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Docket: CR 18-01-36760
(Winnipeg Centre)
Indexed as: *R. v. Bunn*
Cited as: 2021 MBQB 71

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,	)	Appearances:
	)	
	)	Joel N. Myskiw and
- and -	)	Bryton M.P. Moen,
	)	for the Crown
PERCY WARREN BUNN,	)	
	)	Brett J. Gladstone,
accused.	)	for the accused
	)	
	)	JUDGMENT DELIVERED:
	)	April 1, 2021

Restriction on publication: By court order made under subsection 486.4(1) of the *Criminal Code*, information that could identify the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

McCARTHY J.

Reasons for Sentence

[1] Mr. Bunn was convicted of one count of sexual assault on March 11, 2020 following a trial of this matter. The issue before the court now is what constitutes a fit and appropriate sentence.

CIRCUMSTANCES OF THE OFFENCE

[2] On June 24, 2017, the complainant, her cousin, a third individual who was a witness in these proceedings, and the offender Mr. Bunn, were all at Mr. Bunn's residence drinking and socializing. At some point, these four individuals decided to call it a night and all went to sleep in different locations in the house. The complainant went to sleep, fully dressed, in Mr. Bunn's bedroom. Mr. Bunn slept on his sofa for a period of time, and then got up and went into his bedroom and had non-consensual sexual intercourse with the complainant. It was the evidence of the complainant, the independent witness (who did not know either the offender or the complainant prior to that weekend), and Mr. Bunn that the complainant was immediately upset and accused him of raping her. The complainant had been drinking and was asleep when Mr. Bunn entered the room, and she did not consent to the sexual activity.

THE PURPOSE OF SENTENCING AND OBJECTIVES OF SENTENCING

[3] The ***Criminal Code***, at section 718, sets out several objectives of sentencing. The offence for which Mr. Bunn has been convicted in this case constitutes a major sexual assault, which requires that deterrence and denunciation be the paramount sentencing factors. The court may consider other factors as well, such as separation of the offender, rehabilitation and *Gladue* factors, and reparations to victims and the community.

[4] The fundamental or over-arching principle of sentencing must be proportionality. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[5] In looking at the seriousness of the offence in the case before us, non-consensual sexual intercourse with a sleeping complainant is characterized as a major sexual assault and carries a maximum sentence of ten years. The harm to a victim inherent in such wrongful interference with her sexual integrity is now widely recognized by the courts. Similarly, it was recognized by the Supreme Court of Canada in the 2019 decision of ***R. v. Friesen***, 2020 SCC 9 ("***Friesen***"), that women and Aboriginal women are disproportionately victimized and vulnerable with respect to such assaults. While this particular victim did not give a Victim Impact Statement, the court can assume that a certain amount of emotional and psychological harm to the complainant results from any major sexual assault.

[6] With respect to the circumstances of the offender, the court must consider whether there are any circumstances that reduce the moral culpability of this particular offender. In this case, the offender is a 56 year old Indigenous man from Sagkeeng First Nation. Mr. Bunn was raised by separated parents, and lived primarily with his mother. His father and his fraternal grandfather were survivors of Indian Residential Schools, and Mr. Bunn, himself, attended day school. As a result, he has been alienated from traditional, spiritual and cultural practices.

[7] Based upon the pre-sentence report, which included an extensive interview with Mr. Bunn's sister and Mr. Bunn, he and his extended family have grappled

with substance abuse over many years and generations. Mr. Bunn has also suffered from depression and suicidal ideation in the past. He is also immunocompromised, and being treated for HIV. The mother with whom he resided suffered from alcohol abuse. More recently, the family has suffered the loss of a nephew from methamphetamine abuse, and other friends and family have fallen victim to these challenges. Mr. Bunn describes himself as having started to consume alcohol at age 16. On two prior occasions, he has attended for residential treatment with respect to his substance use. The evidence is also clear that Mr. Bunn had consumed a significant amount of alcohol in the days and hours leading up to this offence. His sister describes him as violent, or is occasionally violent, when drinking.

[8] Although, there are gaps in Mr. Bunn's criminal record and he has not had any convictions since 1994, he has a history of criminal involvement from an early age, and for an extended period. Mr. Bunn witnessed domestic violence in his immediate family and he describes his mother's treatment of him as, at times, abusive. His sister confirms that there was corporal punishment used within the family. Mr. Bunn was also a victim of sexual abuse as a teenager. While Mr. Bunn completed a Grade 12 education and some college and university courses, he failed to complete post-secondary education. While he is described positively, as a good worker, he appears to have had a sporadic history of employment.

OTHER RELEVANT SENTENCING PRINCIPLES

[9] Pursuant to section 718.2 of the ***Criminal Code***, the sentencing court must:

(a) consider any aggravating and mitigating circumstances;

(b) consider parity, with sentences being similar for similar offenders for similar offences committed in similar circumstances;

(c) refrain from restricting liberty if less restrictive sanctions may be appropriate;

(d) consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community, with particular attention to the circumstances of Aboriginal offenders.

AGGRAVATING FACTORS

[10] The vulnerability of a sleeping victim is accepted as being an aggravating factor, to be considered on sentencing.

[11] The Crown has urged me to find additional aggravating factors in this case, being:

(a) that the assault was premeditated and planned; and

(b) the failure of the offender to use a condom, and the emotional effect on the victim of that failure.

[12] With respect to premeditation and planning of the assault, Mr. Bunn confirmed that he went into his room where the complainant was sleeping with the intention of having sex. While he was candid that he was looking for sex, whether his intention was to seek consensual sex or force sex when he entered the room, is not clear on the evidence. The facts in this case are somewhat different than the facts in the Manitoba Court of Appeal case of ***R. v. J.A.W.***, 2020 MBCA 62, relied upon by the Crown. In that case, the accused knew the complainant well; knew that she had a boyfriend; knew that she was in a vulnerable state of mind and had been drinking heavily; and probably most importantly, the offender locked the door when he entered the room where she was sleeping. The court found it to be a planned and premeditated assault. The above facts do not apply in this case, and I am not prepared, on the evidence as presented at trial, to conclude that Mr. Bunn planned and set out to have non-consensual sex. An appropriate sentence for major sexual assault, already encompasses *mens rea,* being a decision made at the time of the assault to have sex, whether consensual or not. I am not prepared, on the facts of this case, to find any preplanning or premeditation, which would constitute an additional aggravating factor.

[13] With respect to the failure to use a condom, the complainant testified that she did not know whether Mr. Bunn used a condom. I am not prepared, as the Crown requests, to accept part of the accused's evidence with respect to the condom breaking and him proceeding without it, as I do not accept any part of his

evidence as to the events in the bedroom. I found all of Mr. Bunn's evidence with respect to obtaining consent and using a condom to be contrived and not credible. The onus remains on the Crown to prove any facts which it intends to assert as constituting an aggravating factor. I do not find that that fact was proven at trial, nor was any additional impact on the complainant established. I cannot simply infer an aggravating impact on the complainant.

MITIGATING FACTORS

[14] I find that there are no mitigating factors with respect to the circumstances of the offence.

[15] However, with respect to the circumstances of the offender, Mr. Bunn has significant *Gladue* factors which must be considered in arriving at a fit and appropriate sentence.

[16] As stated by the Saskatchewan Court of Appeal in ***R. v. Chanalquay***, 2015 SKCA 141 ("***Chanalquay***") (at para. 39):

> …the methodology mandated by the Supreme Court directs sentencing judges to consider two matters when dealing with s. 718.2(e): (a) systemic and background factors which played a part in bringing the Aboriginal offender to court, and (b) the types of sentencing procedures and sanctions that may be appropriate for the offender in light of his or her Aboriginal heritage.

[17] The court went on to state with respect to systemic and background factors that (at para. 40):

> … In *Ipeelee,* the Supreme Court said these factors may speak to the culpability of an Aboriginal offender if they reveal something of his or her level of moral blameworthiness and, as a result, may affect the nature of an appropriate sentence (*Ipeelee* at para. 73).

[18] Further, the court stated that (at para. 41):

> The second and ultimately most important aspect of the *Gladue* framework that must be considered by a sentencing judge is the types of sanctions which might be appropriate. In this regard, and keeping in mind that the root purpose of 718.2(e) is to address the overrepresentation of Aboriginal offenders in Canadian jails, a sentencing judge must carefully consider available alternatives to incarceration.

[19] I take judicial notice of the fact that Mr. Bunn and his extended family have suffered many of the adverse effects of colonialism and residential and day schools, and how that history continues to translate into lower employability and educational attainment, unemployment, depression, substance abuse, loss of culture, physical and sexual abuse, and criminality and incarceration. The facts giving rise to this conclusion are contained in the detailed pre-sentence report filed in this proceeding.

[20] Of particular note, with respect to the personal circumstances of Mr. Bunn, he, like much of his family, has suffered from substance abuse for many years. Notwithstanding attempts at dealing with the issue through residential treatment, it is clear that he has, to date, been unable to overcome that hurdle. It is likely from the circumstances of this offence, which occurred after many hours of drinking, that substance abuse played a role. While this does not excuse his behaviour, it is certainly relevant to determining what an appropriate sentence is in the circumstances.

[21] Similarly, Mr. Bunn disclosed to the probation officer during his pre-sentence report that he was a victim of sexual abuse as a teenager. The Supreme

Court in ***Friesen*** recognized that Indigenous children are more often the victims of sexual assault. Also, as stated in ***Friesen*** (at para. 56):

> … Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw*, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm".

This is relevant to the determination of an appropriate sentence for this offence.

[22] The above *Gladue* factors, in their entirety, are significant and must be considered with respect to the type of sanctions that may be appropriate bearing, not only on the offender's degree of culpability, but also on the effectiveness of the sentence.

[23] I am bound, as set out by the Supreme Court in ***R. v. Gladue,*** 1999 SCC 679, [1999] 1 S.C.R. 688 and ***R. v. Ipeelee***, 2012 SCC 13, [2012] 1 S.C.R. 433, and by the statutory provisions of section 718.2 of the ***Criminal Code***, to consider all available sanctions other than imprisonment. If those sanctions are reasonable, then I must refrain from depriving an offender, and particularly an Indigenous offender, of his liberty where a less restrictive sanction may be appropriate.

OTHER FACTORS

[24] In addition to aggravating factors, the Crown has argued, in light of the sentence imposed in ***Friesen,*** and because of the passage of time and changes in societal attitudes toward sexual assault, that the court should be imposing more stringent sentences generally for sexual offences against adult complainants. I find that that argument runs counter to the express statement of the Supreme Court of Canada in ***Friesen***, at paragraph 118, that their decision should not be

taken as an indication that stronger sentences are warranted or not warranted for those who offend sexually against adults. Overall, I find the position of the Crown, which was to seek a penitentiary sentence well beyond any similar precedent provided by either counsel, to be inconsistent with the principle of parity as required by the ***Criminal Code***. It is also contrary to the appropriate application of the principle of proportionality and consideration of the *Gladue* factors in this particular case.

CONCLUSION

[25] It is clear that in the circumstances of a major sexual assault, denunciation must be a significant consideration in sentencing. While no sentence can undo the harm caused to the complainant, a custodial sentence is required to send a clear message that sex without consent will not be tolerated, and will be taken very seriously by the courts. Where the complainant is unconscious or sleeping, and the offender acted without consent, serious consequences, including a period of incarceration, are warranted. The sentence must be sufficient to deter others, and to deter the individual offender from again acting in a predatory manner in the future. While those considerations are paramount, the court must also impose a sentence that addresses the principles of rehabilitation where appropriate, and restraint and restorative justice with respect to Aboriginal offenders.

[26] I accept that the starting point in Manitoba for major sexual assaults is three years. I also find that a penitentiary sentence is warranted for this offence to send a strong message to this offender and other potential offenders. Having taken

into account the aggravating and mitigating factors and the particular circumstances of this Indigenous offender, I find that the appropriate sentence for Mr. Bunn is 28 months of incarceration, followed by two years of supervised probation. Mr. Bunn has served 84 days of pre-sentence custody, at enhanced credit of time and a half for a total of 126 days, or roughly four months. Therefore, Mr. Bunn shall serve an additional two years in a federal institution, followed by two years of supervised probation.

[27] This offender has, in the past, availed himself of treatment programs and has indicated his willingness to do so on a go-forward basis. While that treatment has not brought success to this point, overcoming an addiction is a process, and one that this offender has demonstrated a willingness to engage in. This sentence will allow him to access resources while incarcerated (subject of course to current COVID-19 restrictions on such programs), and to access further resources once returned to the community.

[28] Mr. Bunn has also recently disclosed childhood sexual abuse and is amenable to sexual offender treatment. In my view, dealing with Mr. Bunn's history as a victim and an offender, is an important component of a fit and appropriate sentence aimed at preventing further offending.

[29] Mr. Bunn's history shows that, notwithstanding a dated criminal record of unrelated offences, he is able to live in the community without offending. He has not been convicted of any criminal offences for many years now and he was under

very stringent release conditions with respect to these charges for a period of three years, with no breaches.

[30] An effort toward rehabilitation of this offender with respect to the above issues, both in prison and continuing in the community under supervision, will best meet the circumstances of this offender and the safety of the community, and the complainant in this case.

[31] In my view, this sentence is in the range appropriate to the gravity of the offence and the degree of responsibility of the offender. It is consistent with the range set out in the cases filed by both counsel, and in ***Chanalquay***, which was raised by the court for consideration. The sentence is one of a significant period of incarceration to meet the objectives of deterrence and denunciation, and a significant period of probation to support the offender in rehabilitation. Manitoba Probation Services has outlined in the pre-sentence report a number of services available at Sagkeeng First Nation, and in the nearby community of Pine Falls. It is clear that the author of the pre-sentence report believed that Mr. Bunn would be a suitable candidate for community supervision. The conditions of the probation portion of his sentence will be that he:

- report to Probation Services within 72 hours of release;
- abstain absolutely from possession, use and consumption of alcohol and non-prescribed drugs;

- attend, participate in and complete any assessment, counselling, or programming, to include sexual offender programming and addictions programming, as directed by a probation officer;
- participate in an organized activity as agreed upon with Probation Services, which may include community service work or a similar activity;
- have no contact or communication with the complainant.

[32] There will be additional orders for provision of a DNA sample, a ten-year weapon's prohibition, a 20-year registration under the ***Sex Offender Information Registration Act***, and an order that he have no contact or communication with the complainant while in prison.

McCarthy J.