SUPREME COURT OF YUKON

Citation: *R v Papequash*, 2022 YKSC 68

Date: 20221107
S.C. No. 20-01511A
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

JONAH PAPEQUASH

Before Chief Justice S.M. Duncan

Counsel for the Crown — Noel Sinclair

Counsel for the Defence — Nathan Forester and Amy Chandler

This decision was delivered in the form of Oral Reasons on November 7, 2022. The Reasons have since been edited for publication without changing the substance.

REASONS FOR SENTENCE

[1] DUNCAN C.J. (Oral): On October 12, 2021, Jonah Papequash pled guilty, contrary to s. 268 of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*"). I accepted his plea and found him guilty on the basis of an agreed statement of fact filed with the Court for the purpose of the guilty plea and sentencing.

[2] On November 7, 2022, the Crown advised it was electing to prosecute the lesser included offence of assault causing bodily harm, contrary to s. 267(b), by summary conviction. Mr. Papequash was granted permission to revoke his guilty plea to the

s. 268 with the Crown's consent and instead entered a plea of guilty to assault causing bodily harm.

[3] After reviewing the criteria in s. 606 of the *Criminal Code* with him, I accepted Mr. Papequash's plea of guilty to the s. 267 charge.

[DISCUSSIONS]

[4] Counsel has presented the Court with a joint submission for sentence on the s. 267 charge. The joint submission is for a conditional sentence of 20 months with significant strict conditions, including house arrest for the majority of that time, followed by probation for a period of 18 months with comparable strict conditions. Ancillary orders requested include a firearms prohibition for a period of 10 years and a DNA order.

[5] As I go through the sentence, Mr. Papequash, I just want to alert you that there is a legal issue that was raised with respect to a conditional sentence order, so I am going to go into a bit of legal detail in my analysis, which is not usual in a sentencing procedure like this. But because of the unusual nature of the issue and the joint submission I am going to do that here in a few paragraphs, so just bear with me.

[6] I note the decision of *R v Anthony-Cook*, 2016 SCC 43, in which the Supreme Court of Canada held that unless the proposed sentence on a joint submission from Crown and defence counsel would bring the administration of justice into disrepute or would otherwise be contrary to public interest it should be accepted by the Court.

[7] With this high threshold in mind, in the following, I am going to examine:

- the circumstances of the offence;
- the circumstances of Mr. Papequash;

- the impact of the offence on Mr. Tom Tom;
- very briefly, the legal parameters of the offence of assault causing bodily harm;
- the mitigating and aggravating circumstances in this case.

[8] I will then:

- apply the principles of sentencing;
- consider the objectives of sentencing; and
- provide my reasons and the orders.

[9] In this case, as I just said, I will discuss some of the law around the conditional sentence orders because of the issue that was raised through the joint submission with respect to that.

Circumstances of the offence

[10] It is not necessary to repeat all of the admitted facts, as they have been read into the record on October 12, 2021. So I will just give you the following summary.

[11] In June of 2020, Mr. Papequash considered that he was in a relationship with Aiyana Gatensby.

[12] In early June 2020, Aiyana Gatensby began hanging out with Johnathon Blanchard.

[13] On June 15, 2020, in Whitehorse, Yukon, Mr. Papequash was at Aiyana Gatensby's residence. She lived at the time in the same building as Johnathon Blanchard's mother-in-law. Johnathon Blanchard was there in the building on that same night visiting his mother-in-law and brother-in-law, Tyler Tom Tom. Mr. Blanchard and

Mr. Tom Tom were hanging out and drinking alcohol until the early morning hours of June 16, 2020.

[14] At approximately 3 a.m. on June 16, 2020, Mr. Papequash began yelling outside of Mr. Blanchard's and Mr. Tom Tom's balcony, calling Mr. Blanchard to come outside to fight. Mr. Papequash admits that he was intoxicated by alcohol and cocaine at that time.

[15] As the yelling persisted, Mr. Blanchard and Mr. Tom Tom went outside to speak with Mr. Papequash. Once they were downstairs, Mr. Papequash demanded that Mr. Blanchard fight him. Mr. Papequash pulled out a knife and Mr. Blanchard said he would not fight him if he had a knife and backed away. Tyler Tom Tom moved forward, saying "I'm not scared of you." Mr. Papequash then punched Mr. Tom Tom while he still had the knife in his hand. While the two men struggled on the ground, Mr. Papequash stabbed Mr. Tom Tom. Mr. Blanchard was able eventually to pull Mr. Papequash off of Mr. Tom Tom.

[16] Mr. Tom Tom required four to nine stitches for each injury he sustained, that is, wounds to his left cheek, left shoulder, left arm, right groin, and lower left back. He has permanent scars in all of these places.

[17] Mr. Papequash was arrested on June 17, 2020.

Circumstances of Mr. Papequash

[18] I was provided with helpful information about Mr. Papequash's circumstances through a number of documents: the risk assessment of Dr. Riar, a forensic psychiatrist who met with Mr. Papequash three times and reviewed a number of court files related to Mr. Papequash. There was also a very thorough and well-written *Gladue* report

provided on behalf of Mr. Papequash that traced through the First Nation history in Saskatchewan, Northwest Territories, and the Yukon, the home at various times of Mr. Papequash's parents and grandparents.

[19] I have read both reports in detail and I recognize that Mr. Papequash has been affected by the legacy of colonialism, including intergenerational trauma caused by residential schools and the "Sixties Scoop".

[20] His mother was absent for the first nine or ten years of his life due to her addictions. His father was an alcoholic. Mr. Papequash spent much time with his paternal grandmother while growing up and some time also with his maternal grandmother. I note, for the record, that, according to Dr. Riar's report, Mr. Papequash's mother has achieved sobriety by herself and is now working. She is a main source of support for Mr. Papequash.

[21] Mr. Papequash's paternal grandmother is here in Court today and also remains a significant support to him.

[22] The addictions of both parents created distress and difficulties for Mr. Papequash throughout his youth, including impoverished economic circumstances and much partying and fighting at his home.

[23] It is acknowledged, though, that his father was a good provider and they had a good relationship, including sharing activities on the land from time to time. The tragedy here was his father's premature death in his 40s when Mr. Papequash was only 12 and Mr. Papequash's finding him in his home shortly after he had passed away. This surely was a traumatic experience for Mr. Papequash. This occurred after Mr. Papequash's father had recovered from a serious brain hemorrhage a few years earlier which had

occurred while Mr. Papequash and he were on a canoe trip together along with other family.

[24] Mr. Papequash was born on November 29, 1999, was 20 at the time of the offence, and is almost 23 today. He was born and raised in Whitehorse and is a member of the Champagne and Aishihik First Nations. He had anger issues while a child and finished high school as a young offender in jail. Before that, he spent some time living in a group home when his parents could not look after him.

[25] Mr. Papequash began drinking at age 12 and would often drink to get drunk and get into fights while intoxicated. His violent activities are connected to his use and abuse of alcohol and other intoxicants. His negative behaviours escalated after the death of his father. He has also been diagnosed with attention-deficit/hyperactivity disorder ("ADHD").

[26] Mr. Papequash's criminal record is a serious one and is mostly a youth record. It includes assaults causing bodily harm, assaulting a police officer, simple assaults, robbery, uttering threats, and manslaughter. As noted, these offences were very much connected to Mr. Papequash's use of alcohol and other intoxicants.

[27] Defence counsel provided additional material relating to occurrences since this latest offence and since Mr. Papequash has been on release from jail starting in March 2021.

[28] On release, Mr. Papequash immediately attended and completed a 60-day residential treatment program for substance abuse in Vancouver, British Columbia. He has been sober since that time.

[29] He has worked full-time for P.N.J. Holdings in Merritt, British Columbia, as a wood grader, starting on January 3, 2022 – 45 hours a week plus overtime, making $20 dollars an hour. His employer, Parm Sahota, writes that Mr. Papequash has a bright future in the company and is a dedicated and hard worker.

[30] Mr. Papequash lives with his girlfriend, Maddison Stead, in Merritt, British Columbia, in a basement suite of a home occupied by her father. Maddison's mother lives four blocks away.

[31] Maddison was in court today and she and her family also provide significant support to Mr. Papequash. Mr. Papequash's counsel says that they plan to marry and start a family in British Columbia.

Victim and community impact statement and impact on Mr. Tom Tom

[32] Neither was provided in this case. The Council of Yukon First Nations confirmed their awareness of this case and that they did not intend to provide a community impact statement.

[33] Crown counsel advised Mr. Tom Tom's knowledge of the proposed joint commission on sentence and that he was content with the proposal. Although he did not provide a formal victim impact statement, he indicated that he would like the following statements to be transmitted to the Court, which the Crown read into the record and I have accepted.

[34] Mr. Tom Tom says he hates the scar on his face, that it reminds him of the night that it happened, and that he doesn't like to talk or think about that.

[35] Mr. Tom Tom no longer lives in Whitehorse.

Offence of assault causing bodily harm

[36] As I said, assault causing bodily harm is set out in s. 267(b) of the *Criminal Code*. It can be prosecuted by indictment or on summary conviction. In this case, it is being prosecuted on summary conviction. The maximum sentence when prosecuted on summary conviction is two years less a day.

[37] In this case, the admitted facts meet the essential elements of the offence of assault causing bodily harm. Mr. Papequash intentionally applied force to Mr. Tom Tom without his consent by stabbing him multiple times with a knife. Mr. Tom Tom's injuries to his face, shoulder, arm, groin, and back are non-trivial and non-transitory. They will all leave permanent scars. There is a low threshold for what is considered hurt or injury for assault causing bodily harm. This is a clear case of assault causing bodily harm.

[38] The range of sentences emerging in the case law for assault causing bodily harm is broad. This is due to the variety of factual circumstances that can give rise to a conviction. Some fact situations can be close to inadvertence or accident while others are closer to aggravated assault or worse. In the Yukon, there has been no determination by a higher court of the range of sentence for assault causing bodily harm.

[39] Because of this, other cases are not especially helpful in assessing appropriate penalty. Instead, what is most relevant are the objectives and principles of sentencing.

[40] Sentencing is an inherently individualized process. No two offenders are identically situated and there is no such thing as a uniform sentence for a particular crime.

Mitigating circumstances and aggravating factors

[41] The following I see as mitigating factors in Mr. Papequash's case:

a. Mr. Papequash had a troubled childhood, including addicted parents, abandonment, and maltreatment. The chaotic environment he grew up in resulted from the legacy of residential schools attended by his family members;

b. Mr. Papequash is young;

c. Mr. Papequash entered a relatively early guilty plea in this matter; and

d. Mr. Papequash has shown remorse, as is indicated by his statement to the Court today, and is also showing a sincere desire to improve his life circumstances.

[42] The following I see are aggravating factors in this case:

a. Mr. Papequash has a significant criminal record, mostly obtained in his youth;

b. by his own admission, Mr. Papequash was intoxicated at the time of the offence and has a negative relationship with alcohol and drugs.

Principles and objectives of sentencing

[43] The *Criminal Code*, as we all know, sets out the purposes and principles of sentencing. The objectives of sentencing are one or more of the following:

- denouncing unlawful conduct and the harm to victims or community caused by that unlawful conduct;
- deterring the offender and other persons from committing offences;
- separating the offender from society where necessary;

- assisting in rehabilitating offenders;
- providing reparations for harm done to victims or the community; and
- promoting a sense of responsibility in offenders and acknowledging the harm done to victims or the community.

[44] No one objective is more important than the others and it is up to the judge in each case to determine which objectives merit the greatest weight in the circumstances of each case.

[45] As noted by the Supreme Court of Canada in the decision of *R v Parranto*, 2021 SCC 46:

> [10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. …

This means that courts must strive to ensure that the sentence imposed is proportionate to the gravity or seriousness of the offence and the degree of responsibility of the offender.

[46] Finally, a fit sentence is always defined by the totality of the circumstances.

Suitability of conditional sentence

[47] The joint submission seeks approval of a conditional sentence, as provided by s. 742.1, which permits offenders who meet the statutory criteria to serve their sentences under surveillance in their communities rather than in jail. The statutory prerequisites are:

(1) the offender must not have been convicted of certain offences (none of which is applicable here);

(2) a court would have otherwise imposed a sentence of less than two years; and

(3) the safety of the community would not be endangered by the offender serving the sentence in the community.

[48] Once these prerequisites have been met, a court must then consider whether a conditional sentence is appropriate, keeping in mind the fundamental purpose and principles of sentencing set out in ss. 718 and 718.2.

[49] In this case, s. 718.2(e) is of particular significance. It provides:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[50] A potential issue has arisen in this case because of Mr. Papequash's time served in custody before sentence. The issue is whether it must be taken into account as part of his punishment. If it must be taken into account then there is an argument that the full punishment, when you add the joint submission to the pre-trial custody time, makes Mr. Papequash ineligible for a conditional sentence because the sentence would then be more than two years, so one of the prerequisites is not met. This is based on the Supreme Court of Canada decision in *R v Fice*, 2005 SCC 32.

[51] Defence counsel has stated clearly that they are not asking the Court to take into account any of Mr. Papequash's remand time, and the Crown consents to this approach. Although this technically may address the legal concern raised by the decision in *Fice*, I want to elaborate briefly on this analysis.

[52] I first want to note that the majority decision in *R v Sharma*, 2022 SCC 39, which was released last Friday, confirmed at para. 73 that there is a link between the *Gladue* framework related to s. 718.2(e) and the conditional sentence regime. The court noted that both were adopted as part of the same legislation aimed at reducing the use of

prison as a sanction and expanding the use of restorative justice principles in sentencing (*R v Gladue*, [1999] 1 SCR 688 at para. 48; *R v Proulx*, 2000 SCC 5 at paras. 15, 18-21; and *R v Wells*, 2000 SCC 10 at para. 6).

[53] *R v Proulx* is a leading case from the Supreme Court of Canada dealing with conditional sentence orders. The court in *Proulx* wrote that a literal reading of conditional sentence orders leads to the following interpretation, “the decision to impose a conditional sentence should be made in two distinct stages.” First, the judge decides the appropriate sentence according to the general purposes and principles of sentencing. If a term of imprisonment of less than two years is warranted, the judge then decides at the second stage whether the same term should be served in the community under s. 742.1.

[54] However, the court in *Proulx* rejected this literal approach in favour of a more purposive approach. This is because of their view that applying this two-stage literal approach introduces a rigidity that may lead to an unfit sentence. For example, a term of “X” months may be proportional but once a decision to have it served in the community is made, it is possible the sentence is no longer proportional to the gravity of the offence or the responsibility of the offender since the conditional sentence is more lenient than an equivalent jail term.

[55] Instead, the court wrote that the purposive approach is to identify the type of offenders who could be entitled to a conditional sentence, that is, exclude a penitentiary term for those offenders and exclude probation (see para. 12 in *Fice*). The court in *Fice* interpreted this as still requiring a sentencing judge to proceed in two stages — first, to determine if a conditional sentence is available; and secondly, if it is appropriate. But at

the first stage there is no need to impose a term of fixed duration, only to exclude a penitentiary term and probation, based on the fundamental purpose and principles of sentencing as set out in ss. 718-718.2.

[56] On the facts of *Fice*, the court found at the first stage that a conditional sentence was not available. In that case — which was not a joint submission like this situation but instead a contested sentencing — defence counsel conceded that a penitentiary sentence would have been appropriate for the accused if imposed at the time of the accused's arrest, but still urged the court to impose a conditional sentence order because of the time the accused had spent in pre-trial custody. The court found that the respondent was the type of offender therefore who deserved a penitentiary term by operation of s. 742.1(a) – thereby making a conditional sentence unavailable. This meant that the credit for pre-sentence custody could not be taken into account in determining whether a conditional sentence was available.

[57] The second reason noted by the majority of the court in *Fice* why credit for pre-sentence custody should not be taken into account in determining the availability of a conditional sentence was because they were of the view that the time spent in pre-sentence custody is part of the total punishment imposed and not a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence.

[58] The majority in *Fice* concluded:

> [21] … that the time credited to an offender for time served before sentence ought to be considered part of his or her total punishment rather than a mitigating factor that can affect the range of sentence …

following *R. v. W.(L.W.)*, 2000 SCC 18. The majority in *Fice* went on to say that on the basis of the Supreme Court of Canada decision in *R v Wu*, 2003 SCC 73:

> [23] … the appropriate range of sentence and therefore the availability of a conditional sentence is dependent on the gravity of the offence and the degree of responsibility of the offender. …

[59] The court in *Fice* concluded that the time in pre-sentence custody does not change the gravity of the offence or the degree of responsibility of the offender. Therefore it is not a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence.

[60] After *Fice*, the case of *R v Mathieu*, 2008 SCC 21 was decided again by the Supreme Court of Canada in 2008. Justice Fish, who had issued a strong dissent in *Fice,* wrote for a unanimous court, which consisted of the same judges save one as in *Fice*. Justice Fish looked at the issue of pre-sentence custody in the context of probation orders, not conditional sentences.

[61] At para. 16 of that decision, the Court interpreted s. 719(3) to authorize:

> [16] … [a] court that might otherwise have imposed a sentence of more than two years . . . to impose a sentence of less than two years where a longer term of imprisonment would be excessive, bearing in mind the time already spent in custody as a result of the offence.

This adopted the dissent in *Fice* at para. 62.

[62] At para. 17, the Court wrote that:

> [17] … "pre-sentence custody is not part of the sentence, but is only one factor taken into account by the judge in determining the sentence" [citations omitted]. This means that a sentence of less than two years does not, for the purposes of s. 731(1)(b) …

— which is a probation order —

> …. become a sentence of more than two years simply because the trial judge, in imposing the sentence of less than two years, took into account the time already spent in custody as a result of the offence.

A sentence is only that punishment pronounced and imposed by a judge at the time of sentencing itself. Pre-trial detention is a factor which can serve to reduce the length of sentence imposed but it does not become part of the sentence itself.

[63] As noted by Charles Davison in his 2008 commentary on the difficulties in reconciling *Mathieu* and *Fice*, the only reconciliation that may be possible is what was said by the majority in *Fice*. Pre-trial custody will not affect the proportionality principle. Some offenders will simply not be suitable for conditional sentence orders and some offences will call for more severe and longer sentences than are possible under the conditional sentence regime. This is the approach I will take here, in addition to distinguishing *Fice* on a factual basis.

[64] In this case, I have considered the totality of the circumstances, including the *Gladue* factors and the direction of the Supreme Court of Canada in *R v Gladue*, [1999] 1 SCR 688 and *R v Ipeelee*, 2012 SCC 13 to consider the unique systemic and background factors which may have contributed to Mr. Papequash's offence and the type of sentence that may be appropriate because he is an Indigenous man. I recognize that no counsel in this case is suggesting that a penitentiary term is appropriate for Mr. Papequash in this offence for the reasons which I will address momentarily. I also note that s. 719(3) makes it discretionary for a Court to consider pre-trial custody and that counsel have asked me not to give credit for pre-trial custody in this case.

[65] I find that a conditional sentence order is available to Mr. Papequash on the basis that he has met the second prerequisite. In doing so, I acknowledge the time

spent in pre-trial custody but I am not directly applying that time served. Proportionality — that is, the recognition of the gravity of the offence and the moral responsibility of the offender — can be achieved here by imposing a conditional sentence order with the strict conditions proposed. This is consistent with the purpose and principles of sentencing and, in particular, denunciation and deterrence.

[66] Before leaving this stage of the analysis, I need to address the third prerequisite, that is, the safety of the community must not be endangered by the offender serving the sentence in the community. For this, I turn largely to the observations and conclusions of Dr. Riar in his risk assessment.

[67] First, in his observations on p. 8 of his report, Dr. Riar noted that Mr. Papequash, on one of the days of the interview with him:

> 46 …was cooperative, polite, open, and accessible. … No grandiosity, glibness or superficial charm was noted. His speech and thought process were good. … He has no negative or dark thoughts. He appeared to have average intelligence. His attention and concentration was fair, but he had a good short term memory. His insight was good.

[68] At p. 12, Dr. Riar noted again during his interview that:

> 71 … there were no signs or symptoms of depression or anxiety. [Mr. Papequash] was not defensive or had any narcissistic or manipulating tendencies. He was quite positive and optimistic about his life. He had good insight. He took responsibility for his actions and was able to express empathy.

[69] At p. 13:

> 78 In his late teen years, onwards, he has shown very good insight into his problematic behaviours, including his anger, acting out, violence and substance use, but he was not able to control his aggressive and violent behaviour, as well as substance use until after getting out of the treatment centre in August 2021. Again, he shows very good insight into his problematic behaviours, as well as substance use and plans

> to keep control by not indulging in using any substances, getting into a relationship, working, attending self-help group, counselling, et cetera.

[70] On p. 15, just before his conclusion, he notes:

> 86 From the records, I noted that he always had displayed very good insight and has said that he understood and he had to control anger, drinking and acting out, but he was unable to do so until the latest offence of aggravated assault. He had been noticed by people around him being very polite, cooperative, respectful and conforming. At the same time, despite that, he was noted to be quite threatening, intimidating and using the violence quite easily. I also noted that his reactions on a number of assaults have been disproportionate to the circumstances at hand.

[71] Finally, in Dr. Riar's conclusion of the risk assessment, he writes:

> 93 As far as his risk of committing a violent act in the future, it is substantial which means high. I believe that this has to do with his impulsive and reactive pattern of demeanor especially in context of being challenged, slighted or insulted. In the face of difficult situations, he gets so emotionally charged or aroused, and then he resorts to violence to solve the problem, rather than considering any other alternatives. Other aggravating factors for him to react impulsively and violently are his tendency to use alcohol and other illicit substances. Under the influence of alcohol, there is disinhibition, poor judgment, increased impulsivity and reactivity and in the face of alcohol withdrawal, again, there is increased irritability, reactiveness and impulsivity. The other circumstances which can be aggravating are stressful situations in his life, the presence of low mood, depression or even anxiety.
>
> 94 On the contrary, mitigating factors which can be of benefit to him are, structure in his life and it can be achieved by having regular employment, a healthy relationship and support from family and friends. The other significant factor which can be addressed is his substance use. I do not believe that he can ever handle alcohol or regular use of other illicit substances without there being negative influence on his mood, impulsivity and reactivity. It is paramount that he stays sober, especially to conduct himself in a pro-social manner. It will be beneficial for him to consider medications for his attention deficit and hyperactivity disorder, although

> he has been doing very well for the last year or so without it. He has in built protective and resilient factors which can be enhanced by attending self-help groups or counselling. These include but not limited to his average cognition, good insight into his difficulties, ability to get along, ability to express empathy and sympathy, motivation to change and be prosocial etc.
>
> 95 Lastly, despite the abovementioned attributes and his old history which places him at high risk of reacting aggressively and violently in the future, in my view, he possesses the ability to manage his risk and reduce it substantially by enhancing mitigating factors and managing his aggravating factors.

[72] To that, I will also add to the comments of Kenneth, Mr. Papequash's stepfather, who was quoted in the *Gladue* report as saying this:

> Kenneth believes that the most important things for Jonah would be counselling and structure. He said:
>
> > "Jonah needs counselling. I'm only speaking from my perspective. I've taken anger management three times. Once through court and twice on my own. … He needs to do anger management, psychological, wellness counselling. When he's in a structured environment, he does so well. He's an absolute genius in a structured environment. He was getting high 90s. When he gets out and gets involved with other people, crowd, peers ... And he's missed so much in his life, can't blame him. Now he has a girlfriend; I think that helps him. I still think he needs that counselling help. That's only my opinion. I don't know if jail would help him at all, I don't know if that'll make it worst. I think he needs to be monitored for a while. Talking to him lately, how good he is doing."

[73] Given Dr. Riar's risk assessment and the comments and observations made in the *Gladue* report, and the comments and submissions made by counsel, both Crown

and defence, a conditional sentence with strict conditions will meet, in my view, the third statutory prerequisite in Mr. Papequash's case.

Conclusion

[74] To conclude, Mr. Papequash, in my view, is the type of offender who is not suitable for penitentiary or for a probation order, so a conditional sentence order is available, applying the objectives and principles of sentencing. I accept the joint submission of Crown and defence, and agree that a conditional sentence order on the conditions set out for 20 months followed by probation for 18 months on conditions set out by the Crown is appropriate in these circumstances.

[75] In accepting this, I am emphasizing the principle of denunciation and deterrence, recognizing that a conditional sentence order is punishment and, in this case, the strict conditions, including house arrest and complete abstinence with enforcement mechanisms in place, make this punishment particularly real.

[76] This offence was serious. The injuries have a lasting and permanent effect on Mr. Tom Tom.

[77] On this point, Mr. Papequash, I want to reiterate what the Crown said earlier this morning. You heard that their office has deemed you a high-risk offender. Their agreement to this sentence today is based on a recognition of the progress you have made so far, especially since your release from jail in March of 2021. It is a recognition of the faith that they are placing in you that you can continue along this path.

[78] My acceptance of this joint submission is also based on the faith and trust that I am placing in you to use your supports that you have recognized: your partner,

Maddison, your family, her family, counselling, your employer. Use those supports and keep on the path that you have started on.

[79] If you do not, you know that with your criminal record and with the risks that Dr. Riar has noted here, if certain external circumstances change in your life, that you will be facing serious consequences if you reoffend. The Crown is not likely to agree to something like this in future if there is another offence.

[80] You are clearly very motivated right now — and that is extremely commendable and that is why I am endorsing this joint submission — but if you ever feel this motivation lagging, which may happen, just remember, please, the potential consequences of a reoffence and what you said to me and to everybody here just earlier, before I started this, that you do not want to go to jail, you do not want to go back to that life, you want to continue on the path that you are on now.

[81] I also want to say that I am giving weight, obviously, to the objective of assisting you in your rehabilitation because I think the structure created by these conditions, especially when the requirement for counselling is also considered, will allow you to continue and make a good life for yourself and your partner. I note the *Gladue* factors that were considered in the development of the sentencing proposal.

[82] I commend counsel for working hard to come up with an individualized proportionate sentence in these circumstances that I think respects the principles and objectives of sentencing that will serve society, the community, and Mr. Papequash well, if he can comply with all of the conditions.

[83] I will sentence you, Mr. Papequash, to a conditional sentence for a period of 20 months with the following conditions. You will:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so by the court or your supervisor.
3. Report to a supervisor within two working days, and thereafter, when required by the supervisor and in the manner directed by the supervisor.
4. Have permission to reside in British Columbia, specifically in Merritt, British Columbia.
5. Notify the supervisor of any changes to your address, employment, or occupation.
6. Have no contact directly or indirectly or communication in any way with Mr. Tyler Tom Tom.
7. Remain 100 metres away from Mr. Tyler Tom Tom, from any known place of his residence, his employment, or his education.
8. Reside at 2537 Coutlee Avenue, Merritt, British Columbia, or as approved by your supervisor, abide by the rules of that residence and not change that residence without the prior written permission of your conditional sentence supervisor.
9. For the first 12 months of your conditional sentence order, remain inside that residence or on the property at all times except with the prior written permission of your conditional sentence supervisor for the purposes of employment, which includes travelling directly to and from your place of employment, or otherwise as permitted in advance in writing for counselling, treatment, medical examinations, or emergencies, and up to

four hours per week to attend to personal necessities and religious observance.

10. For the remaining eight months of your conditional sentence order, you will abide by a curfew by being inside your residence or on your property between 10 p.m. and 6 a.m., except with the prior written permission of your conditional sentence supervisor or in the actual presence of a responsible adult approved in writing in advance by the supervisor. You must answer the door or telephone to ensure that you are in compliance with these conditions. Failure to do so during reasonable hours will be a presumptive breach of this condition.

11. Not possess or consume alcohol or controlled drugs and substances which have not been prescribed by a medical doctor.

12. Provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have consumed substances prohibited by this order.

13. Not go to any premises whose primary purpose is the sale of alcohol.

14. Attend and actively participate in assessment and counselling programs as directed, and complete them to the satisfaction of your conditional sentence supervisor, for the following issues:

    - substance abuse,

    - alcohol abuse,

    - anger management,

    - psychological issues, and

- life skills,

and provide consents to release information to your conditional sentence supervisor about participation in any programs you have been directed to attend.

15. Maintain suitable employment and provide the conditional sentence supervisor with necessary details about your employment or efforts to seek employment.

16. Not possess any firearm, ammunition, explosive substance, or any weapon as defined by the *Criminal Code*.

[84] Following your conditional sentence, you will be on probation for a period of 18 months. The conditions for the probation will be as follows. You will:

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 supervisor of any changes to your address, employment, or occupation.

4. Report to your probation officer immediately upon the completion of your conditional sentence order.

5. Have no contact, direct or indirect, with Mr. Tyler Tom Tom.

6. Remain 100 metres from Mr. Tyler Tom Tom, any known place of his residence, employment, or education.

7. Reside at 2537 Coutlee Avenue, Merritt, British Columbia, or as approved by the supervisor or the court, abide by the rules of that residence and not

change that residence without the prior written permission of your supervisor.

8. Not possess or consume alcohol or controlled drugs and substances which have not been prescribed by a medical doctor.

9. Not go to any premises whose primary purpose is the sale of alcohol.

10. Attend and actively participate in assessment and counselling programs as directed, and complete them to the satisfaction of your supervisor, for the following issues:

- substance abuse,
- alcohol abuse,
- anger management,
- psychological issues, and
- life skills,

and provide consents to release information to your supervisor about participation in any programs you have been directed to attend.

11. Maintain suitable employment and provide your supervisor with necessary details about your employment or efforts to seek employment.

12. Not possess any firearm, ammunition, explosive substance, or any weapon as defined by the *Criminal Code*.

[85] As for ancillary orders, I will order that there be:

- a firearms prohibition for a period of 10 years, pursuant to s. 110; and
- a DNA order, pursuant to s. 487.04 as a primary designated offence that 267(b) is.

[DISCUSSIONS]

[86] In the circumstances, since Mr. Papequash is employed and has been for some time, I will not waive the victim fine surcharge so that will be ordered and applied, 30 days as time to pay.

[87] MR. SINCLAIR: Has Count 2 already been addressed?

[88] THE COURT: No, it has not.

[89] MR. SINCLAIR: I would apply to withdraw that count, please.

[90] THE COURT: Thank you. It is withdrawn.

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DUNCAN C.J.