

Citation: *R. v. Muldoon*, 2021 YKTC 63

Date: 20210927
Docket: 20-00561
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Caldwell

REGINA

v.

GEOFFREY MATTHEW MULDOON

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Jane Park
Jennifer Budgell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CALDWELL T.C.J. (Oral): Mr. Muldoon is before me on a count of assault involving five young complainants, young people who were training to be hockey referees.

[2] The facts themselves, that Mr. Muldoon has accepted, I will not repeat but they are an exhibit on this proceeding.

[3] I have also received a number of other materials. I have seven Victim Impact Statements from parents of the complainants. I also have letters filed by the defence

from Mr. Muldoon's employer, family members, friends, and an individual that he works with. There are seven letters that were filed in total.

[4] The Victim Impact Statements, on the one hand, and the letters from the individuals that know Mr. Muldoon well, on the other hand, do highlight a tension in cases such as this and do illustrate why sentencing decisions in cases such as this are very difficult. The Victim Impact Statements definitely drive home the fact that Mr. Muldoon's actions, which he has accepted, crossed the boundary into criminal acts. They involved non-consensual physical contact. The Victim Impact Statements do speak to the very significant negative impact that those actions have had not only on the young people who were involved, but also on their parents, who are victims by definition as well.

[5] On the other hand, the letters are quite positive and speak to the other side of Mr. Muldoon, and I do accept those letters as being quite genuine. The tensions that are expressed between what is stated in the Victim Impact Statements and the letters reflect the reality that the good can co-exist with the negative, and it is one of the reasons why sentencing and decisions in cases such as this are so difficult.

[6] I do want to address a couple of themes that came out of the Victim Impact Statements at the outset.

[7] It was clear to me from reading those Victim Impact Statements that a number of the parents, if not all, felt somehow responsible in some way for what unfolded here. We all want to watch out for our children and the Victim Impact Statements certainly reflected that on the part of the parents. I understand that emotion. When our children

are the victims of behaviours that we have not been live to, and when we have allowed our children to be in the presence of an individual who behaves in the fashion that Mr. Muldoon did, there can be the feeling that somehow we have let our children down.

[8] What I certainly do want to try to emphasize to the parents, who I know are in the room — I am not sure if everyone who has written a statement is present — there is nothing that you could have done about this. I have been working in this role for close to 20 years and certainly what I have become aware of over that time period is that people are not aware of what is unfolding when our children are not in our presence. Children often do not want to talk, so it is very difficult, I think, to accept that but it is very common. Nothing that occurred in this case was the fault of any of the parents that are in the room or that have written those Victim Impact Statements, nor, of course, was it the fault of the young people.

[9] I emphasize that on the part of the young people as well. I am sure that you have already conveyed this message to your sons. Sometimes it helps if the judge repeats it — and that can also be conveyed to them after the fact. They did nothing wrong here.

[10] I think often young people wonder why me not someone else? You were in a certain place at a certain time, in a certain scenario, in a certain set of circumstances, in a certain moment, and it unfolded with respect to you, while it may not have unfolded with respect to your close friend who could have been in the same situation on another date perhaps, but it is nothing that any of the young men, as I will call them, did here that brought anything on and certainly no blame should lie at their feet. I know that you

will have expressed that to them but I wish to convey that as well because I think that it can help to hear it from another source other than the parents, and I certainly have come to firmly believe that in my time in this business as well.

[11] In terms of the sentences being sought, frankly, the two sides are not really that far apart. The Crown is seeking a suspended sentence, and I am sure it has been explained and I am sure Mr. Muldoon is very aware that the significant factor that goes along with that is that it carries with it a criminal conviction. The defence is seeking a conditional discharge, which is not a conviction under our law. It is a finding of guilt — which is very significant — but it is not a conviction per se. Therefore it does not have the ramifications of a criminal conviction when it comes to employment and certain other collateral consequences.

[12] In considering which of these two sentences to impose, I have to look at many factors.

[13] First of all, I do have to look at the nature of the offence. I do agree with both of the lawyers that the nature of the assaults in the scheme of what is seen in the courts is on the lower end. I certainly understand why it is very concerning to the parents. I understand why it was very upsetting to the young people in question here. But I do have to consider the fact that it is on the lower end of the spectrum and Mr. Muldoon, quite appropriately, has pleaded guilty to an offence of simple assault, not another form of assault, as these are simple assault facts.

[14] We often speak in terms of aggravating factors and mitigating factors. In this case, the Crown, quite rightly, directs my attention to s. 718.2 of the *Criminal Code*. I

will not repeat each of the factors that she highlights but the tenor of the factors that she has emphasized before me relate to the fact that when offences involve young people, particularly when the accused person is in a position of trust, those are aggravating factors on the sentence.

[15] I also must look in terms of the aggravating factors on the impact on the young people and on their families. That is why, quite frankly, the Victim Impact Statements are so important, because they do drive home what essentially was the fallout of what occurred here, in terms of the loss of innocence that the young people suffered as a result of what happened here; the impact that it had on a number of them in terms of their perceptions of hockey and refereeing; and also the impact on the parents, not only in terms of issues with sleep and appetite, which were certainly commented on, but, as I say, that feeling that they wished they could have prevented this from happening to their children.

[16] I also have to look at the principles of denunciation and deterrence, both specific and general, which do apply in a case involving young persons. By denunciation, it is denouncing the behaviour itself; and by deterrence, we speak of specific deterrence and general deterrence. General deterrence goes towards sending a message to the community that the behaviour is not appropriate. Specific deterrence is sending a message specifically to Mr. Muldoon, that this behaviour is not appropriate.

[17] However, having looked at aggravating factors, I also, of course, need to look at mitigating factors.

[18] One of the most significant mitigating factors here is that Mr. Muldoon is a first offender. I think that the school board case that Mr. Muldoon was involved in can leave the impression that he was not. This is because there had been a finding by the discipline committee of the Ontario College of Teachers that he had behaved inappropriately in the past, I will note in a different context than the one that is before me, but there had been allegations of inappropriate behaviour on his part and there had been a disposition with respect to that.

[19] However, I do need to emphasize that the school board case was not a criminal matter. In fact, I think that was highlighted by Ms. Budgell's submission regarding the nature of the boundary counselling that flowed here. I do accept Ms. Budgell's submission that this counselling constituted an hour, largely in the form of a PowerPoint. Obviously, that is not, by anyone's definition, particularly rigorous. Mr. Muldoon has not had the benefit of rigorous counselling in terms of how to behave with respect to boundaries involving young persons. Certainly, the probation order that will flow in this particular case will involve much more rigorous counselling than what was done on that occasion. The very fact that it was as limited as it was does highlight the fact that that was not a criminal finding of guilt or conviction by any stretch.

[20] In terms of other mitigating factors, a very significant one is that Mr. Muldoon entered a guilty plea. I appreciate that this was not done at the earliest possible opportunity and it is unfortunate that it flowed after the young people had to go through the stress of preparing for the court process because I know that is not easy. However, he did plead guilty in the end, and that is very significant. It did save them from having to testify and that, in my view and in the view of the law, is very significant here. They

did not have to go through the court process because that is very difficult — even with preparation.

[21] Further, it does reflect his remorse. When one enters a guilty plea, by definition, you are obviously accepting that the facts happened, you are not shying away from them. Mr. Muldoon has done that. That is to his credit. You have spared those young people from going to the trial, and most importantly, by accepting the facts, you have said to the community: I am guilty and I am remorseful of this. You are not fighting the charge to the end of a trial. That is very significant when it comes to the sentencing as well.

[22] Further, I do put emphasis, of course, on the letters that were filed which speak to a different side of Mr. Muldoon, and I accept the genuineness of the letters. Why I say that, in part, is because the way these letters were written, and I appreciate the parents undoubtedly have not had an opportunity to see them, they were written with the individuals in question pointing to specific examples of why they attest to Mr. Muldoon's otherwise good character. Much of that going towards his work ethic and his value as an adult friend to others in his life. I certainly put emphasis on those as well when determining a sentence.

[23] The difficult aspect is how to balance these competing tensions.

[24] The test, as has already been outlined, with respect to a conditional discharge is whether it is in the accused's best interests and not contrary to the public interest. Quite frankly, I have never seen a case where it is not in the accused's best interests; it is

always in the accused's best interests. The difficult part is generally the issue of the public interest.

[25] At first blush, I could see how one would say: Well, obviously it is not in the public interest, given that what happened here was with young people who therefore have lost a certain amount of trust in those that they might view as mentors, given that this was their first attempt at employment, given the impact that it has had on their views with respect to hockey itself, how could it possibly be in the public interest to impose a discharge?

[26] However, public interest does go beyond that. I have to look at other factors. For example, his employment. The fact that the ramifications of a criminal conviction on his employment will undoubtedly be much greater than with a discharge is a significant factor, particularly with a first-time offender.

[27] That does not mean that the courts feel that, in all instances, they should be ensuring that people simply manage to keep their jobs. Part of the reason why we emphasize that issue in sentencing is that it is in the public interest that people continue to be fully contributing members of society. Of course, if Mr. Muldoon does lose his employment and is unable to gain other employment, which can flow as a result of a criminal conviction, then he becomes further marginalized, and that is not in the community interest. So I look at that factor.

[28] I also look at the nature of the probation that is being asked for here. What I find when I balance these various tensions is that a discharge is not contrary to the public interest if it does carry with it a lengthy period of probation and strict terms.

[29] The period that the Crown has asked for (two years) is, I would say, on the higher end of what we often impose. One-year probations are extremely common; two years, somewhat less so.

[30] I am going to impose beyond two years in this case. I am doing that, in part, because I do feel that it is important that the real substance here, which is the probation in my view, is lengthier than the norm to reflect the impact that these incidents did have on everybody that was involved. For that reason, the maximum that we can impose is three years. In my view, a three-year probation is warranted in this instance, particularly given that it is being handed down in conjunction with a conditional discharge.

[31] I am going to impose, as I say, a probation beyond the length of time that was requested by the Crown and impose a three-year probation, Mr. Muldoon, which means that you will be under strict supervision for a period of three years. It certainly, as I say, will go beyond the school board's decision. A certain amount is left to the discretion of the probation officer, but I can only draw parallels to the experience I am more familiar with, which is in Ontario, and certainly when it comes to things such as reporting conditions and counselling, in my experience, the probation officers do wish to keep fairly close tabs with at least monthly, if not more frequent, reporting and will ensure that there is counselling that is followed through with.

[32] The very fact that you are reporting to a probation officer also serves to remind you of the other terms that will go along with the probation, which will involve restricting your involvement with young people and I do think that is important here as well for the reasons that I have already outlined.

[33] In terms of probation conditions, the statutory conditions that go on all probation orders are that you:

1. Keep the peace and be of good behaviour;

[34] This means that you essentially do not get into trouble with the law. If you were to get into trouble with the law during the course of your probation, then you can also be charged with breaching your probation on top of whatever other charge you might face.

2. Appear before the court if that is required during the term of your probation;
3. Notify your Probation Officer, in advance, of any change of name, your address, and promptly of any change in employment or occupation;

[35] That allows them as well to keep tabs on your whereabouts and what is unfolding in your life.

4. Have no contact directly or indirectly or communication in any way with K.B., R.S., S.N., J.N., and O.H.;

[36] I know from what Ms. Budgell has already said that you understand what that means. Essentially, if you are in a store and they are there, you are the one that has to leave, not them.

5. Not go to any known place of residence, employment or education of K.B., R.S., S.N., J.N., and O.H., or anywhere else that you know them to be;

6. Not have contact directly or indirectly with any individual under the age of 16, unless an adult third party is in your direct presence;

[37] The reason I am saying direct presence is I would not want it to be interpreted that, for example, if you were in a room in a home with a person under the age of 16 and there was an adult in the house that that was okay. They have to be in your direct presence. The third party has to be able to see you with the young person in order to make the condition effective.

[38] I am not going to put in the word "sober". Frankly, I do not think I have ever included that word in a condition of that nature before and I do share with Ms. Budgell the concerns about how that could be interpreted. I would not want it to be viewed that if your brother, for example, had a glass of wine at dinner that somehow that meant that you could not be in the presence of your niece. I do not think that that would be appropriate and I am not hearing that alcohol was involved here or is an issue at all. For that reason, I will leave that word out but the important thing is that there needs to be another adult directly with you.

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

[39] I do think it is important that you receive counselling. I will not dictate, per se, the exact form of it. I think that will need to be explored a little bit further with your probation officer. I appreciate that substances are not an issue, alcohol or drugs, for example.

8. Attend and actively participate in all assessment and counselling programs as is directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues:

- psychological issues;

[40] In the letter of one of your friends, in particular, there was comment about various stresses that you have been under and depression as well. I could see from the perspective of the parents involved that it would be hard to imagine that what happened here would be tied to issues along that line but, quite frankly, depression and stress can exhibit themselves in unpredictable ways. So I think it would be beneficial that you have counselling along that line and it sounds as if you need that in any event from what has been put in some of the letters that are before me; and

- any other issues identified by your Probation Officer that allow you to explore that a little bit more what might be appropriate here, for example, boundaries with young people;

and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition.

[41] I appreciate, again, that some of that was done in terms of the school board case and undoubtedly is one of the things that has caused parents concerns, because it has already happened so how is that going to benefit here. However, accepting

Ms. Budgell's submissions as to what that involved, it sounds as if it was somewhat more cursory, probably because it did not involve a criminal case and it sounds as if more intensive work along that line is required.

[42] Beyond that, you have indicated your willingness to not coach any longer. Obviously, that has been a concern of a number of the parents in this case, as well, about the fact that you could move to another community. I do think, from what I am hearing, that the vulnerable persons check will flag any issues. However, out of an abundance of caution, for the term of the three years, I will also make it a condition that you:

9. Not participate in any capacity in sports involving those under the age of 18.

[43] I do not believe that there are any other conditions on the probation that have been asked for or that would be meaningful in this instance.

[44] In substance, it is rigorous, especially for somebody who is a first offender and who did enter a guilty plea. Quite frankly, I understand the Crown's submission in terms of a suspended sentence. I would have found that more appropriate after a trial but, taking into consideration as well that this was a guilty plea, I find that this is the appropriate disposition when I balance in all of the factors that are before me, so that will be the sentence.

[45] In terms of other charges, were there other charges that you needed to deal with at all here?

[46] MS. PARK: Yes, Crown will withdraw the remaining counts.

[47] THE COURT: I will give you 30 days to pay the victim surcharge.

CALDWELL T.C.J.