

[19] THE COURT: I do not think I am inclined to order the spousal abuse programming, because, of course, this is not by any means, a spousal assault, although I recognize the Crown, you know, is indicating that there is a need for you to get some. Do you have any sort of alternatives to violence programming here in the Yukon?

[20] MR. CHRISTIE: There is, but, Your Honour, my request would just to be simply counselling as directed. I think counselling's better; first of all, it's voluntary, which we've got an indication, but secondly, it's better if it's tailor suited with probation.

[21] THE COURT: Specifically to him. Yes, I think it will be counselling as directed by his Probation Officer. That can include grief and trauma counselling, which I really think you do need, Tarence. There is some unresolved issues in your life, and they have to be dealt with by you and in the proper manner, not through drinking.

[22] Other than that, of course, and this is important for Ms. D. to hear, there will also be, during the time of your incarceration, as well as during the time of your probation, a no contact condition, either directly or indirectly or in any way, with K.D. So you are not to contact her at all. Now, of course, while you are incarcerated you would not phone

her or try and contact her by letter or otherwise, and then when you are released in the community, simply put, all of that same applies, and if you happen to be at the same place at the same time by accident in this community, you leave and you do not turn to have a conversation or make any remark or gesture towards Ms. D. Understood?

[23] MR. CHRISTIE: Your Honour, my request for during the probation period is, there was mention in the report about the possibility, it is hypothetical, but reconciliation or some form of apology, and I know my client had said he would explore that, if it could have "In exception with written expressed permission," or something.

[24] THE COURT: What we could do on that, I will just try it out for size, sometimes what we do have in probation orders that I have done is the no contact clause that I had mentioned, except for the purpose of perhaps writing an apology to the victim, K.D., which would be vetted by a Probation or Correctional Officer. Then it would be, that Correctional or Probation Officer would determine, first of all, if Ms. D. was receptive to that, and secondly, if it was, to make sure the appropriate language is used. So they would look it over and make sure that the language is appropriate. Any concerns about that, Crown?

[25] MR. PARKKARI: No, that would be fine.

[26] THE COURT: All right. Anything further, counsel? Oh, we do have to deal, then, I am sorry, there is one thing I forgot, which is dealing with the DNA order. You will have to submit a sample of your DNA, which will be taken from you. You will also be ordered to be part of the *Sex Offender Information Registry Act*, S.C. 2004, c. 10, for a period of ten years. I wanted to ask on firearms, do you have any firearms? Do

you use any firearms?

[27] THE ACCUSED: No.

[28] THE COURT: You do not do any traditional hunting or anything like that?

[29] THE ACCUSED: Well, I don't usually --

[30] MR. CHRISITE: I would ask for that not to be ordered. There's enough -- there's -- I shouldn't say the word enough, but there are other restrictions that there certainly wasn't -- I don't think there's a history that might sometimes justify that in other cases. I'd ask Your Honour not to make that discretionary order, I guess, for the firearms.

[31] THE COURT: Anything from Crown on that?

[32] MR. PARKKARI: No. In my opening, I just put it out there for the Court to consider.

[33] THE COURT: You said it was discretionary.

[34] MR. PARKKARI: Yes.

[35] THE COURT: Well, there are certainly no firearms involved in this offence. As a First Nations person, it is quite possible that you might, at some point, explore your heritage more and decide to do some hunting. So I will decline to make that order. I think then, Mr. MacIntosh, that is everything and we can be adjourned.

- [36] THE CLERK: The victim fine surcharge?
- [37] THE COURT: The victim fine surcharge will be waived. Anything else, Madam Clerk?
- [38] THE CLERK: Count 2?
- [39] MR. PARKKARI: Count 2 on the two-count Information, direct a stay of proceedings.
- [40] THE COURT: Thank you.
- [41] MR. PARKKARI: Just for clarification, then, with the exceptions that the Court's noted, all of the terms of --
- [42] THE COURT: Yes.
- [43] MR. PARKKARI: -- in the PSR get moved over to the Probation Order?
- [44] THE COURT: That is right, and then just adding the one.
- [45] MR. PARKKARI: Yes. Thank you.

HINDS T.C.J.