SUPREME COURT OF YUKON

Citation: *R.* v. *Derkson,* 2009 YKSC 66 Date: 20091022
Docket S.C. No.: 08-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

CLINTON ROBERT DERKSON

Before: Mr. Justice J. Richard

Appearances:
David McWhinnie Appearing for the Crown
André Roothman Appearing for the Accused

REASONS FOR SENTENCING
DELIVERED FROM THE BENCH

[1] RICHARD J. (Oral): The offender before the Court has been found guilty by a jury of an offence of aggravated assault contrary to s. 268 of the *Criminal Code*. This offence carries a maximum sentence of 14 years imprisonment in a federal penitentiary; thus, Parliament has given a wide discretion to a sentencing judge to impose a fit and appropriate sentence in each case of aggravated assault. The sentencing judge is required by law to have regard to the principles of sentencing, which are now codified in the *Criminal Code of Canada,* and I have done so. Also, the Court is required to take into consideration the particular personal circumstances of the offender before the Court and the particular circumstances of the crime that he has committed.

[2] The offender before the Court is Clinton Derkson, a 24-year-old man who, at the time of the offence, was a bouncer or doorman or security person working at a bar in Whitehorse. The victim of the aggravated assault was Joshua August, a 19- or 20-year-old young man who had been in the bar with his friend, Brent Lehrbass, drinking for several hours. The two of them, at the time of the assault, were both extremely intoxicated.

[3] The two intoxicated young men had to be asked several times to leave the bar at closing time by the bar staff, including by this offender. One or both of the two intoxicated young men used abusive or rude language towards the bar staff but eventually left of their own accord. About five minutes later, three members of the bar staff, including this offender, went out the front door of the bar to have a cigarette on the sidewalk. While there, they were approached by the two intoxicated young men and discussions ensued again about the fact of their having been asked to leave the bar.

[4] A physical altercation started between the victim's friend, Brent Lehrbass, and another individual associated with the bar staff. While the victim was watching this other physical altercation, he was struck on the face by this offender. The blow to his head knocked him down, and he hit his head on the sidewalk. As a result, he suffered serious injuries, in particular, a fractured jaw and a skull fracture. He underwent surgery and, although at the time of the trial some 20 months later he appeared to have recovered, for a time he had hearing difficulties; he obviously required surgery and dental treatment, and for eight weeks could only take nourishment through a straw.

[5] By their verdict, the jury did not accept this offender's statement that he was

acting in self-defence. By their verdict, the jury accepted the testimony of the one eyewitness who stated that the one blow was administered by the offender while the victim was looking at the other altercation. So although this is a one punch case, the one punch, in the vernacular, was a sucker punch or a blindsided one, and at the time of this blindsided punch the victim was, by the offender's own testimony, extremely intoxicated.

[6] In addition to hearing the victim's testimony at trial, the Court has also been provided with Mr. August's victim impact statement, as permitted by the *Criminal Code*. That victim impact statement is now marked as Exhibit S3. The victim confirms that he was in a great deal of pain for some time following this serious assault. He makes particular mention of having to wear wire braces as his jaw was wired shut for several weeks. As a result, he was restricted in his eating habits and was on a liquid diet for an extended period of time. His physical activities were also restricted. He was unable to return to work for two or three months. He lost employment income. He also incurred expenses for dental care, for transportation costs in connection with his medical and dental care, and expenses associated with his special diet while his jaw was wired shut.

[7] Mr. August also suffered emotionally as a result of the restrictions on his daily life or daily routine. For example, he suffered depression, anger, bitterness, et cetera. All of this to say that this was not only a serious assault; it had significant consequences for the innocent victim.

[8] The offender before the Court is 24 years old and was 22 at the time of this offence. He was raised in British Columbia and had been living here in Whitehorse for a

year or so at the time of committing this offence. Although the offender's high school education was interrupted for intervals of time, he has, since the events of October, 2007, returned to high school in British Columbia, and I take it that he now has the equivalent of a high school education. In addition to the employment that he had at the Whitehorse bar, he has had other sporadic employment on various jobs in the construction industry and related fields.

[9] Clinton Derkson has a criminal record which has been placed before the Court on this sentencing hearing. He is not a first offender. In June 2005, in Surrey, B.C., he was convicted of assault and received a sentence of a $500 fine plus a six-month probation term. In April 2007, here in Whitehorse, he was convicted of two counts of breach of undertaking or recognizance and received a sentence of seven days time served.

[10] Subsequent to the incident of October 3, 2007, when this offender violently struck the victim, there was a delay in the police investigation for several months. Mr. Derkson was then formally charged and elected trial by judge and jury. Following his conviction by his jury, the Court granted his request for an adjournment of the sentencing hearing so that a pre-sentence report might be prepared. These facts explain, in part, why it is only today, two years after the assault, that there is a final disposition of this matter.

[11] Mr. Derkson's counsel has provided the Court with letters of reference on behalf of his client. In the main, these are from individuals who have known the offender upon his return to a small community in British Columbia, that is, after the October 2007 incident here in Whitehorse, a community where the offender lived with his father and

attended high school in order to complete his Grade 12 education requirements. These individuals speak to Clinton Derkson's efforts to change his life, to become a better person, to providing help to younger students and to that community. These efforts, post-offence, are to Mr. Derkson's credit and I take this into account in the determination of an appropriate sentence. These efforts act to mitigate the sentence that would otherwise be imposed.

[12] The comments in the letters of reference, however, are at odds with some of the contents of the pre-sentence report, and in particular with some of the statements made by Clinton Derkson in his interviews with the author of the pre-sentence report. These interviews took place post-verdict, i.e. in the last few months; in other words, subsequent to the observations made by the authors of the letters of reference. In his statements to the Probation Officer who authored the pre-sentence report, the offender does not appear to have accepted the jury's verdict. In those statements, he displays a rather cavalier attitude towards the justice system and the sentencing process. He appears to blame the Crown witness for his current predicament rather than accepting personal responsibility for his own behaviour. More importantly, he does not appear to have any empathy for the victim of his assault and is insensitive to the grievous harm he inflicted on the victim.

[13] Mr. Derkson today pleads with the Court to not send him to jail but rather to allow him to serve his sentence in the community pursuant to the conditional sentence provisions of s. 742.1 of the *Criminal Code*, i.e. the version of that section that was in force at the time of the commission of this offence in October 2007. Upon careful consideration, I am unable to accede to that request. I look to the criteria for a

conditional sentence as set out in s. 742.1 of the *Criminal Code* and as discussed in *R.* v. *Proulx*, [2000] S.C.J. No. 61, and other cases.

[14] On the facts and circumstances of this offence and of this offender, I am not satisfied that to allow Clinton Derkson to serve his sentence in the community would not endanger the safety of the community. It is the Court's view that he has had, and probably still has, anger management issues. It is the Court's view that this offender does not yet see the seriousness of his conduct, nor of the harm that he has done. To acquiesce to Mr. Derkson's request that he serve his sentence in the community would be to give him the wrong message in the sense of how he is to conduct himself vis-à-vis other members of society with whom he comes into conflict.

[15] In addition, in the particular circumstances of this offence and of this offender, I am not satisfied that the imposition of a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

[16] One of the objectives of sentencing is denunciation of unlawful conduct. In my view, the appalling conduct of Mr. Derkson as a bar bouncer or security person towards an extremely intoxicated patron of that bar, resulting in serious injuries to that patron, requires the Court to denounce such conduct in a meaningful way, and a conditional sentence simply does not do that. For the same reason, in the particular circumstances of this offender and this offence, a conditional sentence would not act to deter this offender or other persons, bar bouncers or otherwise, from committing a similar offence. The Court's sentence must make it clear that bar patrons, even if extremely intoxicated and extremely obnoxious, are entitled to the protection of the law.

[17] Another of the objectives of the sentencing process is to promote in the offender before the Court a sense of responsibility for his unlawful conduct and to promote in him an acknowledgement of the harm he has done to his victim. In my view, a custodial sentence is necessary to achieve this objective in the case of this offender and this offence. I note the fact of Mr. Derkson's two recent convictions for breaches of court process and also I note his comments to the PSR author about the appropriateness of the Court imposing those conditions on him. These things do not bode well for the prospects of any supervisory community sentence that might be imposed on him.

[18] Finally, I will just mention that to impose a conditional sentence in this case would offend the principle of proportionality, i.e. a fit and proper sentence is one that is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[19] In the end result, taking into consideration all of the circumstances, a conditional sentence is simply not on and a meaningful term of actual imprisonment is required. It is the Court's hope and expectation that while serving his term of imprisonment Mr. Derkson will reflect on his own behaviour that has led to his incarceration, that he will not deflect responsibility for his predicament to other people or to the justice system, and that he will, instead, focus on what he himself can do on his release to become the type of person that is described in the letters of reference that have been provided to the Court.

[20] Please stand, Mr. Derkson. Clinton Robert Derkson, for the crime that you have committed, aggravated assault, contrary to s. 268 of the *Criminal Code*, it is the

sentence of this Court that you be imprisoned for a period of 15 months.

[21] In addition, there will be a firearms order under s. 109 of the *Criminal Code* for a period of ten years.

[22] Further, the DNA order sought by the Crown is granted and, in the circumstances, there will be no victim fine surcharge.

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RICHARD J.