

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Tom*, 2003 YKSC 67

Date: 20031126
Docket : S.C. 01-00789A
Registry: Whitehorse
Heard: Carmacks

Between:

HER MAJESTY THE QUEEN

And:

MICHAEL WILSON TOM

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 R.S. Veale

Appearances:

Ludovic Gouaillier
Gordon Coffin

For the Crown
For the Defence

**MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): Michael Wilson Tom has plead guilty to committing a sexual assault on a female person, E.J.M., on May 12, 2001, at Carmacks.

[2] I have accepted his plea of guilty as I am satisfied that he has made it voluntarily. He has admitted the essential facts, understands the nature and consequences of the plea despite his denial of the offence to the probation officer

who prepared the pre-sentence report. The probation officer indicates that it is not uncommon to find sexual offenders minimizing the offence because of the stigma of being labelled a sex offender.

[3] I have on this occasion, as well, covered the voluntariness and the admission of facts with Mr. Tom, so that I am quite confident that he intends and fully understands his plea of guilty.

[4] I am particularly in agreement that he has made a voluntary guilty plea by the nature of his apology to E.J.M. that he gave in open court today.

[5] The admitted facts are that E.J.M. was visiting friends in Carmacks, when she consumed significant amounts of alcohol. She attended the residence of M.S. where M.S. and R.B. were present, along with the offender Michael Tom. All parties present had consumed alcohol and were intoxicated to various degrees.

[6] E.J.M. decided to go to bed in M.S.'s residence. However, she woke up in the early hours of May 12, 2001, when a man in a blue/teal jacket was telling her to put her pants on as he left the bedroom. E.J.M. realized that her pants and underwear were down around her ankles. The complainant left the room and observed Mr. Tom outside the bedroom wearing the blue/teal jacket.

[7] The complainant turned her undergarments over to the police and after DNA analysis it was found that the two semen stains in the underwear matched the DNA profile of Mr. Tom.

[8] Mr. Tom has indicated that he has no recollection of the events, although he

speculated to some degree in the pre-sentence report. I accept it as a fact that he has no recollection of the events.

[9] E.J.M. made a very emotional presentation to the court that I appreciate was very difficult to make. She described the impact of the sexual assault, which I will summarize not in all its complete detail but significantly enough to indicate how she has suffered from the sexual assault.

- 1) She cries and is hurt and gets angry when she thinks of how she was violated.
- 2) She felt unclean, dirty and violated as a result of the sexual assault.
- 3) She no longer trusts anyone and has lost respect for her own people.
- 4) She has become more cautious and does not feel safe anymore. She now sleeps with a light on, locked door and keeps a weapon beside her bed because she does not feel safe in her own home.
- 5) She no longer feels safe with her friends and fears meeting the offender again.
- 6) She has become more judgmental with males, including members of her family.
- 7) She has become more protective and cautious with her children.
- 8) She was unable to work for a week following the sexual assault, and I am taking that from the victim impact statement that was a handwritten one that was previously filed.
- 9) Finally, over two years from the sexual assault, she is only now coming to grips with her own healing process.

[10] Mr. Tom resides with his parents, who are elders in the Little Salmon Carmacks First Nation. He assists them, although his brother is also a neighbour

and can provide assistance.

[11] Mr. Tom completed Grade 10 in Carmacks and some additional educational upgrading when he was incarcerated in 1991 for a previous sexual assault. He is presently working with the Fire Smart Program in Carmacks. He is single and not in any relationship and he does not have any children.

[12] He appears as a reasonably polite man and had no difficulty reporting to the probation officer and attending for the preparation of the pre-sentence report. He is, obviously, a very shy man. There is some significance to the fact that he apologized, I think motivated substantially from hearing E.J. M. describe what the assault has done to her.

[13] Mr. Tom has a lengthy criminal record beginning with breaking and entering in 1981. His offences were minor until he was convicted of impaired driving in 1989, followed by a sexual assault and an assault causing bodily harm in 1991. He was convicted of driving with more than 80 milligrams of alcohol in his blood in 1993. Although the offences are somewhat dated, the sexual assault in 1991 and the drinking and driving in 1994 have not resulted in any sustained treatment being taken by Mr. Tom to understand himself or to make changes to his behaviour. He did not complete a treatment program recommended in 1994.

[14] As recently as his meeting the probation officer, prior to the report of November 26, 2003, he was denying that he had a drinking problem and minimizing the sexual assault.

[15] Although there is some remorse shown as a result of his statement to the

court today, in my view, he has not taken full responsibility for this offence.

[16] This is of great concern because his Static 99 test score rates him in the medium to the medium-high risk category relative to other adult male offenders; hence there is an obvious risk to the community. I appreciate that the Static 99 test is not as accurate as an SVR 20 or structured clinical guidelines but, nevertheless, it is of some assistance and guidance to the Court.

[17] The first matter to determine is the length of sentence to be imposed. I will then decide whether the sentence must be served at the Whitehorse Correctional Centre or whether it can be served in the community with appropriate conditions.

[18] The Crown takes the position that the sentence must be one of incarceration for two years less a day. This is the same sentence that Mr. Tom received in 1991 for a very, very similar offence. In Judge Faulkner's decision of July 4, 1991, he indicated this:

The sexual assault involved taking advantage of a woman who was asleep and attempting to have sexual intercourse with her. She woke up in the midst of the attack and obviously was extremely upset by the incident. She is entitled to the integrity of her person and her body. She was not there simply to be used at the whim of the accused nor anybody else.

[19] As indicated previously, there is no evidence of penetration in this particular case, but there is also evidence that Mr. Tom ejaculated.

[20] The Crown position is based on the authorities as well as the previous sexual assault conviction of Mr. Tom.

[21] The defence position is that Mr. Tom should be given a conditional sentence to be served in the community. The length of sentence submitted by the defence is 12 months based on the lack of penetration and the case authorities which range from sometimes less than one year to two years, depending upon the factual circumstances.

[22] The defence submits, and I agree, that penetration is often a major factor in increasing the sentence.

[23] In sexual assault cases there is often a focus on whether penetration took place. Obviously, in this case, there is no evidence that penetration took place; there is simply the fact that Mr. Tom's semen was found on the complainant's underwear and her pants were at her feet when she became aware of his presence.

[24] However, I do not take the view that the lack of penetration somehow minimizes the offence of sexual assault. I note that E.J.M. went through the sexual assault medical examination and, for peace of mind, she was tested at the Sexually Transmitted Disease Clinic as well.

[25] I am also mindful of the fact that sexual assaults have their greatest impact at the emotional or psychological level, in the sense that a violation of this woman's personal integrity has taken place. It will clearly have an impact upon her for the rest of her life. Sexual assault obviously has a profound impact on a woman's health and well-being and particularly on this woman, as we heard her today.

[26] The fact that Mr. Tom has pled guilty must be taken into account. His

admission of guilt has made a trial unnecessary and, indeed, made it unnecessary for E.J.M. to have to go through with a trial with an examination and cross-examination.

[27] Mr. Tom's apology, although at the last minute, cannot be ignored.

[28] The range of sentences for sexual assault of this nature is from, as I have indicated, somewhere around eight months to a maximum of two years less a day.

[29] Taking into account Mr. Tom's guilty plea as well as his previous sexual assault conviction, and considering the factors of denunciation and deterrence, I am of the view that 18 months incarceration is the appropriate length of sentence.

[30] I will now consider the appropriateness of a conditional sentence. Mr. Tom meets the condition that his sentence is less than two years, but the test also includes, for a conditional sentence, that the Court is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing as set out in s. 718 and s. 718.2 of the *Criminal Code*.

[31] There are two important factors that, in my view, weigh against a conditional sentence in this case. Mr. Tom has a previous sexual assault conviction that is very similar to this one. He was sentenced to two years less a day for that sentence, and although to his credit he took some educational upgrading he was, unfortunately, not motivated to take any treatment to deal with the alcohol and the behavioural problems that he obviously has. Thus, he is what I call an untreated sexual offender whose risk to reoffend is moderate to high. I am of the view that because of that he remains a danger to the safety of the community.

[32] I am also of the view that the principle of denunciation and deterrence would not be met with a conditional sentence. I am mindful of the fact that it is well known that the reported sexual assaults in the Yukon Territory, beginning in the year 2000 and up to this date, are four times the national average, and that is a very significant factor and one of the reasons for my view that the denunciation and deterrence would not be satisfied with a conditional sentence.

[33] I appreciate, though, Mr. Tom, that you have apologized to E.J.M. because that will help her in her healing process. However, without a plan and steps to be taken, that was arranged before today, in terms of taking treatment, I am not satisfied that a conditional sentence is appropriate.

[34] I am well aware of Mr. Tom's aboriginal ancestry and the requirement to reconsider all sanctions other than imprisonment. However, for the reasons above, I sentence you to 18 months incarceration at the Whitehorse Correctional Centre.

[35] The treatment programs, and I am referring now to the Sexual Offender Treatment Program, and alcohol programs, are available to you in that Centre, and I encourage both the Centre to make them available and you to take those treatment programs.

[36] I am also sentencing you to two years probation following your release from the Whitehorse Correctional Centre.

[37] The statutory terms of the probation order are:

- a) That you are to keep the peace and be of good behaviour and appear

- before the Court when required to do so by the Court.
- b) That you are to notify your probation officer in advance of any change of name or address and promptly notify the probation officer of any change of employment or occupation.
 - c) That you are to report to a probation officer immediately upon your release and thereafter as and when directed
 - d) That you are to reside in a residence as directed by the risk management team/probation officer.
 - e) That you are to abstain absolutely from the possession, purchase and consumption of alcohol and non-prescription drugs and you are to submit to a breathalyzer or urinalysis upon demand of any peace officer, probation officer or the risk management team who has reason to believe that you have failed to comply with this condition.
 - f) That you are to abide by a curfew between the hours of 10:00 p.m. and 7:00 a.m. unless with the written permission of the risk management team or your probation officer.
 - g) That you are not to attend any licensed bars, taverns or residences where alcohol and non-prescription drugs are being consumed.
 - h) That you are to have no contact, directly or indirectly, with E.J.M., unless an arrangement is made through the risk management team and your probation officer, which would be with the consent of Ms. E.J.M., for the purpose of further healing.
 - i) That you are to attend and participate in such assessment, counselling and treatment as directed by the risk management team, including but not limited to sex offender treatment and alcohol and drug treatment.
 - j) That you are to attend for any other such assessments, counselling, and treatment as might be directed by the probation officer.

[38] Are there any other terms or conditions that should be dealt with?

[39] MR. GOUAILLIER: Nothing that comes to mind.

[40] THE COURT: Thank you.

[41] I do not have that DNA order, Mr. Gouaillier.

[42] MR. GOUAILLIER: Yes. Is there some objection?

[43] MR. COFFIN: No, there is no objection.

[44] THE COURT: There are some changes required, but you have agreed on the form. I will make the order and ask you to submit it to the Court.

[45] MR. GOUAILLIER: Yes, that is what -- I will do it again.

[46] MR. COFFIN: That's fine.

[47] THE COURT: Thank you, Mr. Coffin.

[48] MR. GOUAILLIER: And I will submit a further draft for him.

[49] THE COURT: The victim fine surcharge will be waived in the circumstances.

[50] With respect to the firearms prohibition under s. 109, as I read that, Mr. Coffin, my inclination is that a sexual assault is an inherently violent offence. I am prepared, however, though, because it is a lifetime prohibition, I am prepared to consider further submissions on that at a later time, if either of you care to look at the law so that we can make the appropriate order.

[51] MR. COFFIN: Yes. Just in terms of the length, My Lord; in reviewing the *Criminal Code*, I note, in *Martin's*, the reference under this section:

Where the Crown seeks the longer prohibition for a subsequent conviction, it must give notice as required...

[52] THE COURT: And no notice has been given?

[53] MR. COFFIN: No, no notice has been given.

[54] THE COURT: I am sorry, what section is that?

[55] MR. COFFIN: It is under s. 109.

[56] THE COURT: Subsection?

[57] MR. GOUAILLIER: It is case law.

[58] MR. COFFIN: It is not the section, it is the annotations to the section.

[59] THE COURT: Oh, I see.

[60] MR. COFFIN: It appears at page 203, My Lord.

[61] THE COURT: Yes.

[62] MR. COFFIN: It is the last cases cited above the "Discretionary Prohibition" section.

[63] THE COURT: Yes, I see. What Court of Appeal is that?

[64] MR. COFFIN: It is the Saskatchewan Court of Appeal and the Ontario Court of Appeal.

[65] THE COURT: The Ontario Court of Appeal.

[66] MR. COFFIN: Now, having said that, it would appear, even on a first offence, a lifetime prohibition is available, because the section reads:

- (i) begins on the day on which the order is made, and
- (ii) ends not earlier than ten years after...

So we talk about them in terms of a ten-year order for a first offence, but it would appear that it could be longer if the Court so desires.

[67] THE COURT: That appears to be the correct interpretation.

[68] My question to you, though, Mr. Coffin, is I have given you my inclination with respect to sexual assaults being inherently violent.

[69] MR. COFFIN: Yes.

[70] THE COURT: Which would apply s. 109(1)(a). Do you wish an opportunity to make further submissions on that?

[71] MR. COFFIN: I wouldn't mind the opportunity to do a little research on that issue, My Lord.

[72] THE COURT: I think it would be appropriate to do, because my inclination is quite clear, but if there is established case law that we have not had an opportunity to deal with because we are in the community of Carmacks, I am quite prepared to leave it to counsel to speak to that.

[73] Do you have a position on that?

[74] MR. GOUAILLIER: Well, the only concern My Lord, would be that you would become *functus* after today. I am not sure that, unlike a condition of the probation or something, the imposition of a firearm prohibition is something that can be deferred unless you adjourn sentencing, in which case --

[75] THE COURT: No, I am not prepared to do that.

[76] MR. GOUAILLIER: The only thing that I would add is, I believe, that your conclusion -- I don't recall seeing a case and, again, I did look at some cases but I have none to point to that stands for the proposition that sexual assault is not a violent offence. Also, as much as there are concerns as to the duration of the prohibition order and the fact that Mr. Tom at some point might be required to handle firearms for either sustenance or employment, there is always an option under s. 113

for him to apply to have the prohibition lifted for those particular purposes.

[77] THE COURT: Just so that I understand your submission, you are suggesting that he does not come within s. 109 (1)(a)?

[78] MR. GOUAILLIER: No, he does. What I said is I don't remember case law saying that sexual assault is not a violent -- I don't know if there is such case law out there. My submission is that it is not an absolutely outlandish conclusion for the Court to make at this point.

[79] There is an obvious issue in delaying the judging on this.

[80] THE COURT: No, I appreciate that. Thank you for that.

[81] What I will do in the circumstances is, I am going to make an order under s. 109 because there has been no notice given to the defence of seeking the increased punishment under s. 109(3). I am going to order that there be a firearms prohibition.

[82] MR. GOUAILLIER: Yes, My Lord. I don't want to interrupt. My only concern with that particular point is that it is based on case law; it is not a requirement of the *Code*.

[83] THE COURT: I heard that.

[84] MR. GOUAILLIER: And the case law has not been so --

[85] THE COURT: Yes, I heard all that.

[86] MR. GOUAILLIER: Okay. Well, it would be -- I mean it would be, just to put it on the record, it would be the Crown's position that I am not aware that these authorities might be -- and of course I did not have enough time unfortunately to prepare for that.

[87] THE COURT: Next time you will be here with the authorities, Mr. Gouaillier.

[88] MR. GOUAILLIER: I will.

[89] THE COURT: Thank you.

[90] I am going to make a ten-year firearms prohibition. Is there anything else?

[91] MR. COFFIN: No, My Lord.

VEALE J.