

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

REGINA

v.

VICTOR JOHN SIDNEY

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Lee Kirkpatrick
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): Mr. Sidney has been convicted of sexually assaulting E.C. on July 1, 2006 here in Dawson City. The circumstances of the sexual assault on E.C. are set out in detail in my reasons for judgment issued subsequent to the trial that was held during the last week of June 2007.

[2] By way of summary, those circumstances were as follows. The accused is a 43-year-old First Nations man. The complainant is a 25-year-old female. Mr. Sidney was found guilty after trial. The victim of the sexual assault, E.C., has known the accused for over six years and considered him to be a close friend, someone that she said she "trusted with her life."

[3] The assault occurred during a drinking party at Mr. Sidney's house. The victim, E.C., had retired to a bedroom where she fell asleep or passed out from alcohol consumption. Mr. Sidney had been drinking on and off for two days and was also under the influence of alcohol. When E.C. woke up, her jeans and underpants had been removed and Mr. Sidney was on top her, engaged in sexual intercourse. He did not desist immediately when told to stop or when she tried to push him off.

[4] The defence does not take issue with the Crown's submission that an appropriate sentence would be in the range of 15 months imprisonment followed by a period of probation. The point of disagreement is whether the sentence should be served in the community, as a conditional sentence of imprisonment. There is further agreement that a sexual assault with full penetration is a serious criminal offence, that it invariably has a serious psychological impact on victims, and that sexual assaults against victims incapacitated by alcohol occur frequently in this jurisdiction.

[5] **Aggravating Factors**

1. The sexual assault involved full vaginal/penile penetration as contrasted with those cases that only involve touching.
2. The victim was in a vulnerable condition, passed out or asleep from overconsumption of alcohol.
3. The victim and offender were friends, a relationship that went back some six years when he befriended and helped her when she was going through difficult times living in Whitehorse. The relationship was a paternalistic one, not one of boyfriend and girlfriend.

4. The victim often stayed over at Mr. Sidney's house. She considered it a place of safety.
5. The witnesses at trial testified that shortly after the sexual assault, E.C. was tearful, upset, and angry. It was evident during the trial that E.C. was still upset by what was done to her. Moreover, the research literature indicates the offence of sexual assault can have very significant and adverse consequences to victims. (See *R. v. G.W.S.*, [2004] YKTC 5, at paragraph 17.)
6. Mr. Sidney has a limited criminal record that is dated and on which I place no weight.
7. He continues to deny his offence, presents himself as a victim, and has not displayed any remorse.

[6] **Mitigating Circumstances**

1. Mr. Sidney has followed the terms of his recognizance for a lengthy period of time without any reported difficulties. In addition to the usual terms, it included a no contact term with E.C., a requirement to abstain from the consumption of alcohol, and not to attend any bar or tavern. The requirement to abstain and not attend any bars or taverns in Dawson City I consider to be difficult terms for most people in this community as much of the social activity in Dawson is centered around drinking and in those premises.

2. I consider his dated criminal record, with the last entry 20 years old, as a mitigating factor. The RCMP do not report any concerns relating to Mr. Sidney.
3. He has a strong employment history and has a full time job with the First Nation here in Dawson. He is considered by his employer and employees to be a valuable and reliable employee and colleague.
4. A number of character references were filed by members of the community, and they suggest that this offence was out of character for Mr. Sidney.
5. The pre-sentence report was detailed and largely positive.

The Law of Conditional Sentences

[7] The leading case in this area is *R. v. Proulx*, [2000] SCC 5, a unanimous decision of the Supreme Court of Canada delivered by Lamer C.J. In that decision, at paragraph 46, he lists the four criteria that a court must consider before deciding to impose a conditional sentence.

1. The offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
2. The Court must impose a term of imprisonment of less than two years;
3. The safety of the community would not be endangered by the offender serving a sentence in the community; and
4. A conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in subsections 718 to 718.2.

[8] There is no concern with respect to the first two criteria. There is no minimum punishment under s. 149(1) of the *Criminal Code*, and Crown counsel and defence counsel are agreed that I should be considering a term of imprisonment of less than two years. In fact, this case was prosecuted summarily, and the maximum sentence I can impose is 18 months imprisonment.

[9] With respect to condition 3 above, there are some concerns and some positive factors. The most positive is that Mr. Sidney has complied with the conditions of his release for 14 months with no breaches. Dawson is a small community and it is likely that even minor breaches would not go undetected. The fact that he is able to abstain from alcohol consumption and appears not to be an alcoholic reduces his risk to the community considerably. His strong community supports and full-time employment speaks to his connection to his community and, in my opinion, reduces his risk factors.

[10] On the other hand, his inability to acknowledge that he has done something wrong, his tendency to "blame the victim," and the apparent absence of remorse give me some cause for concern.

[11] The fourth criteria requires that a conditional sentence must be consistent with the fundamental purposes and principles of sentencing as set out in the *Criminal Code*. That would include both specific and general deterrence. Because of the seriousness and frequency of sexual assaults involving vulnerable victims in this jurisdiction, the sentence imposed must also be denunciatory. The Supreme Court of Canada has stated that an appropriately crafted conditional sentence can still provide a significant amount of deterrence and denunciation.

[12] In *Proulx*, Lamer C.J. stated at page 105:

The stigma of a conditional sentence with house arrest should not be underestimated. Living in a community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison.

This statement may be even more true in a small community such as Dawson.

[13] Further, s. 718.2(e) directs me to consider all available sanctions other than imprisonment that are reasonable in the circumstances, particularly in the case of aboriginal offenders. That requires me, in a case such as this, to explore the suitability of a conditional sentence, and, unless specifically found to be inappropriate, to impose a conditional sentence instead of actual jail time.

[14] In considering Mr. Sidney's dated criminal record and that the sexual assault was singular in nature, meaning it was one occurrence, took place over a short period of time, did not involve any violence or threats of violence apart from the act itself, I am satisfied that specific deterrence is not a significant concern in sentencing, notwithstanding his apparent lack of remorse. The risk of future re-offending is low, in my opinion, as indicated in the pre-sentence report, and can be reduced to minimal levels by the imposition of appropriate conditions.

[15] That leaves me with one final concern, namely, whether a conditional sentence of imprisonment would serve the purposes of general deterrence and denunciation. As mentioned earlier, the victim in this case was vulnerable due to her intoxicated

condition. Further, these kinds of cases occur frequently, and from the number reported, apparently disproportionately in this jurisdiction as compared to others.

[16] To begin with, I note that Parliament has not automatically excluded sexual assaults involving vulnerable victims from consideration of a conditional sentence. Further, there are examples in this jurisdiction and elsewhere of the imposition of a conditional sentence in similar cases. I acknowledge that these cases are not numerous.

[17] I am aware of two from the Supreme Court in this jurisdiction. *R. v. Silverfox*, S.C. No. 97-00744, is a decision of Mr. Justice Maddison. The accused engaged in vaginal intercourse with the victim, who was passed out due to alcohol consumption. She woke up and pushed the accused off, who then left the premises. Mr. Silverfox had no similar offences on his record and had not been in any trouble with the law in the last 20 months except for a breach of an undertaking to abstain. Mr. Justice Maddison held that a conditional sentence of 12 months would meet the deterrent and denunciatory purposes of sentencing.

[18] I am also going to refer to the case of *R. v. D.K.J.*, [1999] Y.J. No. 149. Crown counsel has submitted to me that this case is exceptional for a number of circumstances. All cases, of course, must be considered on their own facts and on their own merits, but I note that the *D.K.J.* case was not appealed by the Crown. In this case the victim was living with the accused and his wife. She was 13 years old at the time. In the course of a single event, the accused fondled her breasts, performed cunnilingus and engaged in two acts of sexual intercourse. He continued to deny his guilt for a

year, at which time he plead guilty to the charge. He had a record, which included jail time for robbery. The accused was obviously in a position of trust towards the victim. He was sentenced to two years less a day to be served conditionally in the community, followed by two years probation.

[19] Taking into account all of the circumstances of this case, considering both mitigating and aggravating factors, I am satisfied that the stigma of trial and conviction, and the imposition of strict and meaningful conditions, a conditional sentence of imprisonment would serve the purposes of denunciation and general deterrence.

[20] Before I conclude my sentence and deal with the terms, Ms. Hill, I want to hear from you on behalf of your client, whether your client is prepared to comply with random testing of breath or urine for the purposes of detecting alcohol consumption.

[21] MS. HILL: Yes, Your Honour. I had the opportunity to speak with my client about this issue, and I can advise that he is willing to consent to such testing. In my view of the law, given that a conditional sentence is a sentence which is a jail sentence served in the community, it would be appropriate to consider consenting to such testing as he would be subject to such testing in jail. He has given me permission to speak about our discussions in court, and I can advise that he is consenting to such terms.

[22] THE COURT: Thank you. In the result then, Mr. Sidney is sentenced to 16 months imprisonment, to be served conditionally in the community, to be followed by 18 months probation. I am going to set out the terms of the conditional sentence as a draft, and I will be looking to counsel for assistance in finalizing those

terms. I will be open to suggestions or modifications from counsel, so I want you to pay close attention to what I am suggesting here. The terms of the conditional sentence will be as follows.

[23] The statutory terms will apply.

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court.;
3. Report to a supervisor forthwith and thereafter when required by the supervisor and in the manner directed by the supervisor;
4. Remain within the Yukon Territory unless you have the written permission from your supervisor;
5. Notify the supervisor in advance of any change of name, address, and promptly notify the supervisor of any change of employment or occupation.

[24] The curfew terms will be as follows.

1. For the first three months of this order you are to abide by a curfew by remaining within your place of residence between the hours of 2:00 p.m. and 10:00 a.m. daily except with the prior written permission of your supervisor.
2. For the next six months you are to abide by a curfew by remaining within your residence between the hours of 6:00 p.m. and 9:00 a.m. except with the prior written permission of your supervisor.

3. For the balance of your conditional sentence you are to remain within your residence between the hours of 10:00 p.m. and 7:00 a.m. except with the prior written permission of your supervisor.
4. After the first three months, the supervisor may, in his or her discretion, make exceptions for the purpose of education, employment, of treatment.
5. During reasonable hours of your curfew, you must present yourself at the door or answer the telephone for curfew checks. Failure to do so will be a presumptive breach of this condition.
6. You are to abstain absolutely from the possession or consumption of alcohol. You are to provide samples of your breath and urine for the purposes of analysis upon demand by a peace officer.
7. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol; that includes the premises known as Gertie's located in Dawson City.
8. You are to take such alcohol assessment and, if merited, subsequent counselling or programming as directed by your supervisor.
9. You are to take such sex offender treatment and counselling as directed by your supervisor.
10. You are to take such psychological assessment, counselling and programming, as directed by your supervisor.
11. You are not to contact, directly or indirectly, or communicate in any way, with the complainant, E.C.

12. You are to provide your supervisor with consent to release information with regard to your participation in any programming, counselling, employment, or educational activities that you have been directed to do pursuant to this conditional sentence order.
13. You are not to have in your possession any firearm, ammunition, explosive substance or weapon during the term this order.
14. You will not bring or allow any other person to bring alcohol or intoxicating substances into your residence.
15. You will not allow any individuals under the influence of alcohol or drugs into your residence.
16. During the first six months of this order, with the exception of immediate family members, meaning siblings or parents, you will not have more than two visitors in your residence at any one time.
17. You will immediately remove yourself from the presence of any female person who is consuming alcohol or is under the influence of alcohol whether you are in the course of employment or participating in social activities, unless you are in a public place and in the presence of other adult persons.
18. You will comply with the sex offender registration requirements as set out in the *Criminal Code*.

[25] Perhaps counsel can assist me. I have incorporated the sex offender registration requirements in this order. Having done that, is there any need to make an independent freestanding order?

(SUBMISSIONS BY COUNSEL)

[26] THE COURT: So Madam Clerk, we will remove it. There will be an independent order pursuant to s. 490.012 in Form 52 requiring Mr. Sidney to comply with the *Sex Offender Information Registration Act*.

(SUBMISSIONS BY COUNSEL)

[27] THE COURT: I think for the convenience of everyone, inserting "as soon as possible" would make sense and I will do that.

(SUBMISSIONS BY COUNSEL RE COMPLYING WITH *SEX OFFENDER INFORMATION REGISTRATION ACT*)

[28] THE COURT: I am ordering him to do it as soon as possible. I think it could be done, effectively, today, without getting into problems of his curfew and making contact with the appropriate people in the limited times that he is going to have. As I read this too, it suggests that I should mention that the order is a 10-year order. It seems to suggest that the judge shall make the order as set out in those sections, so the order should state that it is a 10-year order.

[29] Now, as I read the *Code*, I am not obligated to make a mandatory firearms order. I have incorporated it into an absolute ban in the conditional sentence, and when I deal with the probation terms, I am going to have a conditional ban to permit him only to possess a firearm for the purposes of subsistence hunting, and because the probation order is going to be an 18-month order, it is going to cover a fairly lengthy time . I am

satisfied in the circumstances of this case where no weapon was used, threatened to be used, or whatever, that that would be sufficient.

(SUBMISSIONS BY COUNSEL).

[30] THE COURT: We will check off then the residence clause, to reside as approved by your supervisor, and not change that residence without the written permission of your supervisor.

[31] MS. KIRKPATRICK: That will apply to the conditional sentence as well?

[32] THE COURT: That is the conditional sentence. It will speak to the probation order. It will incorporate almost all of these terms, with the exception of the curfew term. I will look more carefully. There may be a couple of other terms too that we will modify or delete, but essentially this program will be in place for the entire time period.

(SUBMISSIONS BY COUNSEL)

[33] SPEAKER: And strictly the four hours a day of employment?

[34] THE COURT: Exactly.

(SUBMISSIONS BY COUNSEL)

[35] THE COURT: I am going to say that during the first three months he is not to attend at, near, or on the Dawson City ferry without the prior permission of his supervisor, or knowingly attend any other place of employment.

(SUBMISSIONS BY COUNSEL)

[36] MS. KIRKPATRICK: The last thing I wanted to address was the DNA order, which both Ms. Hill and I were agreed was appropriate in the circumstances.

[37] THE COURT: You are quite right. That order will go as requested.

[38] I indicated that the term of probation is 18 months. Statutory terms will apply. Reporting terms will apply. I think it is important that the "reside" term apply. The curfew terms will not apply. The abstain term will apply, and there will be a requirement that he provides a sample of his breath for the purposes of analysis upon demand by a peace officer who has reason to believe that he may have failed to comply with this condition. That is unlike the other one, which is random. There will be a term that he not attend any bar, tavern, or off-sales, et cetera. Take such sex offender treatment and counselling as directed by your supervisor; that will continue.

[39] I would like to hear you on the no contact order, but my sense is that with respect to the no contact order for the probation order, I would merely say no contact, directly or indirectly, or communicate in any way with the complainant.

(SUBMISSIONS BY COUNSEL)

[40] I am going to add a term, and that is make reasonable efforts to find and maintain suitable employment and to provide your probation officer with all necessary details concerning your efforts.

[41] The release of information term will continue in the probation order. The weapons term will be modified, not to have in your possession any firearms or ammunition, except for the purposes of subsistence hunting. No reference to explosive substances or other weapons.

[42] The abstain clause, that continues. As part of that abstain clause, he will not be allowed to bring any alcohol or intoxicating substances into his residence.

[43] I am not going to continue, and I do not think in the probation order it is necessary to continue the individuals under the influence of alcohol. That will not go in. I am not going to continue the limited visiting rights. That is not going to go in.

[44] I am going to continue that you will immediately remove yourself from the presence of any female person who is consuming alcohol or is under the influence of alcohol, et cetera. But with this understanding, that if the treatment is going well and things are positive, it will be open to him, as part of the probation to come, to either vary or terminate that order. I do not want to do it in advance, knowing how he is going to perform in treatment or programming.

[45] MS. KIRKPATRICK: You mean that term of the order?

[46] THE COURT: Yes. So it will remain in, but making it very clear that, down the road, if he is doing well in his programming, he can come back and have that modified.