Citation: *R. v. McInnes*, 2021 YKTC 49

Date: 20211025
Docket: 20-00290
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Chief Judge Cozens)

REGINA

v.

DAVID ROBERT MCINNES

Appearances:
Shandell McCarthy — Counsel for the Crown
André Roothman (by videoconference) — Counsel for the Defence

REASONS FOR SENTENCE

[1] COZENS C.J.T.C. (Oral): David McInnes has entered guilty pleas to having committed the offence of assault against his spouse, Anne Roussain, on three different occasions. An Agreed Statement of Facts has been filed. These are as follows:

1. Ms. Roussain and Mr. McInnes began their relationship in 2003 and they have two children together.

2. On May 19, 2020, the complainant, Anne Roussain, attended the Whitehorse RCMP to report escalating physical assaults.

3. On January 12, 2020, Mr. McInnes and Ms. Roussain were in their bedroom discussing family photos and where to store them. Mr. McInnes got up and came towards Ms. Roussain so she said “if

you touch me, I'll call the police". Mr. McInnes then grabbed Ms. Roussain by the back of the neck and began to push her. He continued to push until they got into the bathroom, which is attached to the bedroom, and held her down against the tub and said "go ahead then, call the police and ruin my life".

4. On January 25, 2020, Ms. Roussain and Mr. McInnes were coming out of their children's bedroom and Ms. Roussain wanted to discuss with Mr. McInnes some unkind things he had said to her that day. As Ms. Roussain was closing the door to their children's bedroom, Mr. McInnes pushed her against the wall.

5. Ms. Roussain then went downstairs in order to go outside and get some fresh air. Mr. McInnes told Ms. Roussain that if she left, he would not be there when she returned. Ms. Roussain expressed concern for who would remain home with their young children. Mr. McInnes didn't want Ms. Roussain to leave the residence so he decided to leave and as a result, Mr. McInnes pushed Ms. Roussain into the metal door. This caused Ms. Roussain to be pushed out of the residence and he locked the door. This incident resulted in bruising to Ms. Roussain's arms and hands, as well as deep bone bruising to her right shoulder.

6. On February 15, 2020, Mr. McInnes had come home from a hockey tournament when Ms. Roussain asked him where he had been.

7. Mr. McInnes became angry and verbally abusive about this and grabbed her arms very hard. He also pushed her against the wall forcefully while being verbally abusive towards her while the children were in the next room watching a movie.

8. On April 6, 2020, Ms. Roussain was talking to Mr. McInnes about not yelling at her in front of the children. Mr. McInnes went downstairs as he was going outside to take the kitchen garbage out. Ms. Roussain followed him in order to continue the conversation, this angered Mr. McInnes and he swung the garbage and hit Ms. Roussain's arm as Ms. Roussain put her arms up to protect her face. Their son was nearby, and afterwards, asked Ms. Roussain what had happened and if Mr. McInnes hit her with the garbage bag.

[2] The circumstances are that on January 12, 2020, January 25, 2020, and February 15, 2020, Mr. McInnes assaulted Ms. Roussain by either pushing her and

holding her down, pushing her against a wall and out of a residence, and grabbing her forcefully and pushing her against a wall.

[3] On April 6, 2020, although no plea was required on this charge, the facts were read in pursuant to s. 725, and are that in the presence of their now six-year-old son, in the course of an argument Mr. McInnes swung a garbage bag and hit Ms. Roussain. She put her arms up to protect her face.

[4] Crown is suggesting a suspended sentence in the area of seven to 12 months probation with minimal clauses, primarily directed at ensuring no contact. Defence counsel is suggesting that Mr. McInnes be discharged and, from what I surmise from the submissions, ideally absolutely discharged, in part due to the terms of an existing court order out of Supreme Court. At a minimum, counsel seeks a conditional discharge for Mr. McInnes.

[5] With respect to the impact on Ms. Roussain, a detailed Victim Impact Statement was filed. There were numerous redactions, and there was some dispute with respect to one area under the category of “economic hardship”. In the end, counsel had agreed on all the redactions except that one paragraph. I allowed that paragraph to go in, understanding that there was no restitution sought for any of these losses. I viewed this paragraph as just simply part of the ongoing entirety of the proceedings between the two parties, and that this economic hardship was not entirely necessarily attributable to the assaults. The assaults were simply part of it. I am satisfied that, in my own mind, I could allow Ms. Roussain to read that portion in and deal with the information appropriately without over or under-emphasizing it.

[6] I am not going to review in detail the Victim Impact Statement, either on its face or in the context of hearing Ms. Roussain read it. It is clear to me that Ms. Roussain has suffered significant emotional and psychological impact that goes beyond the physical shoulder injury, the bruising, and the other injuries that she said she suffered.

[7] These have been ongoing, have been significant, and are not to be under-estimated. I do not think that they need to be set out in detail or that it is necessary to have the entire Victim Impact Statement read into the record here.

[8] Victimization is not something that can be viewed purely objectively. It is to be viewed from the viewpoint of the person who is the victim and what the impact on them is. This is what Ms. Roussain has said the impact on her was, and hearing her read her statement and observing her, I have no doubt that she has suffered significant impact as a result of this. That impact also includes what she feels has been the impact on her role as a mother and, through her, on her children as well.

[9] So that is all I am going to say. I heard Ms. Roussain, and I think we all heard her, and I think it is clear that these assaults in the context in which they occurred have had a significant effect on her that is ongoing, and for which she is continuing to seek assistance and, hopefully, with such assistance, will move beyond.

[10] Mr. McInnes is 50 years of age. He has no prior criminal history. I have a summary of what he has done with respect to his involvement in the Domestic Violence Treatment Option (“DVTO”) court process.

[11] I think it is important to read some portions of the DVTO Treatment Summary. Mr. McInnes entered into the programming on March 29, 2021. At the outset of entering into treatment, the Level of Service/Case Management Inventory ("LS/CMI") had him as a very low overall risk/needs, and the Sexual Assault Risk Assessment Guide ("SARA-V3") had him as a low overall risk when prioritized in terms of further violence in a spousal context.

[12] It is to be noted that prior to his entry into DVTO court, Mr. McInnes had already connected with counsellor Johanne Filion, and was regularly attending for counselling with her. She confirmed that he had attended sessions with her two to three times a month and provided a letter that summarized her services, stating that Mr. McInnes participated fully in sessions and was open and forthcoming.

[13] Topics explored with Mr. McInnes included grief, management of stress, family of origin patterns of communication, patterns of communication in his intimate relationships, and parenting. Mr. McInnes goes on further to state he has been open to exploration of his past actions, and has expressed a strong desire to continue to enhance his ability to communicate more in his intimate relationships.

[14] It is noted that Mr. McInnes, in the report, had indicated he wishes to continue counselling with Ms. Filion beyond this process.

[15] Mr. McInnes entered the Respectful Relationships Program on a one-on-one basis simply due to the lack of numbers that would have made a group attendance feasible.

[16] It is also noted that, throughout his involvement in DVTO, Mr. McInnes presented as a motivated and sincere participant. He presented as being honest in providing the information needed for initial risk and need assessments. He was noted to be an active and contributing participant in the Respectful Relationships programming. There were no concerns noted with respect to his compliance, other than once in late July there was an exchange with the children, but in the circumstances no further actions were taken, and there has been no indication there anything further occurred beyond that one incident.

[17] Mr. McInnes indicates that his children are a large source of motivation for him to make sure that he moves forward in the right way. It is noted that throughout his involvement in DVTO, he continually expressed remorse for his violent behaviour, and was witnessed to be developing a better understanding of how some of his other behaviours were of potential harm.

[18] It is noted that Mr. McInnes' risk of further spousal violence was considered to be reduced due to his involvement in programming, due to his level of understanding of the issues, and due to his acceptance of and recognition of some of the tools that he could use moving forward.

[19] The Respectful Relationships Programme report has a number of categories. It is noted that under the attendance category, Mr. McInnes attended each session on time, ready for the session and that he participated in the 10-session programming.

[20] With respect to his acceptance of responsibility, Mr. McInnes was witnessed to express responsibility of his abusive behaviours with his ex-wife throughout the

program. He was able to identify abusive behaviours he has engaged in. In reflecting on his prior relationship, Mr. McInnes was able to identify and acknowledge how some of his non-violent behaviours likely caused emotional and cognitive harm to his ex-wife, and he noted it is important for him to remain cognizant of his beliefs and attitudes in any future relationships.

[21] Mr. McInnes has expressed on several occasions that he remains disappointed in himself for having been physically violent towards his ex-wife and that he views that behaviour as weak. He has recognized the need to be more self-aware in his future interactions, and to utilize the tools that he has learned.

[22] He has been able to identify the feelings that led him to the abusive behaviours, and the skills that he needs to manage those behaviours. He has been noted to take advantage of the supports that he has. He recognized that in his relationship with Ms. Roussain, he had an unhealthy communication style with checking out, and that he misused and abused the time-out technique during heightened discussions and arguments. Mr. McInnes appears very motivated to learn new skills related to defusing heated situations in a more healthy and respectful manner.

[23] He was noted as appearing open in sharing personal information when appropriate, including his vulnerabilities and insights and examples in his own life.

[24] As I noted earlier, I do not see anything in here where Mr. McInnes has done anything other than accept responsibility for his actions without casting blame on Ms. Roussain.

[25] There is also a letter of support from Ms. Filion with respect to his participation in counselling sessions with her, and that she is prepared to continue to work with him.

[26] I certainly agree that in the circumstances of this case, the Crown has not sought, and it would not have been appropriate to have, a custodial disposition, given what has transpired since these assaults occurred.

[27] Were this had been the case where this matter had gone through "not guilty" pleas, and proceeded to trial and Mr. McInnes convicted, I would expect that a custodial disposition of some sort would have been the result. However, by taking the path that he did in accepting responsibility and engaging in programming even before entering into DVTO, and then remaining fully engaged in this programming and receiving positive reports, that he has done everything that he is able to do within this process to put himself in a situation where the Court is able to impose a sentence that recognizes this.

[28] The issue for me was initially between a suspended sentence or a discharge, and then, if there is to be a discharge, whether there should continue to be any conditions on the discharge to make it conditional rather than absolute. I appreciate that when considering a discharge, there are two parts to the test, the first that it has to be in the best interests of the accused. I am familiar with the case law that has developed in this jurisdiction from the ***R.*** v. ***Shortt***, 2002 NWTSC 47 case, as recently as in cases in this year.

[29] A decision of Justice Campbell, ***R.*** v. ***J.R.***, 2021 YKSC 50, looked at the test for a discharge, and in dealing with this first part of the test, noted the comments in ***Shortt*** that generally speaking, it is important that there be some potential negative impact.

[30] This was also considered in the case of ***R.*** v. ***M.D.,*** 2021 YKTC 24, a decision of Judge Ruddy, in looking at the best interests of the accused,where she cites from ***R.*** v. ***Fallofield*** (1973), 13 C.C.C. (2d) 450 (B.C.C.A.), and she says:

> 24 There is evidence before me, most notably the letters of support, from which to infer that M.D. is a person of good character. He has no prior criminal convictions, nor is there anything to suggest he is at risk to re-offend.

noting in para. 27 the need to consider "… whether the entry of a conviction may result in significant adverse repercussions for M.D."

[31] Defence counsel indicated that it might have adverse implications for M.D.'s employment because there was potentially uncertainty.

[32] Judge Ruddy cited, in para. 29, an excerpt from ***Shortt*** that reads:

> …In my opinion, it is sufficient to show that the recording of a conviction will have a prejudicial impact on the accused that is disproportionate to the offence he or she has committed. This does not mean that the accused's employment must be endangered; but it does require evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime (unless the particular offence is itself harmless, trivial, or otherwise inconsequential)...

[33] Judge Ruddy considered the submission that the entry of a conviction for M.D. may have an adverse impact on his stated desire to travel upon retirement, and stated that this impact amounts to no more than a negative consequence that could be incurred by every person convicted of a crime. With respect to the impact on M.D.'s employment, she noted that it was uncertain with respect to what that impact may be. However, she went on to state in para. 32:

> Ultimately, I accept, albeit somewhat reluctantly, that while unclear at this point, it is not unreasonable to conclude that M.D.'s employment may be adversely affected with the imposition of a conviction [in that case] for sexual assault.

[34] Ruddy J. was satisfied that the discharge would be in M.D.'s best interests.

[35] I note that Mr. McInnes was employed or remains employed, (I have not had any information otherwise), full-time as a director within the Yukon Government Department of Education. It would not be a huge jump for me to think that three convictions for assault in a spousal context, which is an aggravating factor in sentencing, could have a negative impact on his employment.

[36] As I said earlier, there are times when it may be difficult to show that there will actually be a tangible negative impact on employment and, therefore, the whole of the circumstances needed to be looked at. Given Mr. McInnes' employment, and linking this to the second part of the test that I will elaborate upon, I am satisfied that a discharge is in his best interests.

[37] This is not a case where it would be found not to be in Mr. McInnes' best interests to receive a discharge because of the fact that the objective of specific deterrence require that he get a clear sanction such as a criminal record for the crimes that he has committed.

[38] I am also satisfied that denunciation and deterrence can be considered effected through a variety of means, including the imposition of a discharge, depending on what brought about the discharge and what the circumstances were.

[39] The second part of the test is it not be contrary to the public interest. As Justice Vertes said in ***Shortt***, certainly in cases of domestic violence this is a higher hurdle to get across because of the prevalence of domestic violence in our society and the need to protect the vulnerable person within the relationship from the assaultive behaviour of a person who is in a position to be dominant and perhaps more assaultive.

[40] It has been the case for many, many years that domestic violence has been a significant part of the criminal justice system. It is very important that sentences are imposed that send a message that domestic violence of any kind is not acceptable.

[41] However, the DVTO court for many years, since 2000/2001, has provided an option for individuals to acknowledge that they need help, to accept that they need some treatment, to accept responsibility for their offence and then move through a course of programming that enables them to do front-end rehabilitation so that they put themselves in a position where, when they come to sentencing, they have demonstrated what they have done and are not simply promising to do something in the future.

[42] The public interest in the Yukon, in my opinion, has been greatly satisfied through the involvement of individuals who may perhaps have found other means of dealing with these spousal assault charges by accepting responsibility, and going through the DVTO court program. It is not at all uncommon and, in fact, is very common in the DVTO court that individuals who have accepted responsibility, gone through the program, and done exceptionally well in the programming, which I have to say Mr. McInnes has done, receive discharges. Therefore the public interest

component is often met by the fact that this program gives people options for accepting responsibility, and dealing with their issue. In the long run, this is in the best interests of not only society, but of the victim of the offences and any other individuals the offender come to be in a relationship with in the future.

[43] I am satisfied that a discharge accords with the public interest in this case, but that is only because of all the steps Mr. McInnes has taken to deal with his issues, and to accept responsibility and move forward.

[44] I am satisfied that a criminal record is not required, and that a discharge is an appropriate way to deal with Mr. McInnes sentence. However, I am not satisfied that an absolute discharge is the appropriate way to deal with this because of the concerns that Ms. Roussain has.

[45] I appreciate that the Supreme Court order of Chief Justice Duncan that was filed April 8, 2021, stipulates that counsel should not be bringing applications before the Supreme Court until, at the very least, Mr. McInnes' criminal charges have been resolved, he is undergoing treatment, and the no contact order with Ms. Roussain has been removed.

[46] My experience is that any change in circumstances can still ultimately result in matters being brought forward. The best interests of the children remain paramount, and I do not know that this clause is such that, if presented with the circumstances of today's sentencing, the Supreme Court would say that it would not entertain any further applications, if one was necessary.

[47] The criminal charges have been resolved and, as Crown has acknowledged and as I agree, Mr. McInnes is no longer going to be subject to any other order for programming or treatment. He has completed this, and I do not think that any more is necessary. However, the no contact order is going to remain in place, and it is going to be there for a period of nine months. It is going to remain in place in a format that I think will work in the circumstances.

[48] I want to make it clear that, given all the reports and the risk assessments and everything that has been done by Mr. McInnes, I am not putting this no contact order on because I have a concern that Mr. McInnes in particular presents a risk of violence to Ms. Roussain at this point in time of her being the victim of any further actual physical violence committed by him.

[49] Mr. McInnes has been on conditions. I think he is well aware of what caused the assaults committed by him, and he has taken steps to deal with it, but I am putting it on because I believe that Ms. Roussain is genuinely still dealing with the aftermaths of these assaults. I believe that the no contact order is required to provide Ms. Roussain with the level of comfort she is entitled to at this time. In saying this, I am not doing so for any reason, other than in the normal course I would put on such a condition even if there were no Supreme Court order in a case like this.

[50] The one thing I have not mentioned yet is the number of support letters that have been provided for Mr. McInnes from a number of respected individuals within the community, some of whom I know on a personal level. They are very supportive. They

speak of him as a great parent. Certainly, given what these individuals know of Mr. McInnes, they must be somewhat shocked and surprised that these assaults occurred, however they know him in a different format than Ms. Roussain did when these assaults took place, and in the relationship she and Mr. McInnes were in.

[51] Everything these supports have said I have no difficulty with, but Mr. McInnes, by his own admission, was not that person in those circumstances of his interactions with Ms. Roussain, and he has accepted his role in these. The objective component, in many ways, would say that Mr. McInnes does not need to be on a no contact, but there is a subjective element from Ms. Roussain's point of view to this objective component, and I believe that the no contact clause is necessary at this point in time, given the overall circumstances.

[52] So subject to anything counsel says, there will be a conditional discharge attached to each count, for nine months. This, of course, can always be shortened.

[53] The terms will be as follows, and these are minimal terms. They are only designed to deal with the no contact issue. Mr. McInnes is required to:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the Probation Officer in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with Anne Roussain except in the presence of counsel for the purposes of court or except with the prior written permission of your Probation Officer and with the consent of Ms. Roussain in consultation with Victim Services;

5. Do not go to any known place of residence, employment, or education of Anne Roussain except with the prior written permission of your Probation Officer and with the consent of Ms. Roussain in consultation with Victim Services;

6. Do not go to any known place of residence, employment, or education of Anne Roussain except through a third party approved in advance by your Probation Officer in consultation with Victim Services for issues of significance involving the children; and

7. Report to a Probation Officer within two working days and thereafter, when and in the manner directed by the Probation Officer.

[54] Those are all the terms. If there is any problem with any of those terms, the matter can come back in front of me on a review.

[55] There is $300 in victim surcharges. I will give Mr. McInnes three months' time to pay.

[56] The Crown is withdrawing or staying the charges to which guilty pleas were not entered.

[57] The previous conditions on the release order are, of course, vacated at this time. There is no curfew any more. Those are terminated. These are the only conditions Mr. McInnes is on.

[58] Mr. McInnes, if you complete this successfully for nine months, then there is no criminal record for this having taken place. The discharge would stay on your record for a period of time, and you may want to get some legal advice as to what that might mean in the event you were to cross a border.

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COZENS C.J.T.C.