

Citation: *R. v. T.L.*, 2022 YKTC 25

Date: 20220518
Docket: 20-10026
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

T.L.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.5 of the *Criminal Code*.

Appearances:
Megan Seiling
Luke Faught

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM T.C.J. (Oral): T.L. is being sentenced for having committed an aggravated assault on his spouse on January 11, 2020.

[2] The victim suffered a number of injuries, specifically two fractured ribs, a fracture to her left orbital floor, and a comminuted fracture of her left nasal bone. T.L. committed this offence after the couple attended a party and became involved in a verbal argument in their vehicle on the way home. In my reasons for judgment at trial, I found that the victim did not recall the drive home, and could not recall how she was injured.

[3] I found that the victim had no injuries when she left the party with T.L., but sustained serious injuries to different parts of her body, specifically to her orbital bone and nose, as well as to her ribs. I also found, based on all the evidence, including the victim's multiple injuries and text messages sent by T.L. to the victim the following day, that he intentionally committed these injuries either when they entered the car and began to argue, or upon arrival at the residence where they were staying.

Positions of the Crown and the Defence

[4] The Crown seeks a period of imprisonment of 30 months. The Crown points to the fact that T.L., as a spouse, was in a position of trust to the victim, an aggravating factor pursuant to s. 718.2 (a)(ii) of the *Criminal Code*, the severity of the injuries, the emotional trauma experienced by the victim, and the overall negative impact upon her and her family.

[5] The Crown points out that T.L. does not receive the benefit of having pleaded guilty and/or having displayed remorse. The Crown also submits that T.L.'s criminal record, although limited in length, is aggravating. In coming to this sentencing position, the Crown accepts that T.L. had an unenviable upbringing, and that since this offence he has made considerable efforts to improve himself.

[6] The defence takes the position that an appropriate sentence for this offence is 16 to 18 months of imprisonment plus one year of probation. He has attended counselling since this offence and is committed to being a good father to his children. Also, the defence submits that a sentence of imprisonment in the territory will facilitate access

with his young children. Finally, despite his difficult upbringing, he has made positive rehabilitative steps since the offence and is determined to remain on this path.

[7] It is not disputed that T.L. was released from custody the day after his arrest, and that he has been on bail conditions since that time.

Analysis

Victim Impact

[8] L.M., the victim's mother, read her Victim Impact Statement at the sentencing hearing. She described the negative impact that this incident has had on her family. She explained that her daughter has been traumatized by this crime, and lives with the guilt and shame of not being present in the lives of her children. Since the assault, she has become more dependent on drugs and withdrawn almost completely from her family. L.M. also detailed the negative impact upon herself and her two young grandchildren. L.M. has been left feeling helpless, scared, and angry as a result of the assault and the negative impacts that have flowed from it.

[9] The victim in this matter, D.M., did not file a victim impact statement. At trial, she testified to the injuries that she received, including the physical pain that she suffered around the time of the offence, as well as some ongoing physical pain. It was also clear that she had been emotionally traumatized by this crime.

Circumstances of T.L.

[10] I have the benefit of Pre-Sentence Report (the “PSR) dated May 17, 2022. As a result, I have information about T.L.’s background and personal circumstances, as well as the circumstances of his family.

[11] T.L. is 30 years of age. His family moved to the Yukon shortly after he was born, but his parents separated when he was a baby. As a result, his father left the family home, and T.L. had very little further contact with him. He has four siblings, one of whom is deceased. T.L. indicated that he is not close with his siblings. T.L.’s mother commenced a relationship with T.B. after separating from T.L.’s father. T.L. described his relationship with T.B. as having been good. T.B. taught T.L. various work skills and the value of hard work.

[12] On the other hand, T.L. explained that his relationship with his mother has been consistently unhealthy. It is his view that she has not been supportive of him. His family had little money during his childhood. T.L. was expected to work and pay rent to his mother from the age of 13 onward. At one point, he moved to B.C. to be with his father, however, his father left T.L. alone in the home in order to attend a camp job. T.L. was hungry and alone, and returned to the Yukon sooner than expected. At some point, he moved out of his mother’s home and lived with a friend where he paid less rent than he paid his mother. While living there, he continued to attend school.

[13] T.L. noted that the 10-year relationship between his mother and T.B. became unhealthy and violent over time. The couple left T.L., at times, with unsuitable

caregivers who treated T.L. poorly, and, on occasion, assaulted him. He commenced consuming alcohol at a young age as a result of these caregivers.

[14] T.L. advised that he struggled to focus and be attentive in school, despite the fact that he was smart. He is of the view that he suffers from Attention Deficit Hyperactivity Disorder (“ADHD”). He remembered being picked on from an early age at school due to his fair complexion and blonde hair. He spent one year going to school in Fort Nelson while living with his sister. He explained that he was picked on at a school in that community and ended up becoming involved in fights. He returned to the Yukon and finished grade 10.

[15] T.L. indicated that he has had a decent work history, although he has moved around between different employers. He was unwilling to provide the author of the report with any contact information for his employers, so his employment history could not be verified. He advised that he is presently doing odd jobs.

[16] T.L. explained that his children had been living with their maternal grandmother before he made efforts to obtain custody of them. He advised the author of the PSR that since he had recently lost his housing in Whitehorse, the children were living with their maternal grandmother.

[17] T.L. acknowledged that he has struggled with substance use in the past, specifically alcohol and cocaine. According to him and his mother, he has had frequent periods of substance use, interchanged with periods of abstinence.

[18] Although T.L. admitted to the author of the PSR that he drinks alcohol occasionally at the present time, he explained that he does not typically drink to excess and no longer uses hard drugs.

[19] The defence has filed a letter dated February 15, 2022 from a clinical counsellor at Mental Wellness and Substance Use Services (“MWSUS”). The counsellor confirms that T.L. completed a 35-day substance use in-patient treatment program in Whitehorse in October and November 2020. He has also engaged in outpatient counselling on a weekly basis prior to the in-treatment program, and continued with the weekly individual counselling after completing the in-treatment program. The weekly counselling ended in February 2022. The clinical counsellor explained that T.L. has worked hard to make lifestyle changes.

[20] In the PSR, the author outlined information that she had gleaned from Family and Children’s Services (“FCS”). FCS has worked with the family since an incident in 2019. T.L.’s and D.M.’s two young children were initially placed with their maternal grandmother. After T.L. attended counselling with MWSUS and ongoing appointments with FCS, his children were returned to him in November 2021. Subsequently, despite T.L.’s best intentions, some parenting concerns were noted while he cared for his children full-time, such as the children missing some of their appointments. The FCS representative acknowledged T.L.’s love and concern for his children, while at the same time noting that he has struggled, at times, with managing the responsibilities of being a single parent for two young children, aged 3 and 6.

[21] Since T.L.'s recent loss of his rental accommodations, the children have been placed again with their maternal grand-mother in a long-term care agreement. This may turn into a long-term placement, however, T.L. has expressed a desire to regain custody of his children in the future. He would be required to complete a case planning process and assessments before this could occur.

[22] The author of the PSR indicated that T.L. has expressed to her his genuine care and concern for his children, and has demonstrated that he has their best interests at heart. He has kept in regular contact with them even when they are not in his direct care.

Principles of Sentencing

[23] As stipulated in **R. v. Ipeelee**, 2012 SCC 13, and **R. v. Gladue**, [1999] 1 S.C.R. 688, a sentencing court must impose a sentence that fits the offence, the offender, the victim, and the community. Sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender (see **Ipeelee**, at para. 38 and **R. v. C.A.M.**, [1996] 1 S.C.R. 500, at para. 92). Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion (**R. v. L.M.**, 2008 SCC 31, at para. 15; see also **R. v. Lacasse**, 2015 SCC 64, at para. 11).

[24] A sentencing court must consider all relevant sentencing principles in determining an appropriate sentence. The fundamental principle of sentencing is found at s. 718.1 of the *Criminal Code*. It stipulates that a sentence is to be proportionate to the seriousness of the offence and the degree of blameworthiness of the offender. Section 718 outlines the fundamental purpose of sentencing which is:

...to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[25] A sentencing principle that applies in any sentencing is the principle of restraint, which means, in the context of a jail sentence, that the length should not be more than is necessary to achieve the relevant sentencing objectives.

[26] I have considered the principle of restraint and T.L.'s overall circumstances in my deliberations on this matter.

Case law

[27] As with many offences the range of sentencing in aggravated assault cases is broad.

[28] The decision in *R. v. Quash*, 2019 YKCA 8, held that the low end of the sentencing range for the offence of aggravated assault is 16 months, absent

exceptional extenuating circumstances. In other cases, the high end of the range was labelled as six years' imprisonment (*R. v. Porter*, 2017 YKTC 13; *R. v. McGinty*, 2002 YKTC 81; *R. v. Wiebe*, 2006 YKTC 80; *R. v. Bland*, 2006 YKTC 103).

[29] In *R. v. Charlie*, 2020 YKCA 6, the Court of Appeal upheld a 18-month period of incarceration followed by a lengthy probationary period for an offender who committed an aggravated assault by kicking the victim twice in the head while he was on the ground, "causing serious and debilitating injuries to the area surrounding his left eye." Mr. Charlie had a lengthy criminal history, including serious offences of violence. He had been diagnosed with FASD.

[30] The decision in *R. v. Cormier*, 2005 NLTD 35, involved an aggravated assault in a spousal context with facts similar to the case at bar. The parties were drinking alcohol when the offender attacked the victim who ended up on the floor. He kicked her three to four times as she begged him to stop. After he threw a chair at her, she remembered nothing further until she later woke up in bed. Her injuries included fractured ribs, and a fracture to the left orbital bone, as well as a fractured cheekbone and jaw. Due to the victim's lack of memory after the chair was thrown at her, the Court was unable to determine how some of the injuries occurred, but the Court found at trial that Mr. Cormier had intentionally caused them. The injuries required extensive medical interventions. The accused had an extensive criminal record including offences of violence. The Court imposed a 21-month period of incarceration for the s. 268 offence.

[31] In *R. v. Gargan*, 2014 NWTSC 62, the offender and his spouse were consuming alcohol, when an argument occurred. Mr. Gargan struck the victim causing a fracture to

her lower jaw that required her to be transported from the Northwest Territories to a hospital in Edmonton. She underwent surgery resulting in her mouth being wired shut for approximately five weeks. Mr. Gargan was of Dene descent and had experienced a difficult upbringing. His father, who had attended residential school, was physically abusive to his spouse when he consumed alcohol. Mr. Gargan had a criminal record, with offences of violence, but it was not lengthy. The Court imposed a 14-month period of imprisonment followed by 12 months of probation.

[32] In *R. v. Craig*, 2005 BCCA 484, the Court of Appeal increased the sentence for an aggravated assault in a spousal context to three years of imprisonment. Shortly, after separating from his spouse of 23 years, Mr. Craig approached her in a public place where she was sitting with her daughter and a friend. He stabbed her at least three times in the abdomen, before inflicting injuries to her hands. The attack was on a defenceless victim, resulting in severe injuries. The victim required emergency surgery and blood transfusions. The abdominal wounds were slow to heal and the injuries to the victim's hands impaired their function. The offender had a prior, unrelated criminal record. He was highly intoxicated at the time of the offence.

[33] In *R. v. Fisher*, 2017 BCPC 92, the offender committed an aggravated assault on his wife resulting in very serious injuries. Mr. Fisher left his residence to consume alcohol and returned home angry. He attacked his wife and began punching her in the face. While she was on the floor, he put his knee on her throat which obstructed her breathing, while he repeatedly punched her in the face. He told her that she was going to die. The sentencing judge described the injuries as follows:

4 The victim's entire face and her eyes were contused and swollen and she had a cut to her forehead. She suffered fractures to both orbital bones. The fracture to her right orbital bone was displaced and required a plate to stabilize it. She underwent surgery and was required to sleep sitting up for approximately six months. She was unable to work for seven months. She lived with the risk of vision damage throughout her recovery. She continues to have numbness on her face. There is a slight deformity to her right eye which although not disfiguring, it is noticeable to her and is a constant reminder of the incident. The victim continues to experience symptoms of posttraumatic stress.

[34] Mr. Fisher pleaded guilty and was remorseful. The Court observed that some **Gladue** considerations were present. The offender had a criminal record, including two previous convictions for assault against intimate partners. The Court found that Mr. Fisher continued to minimize his abuse of alcohol. The Court imposed a sentence of two years imprisonment less a day, followed by two years of probation.

[35] In the case at bar, the injuries inflicted by T.L. on D.M. were serious. The impact of the crime has negatively affected D.M. and her family. It is statutorily aggravating that T.L. abused his partner. Additionally, she was severely intoxicated at the time, leaving her in a vulnerable position.

[36] Also, T.L. has a prior criminal record, though it is dated. It does, however, include two prior convictions of assaultive behaviour. I am advised that one of those offences, an assault with a weapon, was committed on an intimate partner. The Court imposed a jail sentence of five months' time served for that offence.

[37] On the other hand, there is no evidence before me that T.L.'s crime was premeditated. Additionally, although T.L. does not accept responsibility for this offence, he has nonetheless made efforts to better himself in the last two years. Specifically, he

engaged in weekly counselling sessions from January 2020 to February 2022. He also successfully completed an intensive in-patient treatment program at MWSUS in the fall of 2020. He has demonstrated positive behavioural changes in his dealings with FCS, and intends to remain engaged with them. Although there have been some concerns, he has made efforts to parent his two children. As indicated, due to his recent loss of housing and some outstanding parenting concerns, the children are presently in the care of their maternal grandmother.

[38] I accept that T.L. cares for his children and is committed in his desire to parent them in the future. It would seem that a sentence that facilitates access to the children would be in their best interest.

[39] Finally, I take into account T.L.'s disadvantaged background and how that has impacted him.

[40] Considering the circumstances of this matter and of T.L., I must impose a sentence that denounces his conduct. The sentencing principles of general and specific deterrence are paramount in this matter. A message must be communicated that spousal assaults, which are prevalent in this jurisdiction, will result in significant consequences. I must, however, not lose sight of the rehabilitation of T.L. As outlined above, he has made significant efforts since this offence to better himself and to become a better parent.

[41] Having considered the circumstances of T.L. and this offence, as well as the applicable sentencing principles, I am satisfied that a proportionate sentence is one of two years imprisonment less a day, to be followed by an 18-month probationary period.

[42] The terms of the probation order are:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify your 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 D.M.;
5. Report to a Probation Officer immediately upon release from custody and thereafter, when and in the manner directed by the Probation Officer;
6. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
7. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: anger management, psychological issues, and substance use, 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; and

8. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

[43] I also make the following ancillary orders:

1. A 10-year firearms prohibition, pursuant to s. 109 of the *Criminal Code*;
2. An order under s. 487.051 of the *Criminal Code* for the provision of samples of DNA for analysis and recording. As aggravated assault is a primary designated offence, the order is mandatory; and
3. Pursuant to s. 743.21, you must not have contact, directly or indirectly, with D.M. during your term of custody.

[44] Considering the sentence that I have imposed, and T.L.'s financial circumstances, I waive payment of the victim surcharge.

CHISHOLM T.C.J.