*R v Smith-Tsetta,* 2023 NWTSC 25 S-1-CR-2019-000036

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**-v-**

**TYLER SMITH-TSETTA**

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**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.**

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**APPEARANCES:**

A. Paquin: Counsel for the Crown

C. Davison: Counsel for the Defence

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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*.**

**I N D E X**

**PAGE**

**RULINGS, REASONS**

Reasons for Sentence 1

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

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

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

Sentencing judges must show restraint when presented with a joint submission and their discretion to depart from a joint submission is circumscribed and can only occur when a joint submission does not meet the public interest test. The public interest test set out in *R v Anthony-Cook* is a high standard and a joint submission should not be rejected lightly. So while the proposed sentence is lenient, I am not prepared to say that this joint submission would bring the administration of justice into disrepute or is contrary to the public interest.

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

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

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

When she went to sleep, she was alone on the couch and fully dressed. She awoke later laying on her side with her pants and underwear down to her knees. Mr. Smith-Tsetta was behind her with his pants down having sexual intercourse with her.

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

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

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

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

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

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

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

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

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

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

Deterrence and denunciation are the primary sentencing principles that are applicable to offences of sexual assault. There are other sentencing principles to consider, of course, such as rehabilitation, restraint, parity and proportionality.

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

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

Unfortunately, this type of offence is prevalent in the Northwest Territories and the circumstances of a sleeping or passed-out victim who is sexually violated is a common occurrence here. There are numerous cases dealing with similar circumstances and all saying the same things when it comes to the applicable sentencing principles and the seriousness of these offences. It is sad that these cases continue to come before the courts and that women in this jurisdiction, because the victims are invariably women, continue to be victims of sexual violence.

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

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

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

The guilty plea also provides certainty of result. There is no doubt that Mr. Smith-Tsetta is guilty of this crime because he has entered a guilty plea. In cases like this where it is often one person's word against another, a trial can be fraught with uncertainty and any particular verdict is not guaranteed.

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

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

There are also aggravating factors to consider. Mr. Smith-Tsetta was released for this offence on an undertaking to a peace officer on June 13, 2018, and one of the conditions was to abstain from communicating with the victim or going to her home or place of employment. On June 4, 2019, Mr. Smith-Tsetta made repeated attempts to contact the victim by text message until she called him. So it is aggravating that he attempted to contact her and he did contact the victim of the offence while on conditions not to do so.

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

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

Mr. Smith-Tsetta is currently in custody on this charge. He has been in custody for 162 days. As is standard, Mr. Smith-Tsetta will receive credit at a rate of 1.5 days of credit for every day spent in custody which equates to 243 days or a little over eight months of presentence credit.

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

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

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

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

So taking into account the circumstances of the offence and your circumstances as well as the joint submission that has been presented to the court, for the offence of sexual assault, I sentence you to a period of imprisonment of 27 months. Taking into account your presentence custody, eight months will be deducted from your sentence, leaving a sentence of 19 months left to serve. There will also be an order pursuant to section 743.21 prohibiting you from communicating with the victim while you are incarcerated. You may have a seat.

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

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

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

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

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

A. PAQUIN: Thank you, Your Honour.

THE COURT: All right. Is there anything else?

C. DAVISON: Not that I can think of.

A. PAQUIN: No, thank you.

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

**(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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