

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HIS MAJESTY THE KING

-v-

TYLER SMITH-TSETTA

**Transcript of the Reasons for Sentence by the Honourable
Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, on the 15th day of September, 2021.**

APPEARANCES:

A. Paquin:

Counsel for the Crown

C. Davison:

Counsel for the Defence

Charge under s. 271 of the *Criminal Code*

There is a ban on the publication, broadcast or transmission of any information that could identify
the complainant pursuant to s. 486.4 of the *Criminal Code*.

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Reasons for Sentence

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1 THE COURT: Tyler Smith-Tsetta has pled guilty to a
2 sexual assault committed on June 10, 2018 on the
3 victim here in Yellowknife. It is now my responsibility to
4 impose a sentence on Mr. Smith-Tsetta for this offence.
5 The Crown and defence have jointly submitted that an
6 appropriate sentence for this offence would be 27
7 months imprisonment less credit for pretrial custody.
8 Mr. Smith-Tsetta has been in custody for 162 days in
9 total for this offence.

10 I will say at the outset that I am prepared to
11 implement the joint submission. The Crown submits
12 that the sentence that is proposed is at the low end of
13 the range but fit in the circumstances of the offender
14 and the offence. The sentence is one I would consider
15 at the very low end of the range, given Mr.
16 Smith-Tsetta's personal circumstances and the
17 circumstances of the offence, but I cannot say that it is
18 unfit, and even if it were unfit, there is little that I could
19 do.

20 The Supreme Court of Canada has said in *R v*
21 *Anthony-Cook*, 2016 SCC 43, that a sentencing judge
22 should follow a joint submission unless to do so would
23 bring the administration of justice into disrepute or
24 would be otherwise contrary to the public interest.

25 Sentencing judges must show restraint when
26 presented with a joint submission and their discretion to

1 depart from a joint submission is circumscribed and can
2 only occur when a joint submission does not meet the
3 public interest test. The public interest test set out in
4 *R v Anthony-Cook* is a high standard and a joint
5 submission should not be rejected lightly. So while the
6 proposed sentence is lenient, I am not prepared to say
7 that this joint submission would bring the administration
8 of justice into disrepute or is contrary to the public
9 interest.

10 Mr. Smith-Tsetta is still being sentenced to a
11 period of imprisonment that is in the range for other
12 offenders. As such, I am bound by what counsel has
13 proposed and will implement the joint submission.

14 The facts of the offence are that on June 10,
15 2018, the victim returned to her residence after
16 spending a few hours at the bar. A group of friends,
17 including Mr. Smith-Tsetta, came home with her. All of
18 them had consumed a significant amount of alcohol.
19 The victim and Mr. Smith-Tsetta were very close friends
20 and had known each other for about three years.

21 Eventually, most of the friends left the victim's
22 residence except for Mr. Smith-Tsetta and another
23 female who had fallen asleep in the living room. The
24 victim laid down on a couch in the living room and fell
25 asleep.

26 When she went to sleep, she was alone on the

1 couch and fully dressed. She awoke later laying on her
2 side with her pants and underwear down to her knees.
3 Mr. Smith-Tsetta was behind her with his pants down
4 having sexual intercourse with her.

5 The victim got up and told Mr. Smith-Tsetta to
6 leave, which he did. The victim later told her mother
7 and went to the police. Subsequently, the victim and
8 Tyler Smith-Tsetta communicated by text message and
9 he apologized for what happened. Mr. Smith-Tsetta
10 has no memory of what occurred due to his
11 consumption of alcohol.

12 This offence was a serious crime and involved a
13 serious violation of the victim's sexual integrity.
14 Understandably, it has had a significant impact on the
15 victim. A Victim Impact Statement was filed and it
16 shows that this crime has affected her greatly.

17 She is unable to trust anyone, cannot sleep, and
18 she has felt suicidal. These feelings are unfortunately
19 common amongst sexual assault victims and what she
20 describes are things we hear about the impact of these
21 crimes on victims regularly. The impacts of sexual
22 assault are felt by victims every day and in many ways.

23 The victim also relates that she felt that Mr.
24 Smith-Tsetta was a good friend, so the victim has also
25 lost a friend who she felt she could trust.

26 Mr. Smith-Tsetta is an Aboriginal male which

1 requires me to consider section 718.2(e) of the *Criminal*
2 *Code*. I did not have a presentence report, but I did
3 hear submissions from defence counsel who was able
4 to gather information from Mr. Smith-Tsetta, his father,
5 his sister and a family friend. What I have heard is
6 generally positive about Mr. Smith-Tsetta. It is good to
7 see that he has family support and friends who speak
8 positively about him.

9 There are challenges in his life. He was
10 diagnosed with Fetal Alcohol Spectrum Disorder. This
11 of course is something that has and will continue to
12 impact his life. He has received counselling in the past
13 in order to deal with the challenges that he will face as
14 a person living with FASD, and his father thinks the
15 counselling should continue. Given the serious crime
16 that Mr. Smith-Tsetta has committed and that he has
17 no memory of the incident because of his level of
18 intoxication, I think he would benefit from continuing to
19 seek counselling.

20 I have also heard that Mr. Smith-Tsetta was
21 adopted as a baby which he learned about when he
22 was eight years old. Following this, family members
23 noted that there was a change in his attitude. He has
24 had little contact with his biological mother and it
25 appears that she does not want to pursue a
26 relationship. I have no doubt that this has had an

1 impact on Mr. Smith-Tsetta over the years.

2 Mr. Smith-Tsetta does have a criminal record.
3 There are five convictions between 2010 and 2016.
4 The most serious is a related conviction in 2010 in
5 Youth Court for sexual assault for which Mr.
6 Smith-Tsetta received a significant youth sentence.
7 The remainder of his record consists of two assault
8 convictions and two offences against the administration
9 of justice in 2015 and 2016.

10 The criminal record demonstrates that this is not
11 Mr. Smith-Tsetta's first offence of violence but his fourth
12 and that he has committed a sexual offence in the past.
13 I do not know the circumstances of the previous sexual
14 assault, but the sentence imposed suggests that it was
15 a serious sexual assault. So in that sense, Mr.
16 Smith-Tsetta's criminal record is of concern.

17 I would also note that the last convictions for Mr.
18 Smith-Tsetta were in 2016, and so there is a gap
19 between 2010 and 2015 and 2016 and 2021. So that
20 tells me that Mr. Smith-Tsetta is someone who is
21 capable of staying out of trouble for significant periods
22 of time which is important for his rehabilitation
23 prospects.

24 Deterrence and denunciation are the primary
25 sentencing principles that are applicable to offences of
26 sexual assault. There are other sentencing principles

1 to consider, of course, such as rehabilitation, restraint,
2 parity and proportionality.

3 The offence of sexual assault covers a broad
4 range of sexual activity and a broad range of violations
5 of a victim's sexual integrity. It covers activities such as
6 unwanted touching or kissing all the way through the
7 spectrum to more serious violations of a person's
8 sexual integrity such as sexual intercourse.

9 An act of sexual intercourse is considered a
10 major sexual assault using the reasoning of the Alberta
11 Court of Appeal in *R v Arcand*, 2010 ABCA 363 which
12 has been adopted by the Northwest Territories Court of
13 Appeal. These types of sexual assaults are considered
14 the most serious types of sexual assaults and attract a
15 three-year starting point when approaching sentencing.
16 The crime that Mr. Smith-Tsetta committed was a major
17 sexual assault and was a serious violation of the
18 victim's sexual integrity.

19 Unfortunately, this type of offence is prevalent in
20 the Northwest Territories and the circumstances of a
21 sleeping or passed-out victim who is sexually violated is
22 a common occurrence here. There are numerous
23 cases dealing with similar circumstances and all saying
24 the same things when it comes to the applicable
25 sentencing principles and the seriousness of these
26 offences. It is sad that these cases continue to come

1 before the courts and that women in this jurisdiction,
2 because the victims are invariably women, continue to
3 be victims of sexual violence.

4 It is mitigating that Mr. Smith-Tsetta entered a
5 guilty plea. This is not an early guilty plea. There was
6 a preliminary inquiry at which the victim testified. The
7 trial was scheduled initially but had to be delayed due
8 to the COVID pandemic. The trial was rescheduled for
9 September 13, 2021, and preliminary applications were
10 heard. A section 276 application was scheduled and
11 the trial remained to be heard starting on September
12 13.

13 Mr. Smith-Tsetta changed his plea on
14 September 2, 2021. So the guilty plea cannot be
15 characterized as an early guilty plea, however, it is still
16 deserving of credit for several reasons.

17 The guilty plea eliminates the need for a trial,
18 saving the judicial system time and resources. More
19 importantly, the victim does not have to testify again
20 about these events. Trials can often be traumatic and
21 upsetting for victims. Having to talk about personal
22 details and to relive a traumatic event in a courtroom in
23 front of a jury can be difficult and stressful.

24 The guilty plea also provides certainty of result.
25 There is no doubt that Mr. Smith-Tsetta is guilty of this
26 crime because he has entered a guilty plea. In cases

1 like this where it is often one person's word against
2 another, a trial can be fraught with uncertainty and any
3 particular verdict is not guaranteed.

4 The guilty plea also serves as an
5 acknowledgment of Mr. Smith-Tsetta taking
6 responsibility for his actions and can be considered an
7 expression of his remorse. In the Agreed Statement of
8 Facts, it is apparent that Mr. Smith-Tsetta does feel
9 remorse for what occurred. His text exchanges with the
10 victim demonstrate that.

11 It is also acknowledged that Mr. Smith-Tsetta
12 has FASD and that this is something that can reduce
13 his moral blameworthiness as discussed by the Alberta
14 Court of Appeal in *R v Ramsay*, 2012 ABCA 257, and
15 by this court in *R v Eyakfwo*, 2019 NWTSC 5. I do not
16 have the kind of detailed reports as were presented in
17 *Eyakfwo* regarding the diagnosis, counselling and
18 treatment history of Mr. Smith-Tsetta, so I will not say
19 much more about this or about his personal situation
20 with respect to FASD other than to say that I accept
21 that FASD and his diagnosis can reduce his moral
22 blameworthiness.

23 There are also aggravating factors to consider.
24 Mr. Smith-Tsetta was released for this offence on an
25 undertaking to a peace officer on June 13, 2018, and
26 one of the conditions was to abstain from

1 communicating with the victim or going to her home or
2 place of employment. On June 4, 2019, Mr.
3 Smith-Tsetta made repeated attempts to contact the
4 victim by text message until she called him. So it is
5 aggravating that he attempted to contact her and he did
6 contact the victim of the offence while on conditions not
7 to do so.

8 The circumstances of the offence are also
9 aggravating. The victim was asleep in her own home,
10 a place where she should be safe. She should be safe
11 to sleep without fear that she will be sexually violated
12 by a friend that she trusted.

13 The victim was vulnerable because she was
14 asleep and unable to stop or reject Mr. Smith-Tsetta
15 from pulling down her pants and underwear and having
16 sexual intercourse with her. The victim was also
17 vulnerable pursuant to section 718.04 because she is
18 Indigenous and female. Indigenous women are too
19 often the victims of violence and sexual violence in
20 Canada and in the Northwest Territories. That has
21 been the case and it continues to be the case
22 particularly in this jurisdiction.

23 Mr. Smith-Tsetta is currently in custody on this
24 charge. He has been in custody for 162 days. As is
25 standard, Mr. Smith-Tsetta will receive credit at a rate
26 of 1.5 days of credit for every day spent in custody

1 which equates to 243 days or a little over eight months
2 of presentence credit.

3 The Crown is seeking a number of ancillary
4 orders. They are all mandatory and the defence takes
5 no issue with them. This is a primary designated
6 offence and there will be a DNA order pursuant to
7 section 487.05(1) of the *Criminal Code*.

8 This is also a designated offence for the
9 purposes of the Sex Offender Information Registration
10 Act, so there will be a SOIRA order pursuant to section
11 490.012 of the *Criminal Code* and it will be for a
12 duration of 20 years.

13 It is also mandatory that there be a firearms
14 prohibition order pursuant to section 109 of the *Criminal*
15 *Code*. So Mr. Smith-Tsetta will be subject to a firearms
16 prohibition order that begins today and ends ten years
17 after his release from imprisonment.

18 As I mentioned, counsel have presented the
19 court with a joint submission of a sentence of 27
20 months. Please stand, Mr. Smith-Tsetta.

21 So taking into account the circumstances of the
22 offence and your circumstances as well as the joint
23 submission that has been presented to the court, for
24 the offence of sexual assault, I sentence you to a
25 period of imprisonment of 27 months. Taking into
26 account your presentence custody, eight months will be

1 deducted from your sentence, leaving a sentence of 19
2 months left to serve. There will also be an order
3 pursuant to section 743.21 prohibiting you from
4 communicating with the victim while you are
5 incarcerated. You may have a seat.

6 All right. Thank you. Counsel, is there anything
7 that I have overlooked or anything in addition? Ms.
8 Paquin.

9 A. PAQUIN: Yes, Your Honour. Thank you. I had
10 mentioned in my submissions the possibility of an order
11 regarding the return of the exhibits to the lawful owner
12 as well.

13 THE COURT: And do you have any submissions with
14 respect to that?

15 C. DAVISON: No, I have nothing to say. Thank you.

16 THE COURT: Okay. So there will be an order then with
17 respect to the return of exhibits and you can submit,
18 Ms. Paquin, a draft then with respect to that.

19 A. PAQUIN: Thank you, Your Honour.

20 THE COURT: All right. Is there anything else?

21 C. DAVISON: Not that I can think of.

22 A. PAQUIN: No, thank you.

23 THE COURT: All right. Counsel, thank you for your
24 submissions, for the cases that you provided and for
25 your work in resolving this matter without the necessity
26 for a trial. We will adjourn.

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(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

Veritext Legal Solutions, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 28th day of August, 2023.

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