

Citation: *R. v. Kendi*, 2007 YKTC 27

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Docket: T.C. 06-00689
06-06479
06-00332
Registry: Whitehorse
Heard: Old Crow

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

RICHARD KENDI

Appearances:
Jennifer Grandy
David Christie

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Richard Kendi is before me in relation to two charges, one of assault causing bodily harm on his spouse, and one for breaching his release conditions by failing to abstain as required. The first of the two offences arises on the 19th of July 2006, at which point, Ms. Abel was at a friend's home; the two were drinking. Mr. Kendi arrived, he was not let in the home. He began banging and kicking at the door. Ultimately, Ms. Abel opened the door, at which point, he began fighting with her. He dragged her out of the home by her hair, and then he began stomping on her

head at least five times. Ms. Tizya tried to intervene, and he began kicking at her when she attempted to help Ms. Abel. There were five youth nearby who noted what was happening and yelled for him to stop, at which point, he let go of Ms. Abel and gave chase to the youth.

[2] The RCMP were contacted. When he saw them arriving he hid, but was ultimately located by them and noted to be extremely intoxicated. Ms. Abel suffered injuries including significant bruising and swelling to her face and bruising to her arm. When arrested, Mr. Kendi made the comment, essentially, that they do that to themselves, referring, I take it, to the women, essentially, having asked for what happened to them. He was released on an undertaking with conditions, including one requiring him to abstain absolutely from the possession or consumption of alcohol.

[3] On the 19th of January 2007, he was found by the police to be in a highly intoxicated state, with a bloody face. He was incoherent. He became aggressive when taken into the police vehicle, including kicking and banging his head. He was verbally abusive to the officers. He continued to be so in the detachment, including pushing one of the officers and resisting them. At one point, he bolted when his cuffs were removed. Ultimately, a tazer had to be used to subdue him. He has no recollection, I take it, Mr. Christie, to either event?

[4] MR. CHRISTIE: No.

[5] THE COURT: Due to his state of intoxication.

[6] Mr. Kendi is still a relatively young man. He is a 33-year-old member of Vuntut Gwitchin First Nation. He has a troubled history in that he was raised in an abusive and violent home. He was exposed at an extremely early age to the abuse of substances such as alcohol. The indication in the report is that his first use of alcohol came at the age of nine. It is clear from the submissions I have heard today and the record before me, that from that point on that it has represented as a significant problem in his life. He comes to court with a significant related criminal record, starting as a young youth. There are numerous violent offences on it, and numerous offences for failing to abide by conditions. Of particular importance to me, this is his fourth assault on Ms. Abel. So it is his fourth spousal on the same complainant.

[7] On the positive side, Mr. Kendi has entered a guilty plea. He has good employment history and comes highly recommended by his employer, the First Nation, for whom he does construction work. He and Ms. Abel share two children, two boys aged 13 and nine. He is described as a responsible father who is voluntarily paying support for them. It is clear to me that when he is before the Court and sober, that he feels strongly about meeting his obligations to his family. He did apologize in court today and indicated that he feels shame for what he has done. He has indicated an interest in wanting to change his life.

[8] The issue before me, essentially, comes down to not whether or not there ought to be a jail term or how that jail term ought to be served. The Crown is suggesting that there ought to be a six to nine month jail sentence, followed by a 12 to 18 month probation order and a 30 day consecutive jail term on the breach. They take the

position that in the circumstances before me today, a conditional is simply not appropriate.

[9] Defence is suggesting a somewhat longer sentence of eight to 12 months plus probation, but is seeking that that be served conditionally within the community on strict conditions, which would include house arrest and treatment types of conditions.

[10] Mr. Kendi has, today at least, indicated an interest in seeking treatment. I should say first, I am satisfied there needs to be a jail sentence here. Mr. Kendi has an absolutely terrible record. As I pointed out, the thing that causes me the greatest concern is that this is his fourth assault on his spouse. Notwithstanding treatment that he has had in between in relation to that kind of behaviour, he continues to return both to drinking and to violence on his spouse, which is something that I have grave concerns about.

[11] So I am satisfied that there needs to be a jail sentence. I am satisfied that the jail sentence would fall within the range in which I can grant a conditional sentence. The question for me is whether the pre-conditions of a conditional sentence are met above and beyond the length of the sentence. The *Criminal Code* requires that I satisfy myself that allowing Mr. Kendi to serve the sentence in the community would not endanger the safety of the community and that it would be consistent with the fundamental purposes of sentencing set out in s. 718.

[12] When I view all of the circumstances before me, I must say that, on balance, I am not satisfied of either of those two things. While Mr. Kendi is before me today suggesting that he is interested in treatment, he has also had several months to avail

himself of treatment opportunities and has specifically chosen not to do that. He was given an opportunity to put over his disposition to explore the domestic violence treatment option. He met with the program and he specifically indicated to them that he was not prepared to enter into the group portion of the programming.

[13] He has also made it very clear in his pre-sentence report and in his discussions with his bail supervisor that he is not interested in leaving the community for treatment, although he appears to recognize today that if he is actually going to access treatment, that is going to be necessary. He has indicated today that he is prepared to do so.

[14] With respect to alcohol, which is a significant issue, Mr. Kendi indicates throughout that he is, essentially, -- I do not know if not prepared is the right word; I think the question is whether is he able to address the alcohol issue. I think on some level he appears to recognize that he is not capable, at this point, of abstaining. The majority of his history is violent and it is violence that is alcohol related. When I view the pre-conditions of a conditional sentence, I do not know how I can be satisfied that the community would not be endangered unless I had some degree of certainty that he was going to be compliant with conditions.

[15] When I consider his own stated inability to abstain from alcohol, and the way that he behaves when he does use; when I consider his extensive and lengthy history of breaching court orders, notwithstanding that he has had one prior conditional sentence that he successfully completed, I am left with little to no comfort that he is going to be capable of complying with conditions, no matter how strict.

[16] I am also not fully satisfied that a conditional sentence would be consistent with the fundamental principles. This is, as I indicated, and I have stressed several times, his fourth spousal assault. In my view, deterrence, both specific and general, has to be the overriding factor in these circumstances. While the courts have said before that a conditional sentence can meet deterrent requirements, I am not satisfied, in this case, that it would, not with this history. If it was his first, maybe even his second, then perhaps I think deterrence could be met. This is his fourth, and that does not include all of the violent offences on his record.

[17] So ultimately, what I come down to is while I understand, Mr. Kendi, that you recognize you need to change your life, what I am concerned about, at this point, is your level of motivation to do so, because you have not availed yourself of the opportunities that you did have in between entering your plea and sentencing. I am also significantly concerned about your ability to do so. I have no doubt that you need to do so, or it is simply going to be a matter of you returning back before the Court over and over and over again. I do not think that is the life you want for yourself and I do not think it is the life that you want for your children. At this point, as much as you are expressing a desire to change to me, I am not satisfied that the test I have to apply has been met.

[18] In all of the circumstances, I am of the view that the only response in this particular case is a custodial term. I am also of the view that it needs to be a lengthy one in light your history and your record. So the sentence is going to be as follows.

[19] With respect to the assault causing bodily harm, and bearing in mind, again, that this is his fourth spousal assault, there is going to be a sentence of nine months in jail.

That is going to be followed by a period of 18 months probation. The probation, hopefully, is intended to support you in getting some treatment and help because you desperately need it. I will return with the conditions of that order in moment.

[20] With respect to the breach, there will be a sentence of 30 days consecutive to any other sentence being served.

[21] I am going to waive the victim fine surcharges in the circumstances. Any money he presently has could go to his children, and bearing in mind that he is not going to be bringing any income in for the next little bit, I do not feel it is appropriate to burden him with a financial responsibility.

[22] The 18 month probation order is going to have the following terms and conditions, Mr. Kendi, that you:

1. Keep the peace and be of good behaviour.
2. Appear before the Court when required to do so by the Court.
3. Notify the probation officer in advance of any change of name or address and promptly notify the probation officer of any of employment or occupation.
4. Report to a probation officer immediately upon your release from custody, and thereafter when and in the manner directed by the probation officer.
5. Reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer.

6. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner.
7. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol.
8. Take such alcohol and drug assessment, counselling or programming as directed by your probation officer.
9. Report to the family violence prevention unit to be assessed and attend and complete the spousal abuse program as directed by your probation officer.
10. Take such other assessment, counselling and programming as directed by your probation officer.
11. Have no contact directly or indirectly or communication in any way with Barbara Abel when you are under the influence of alcohol.

[23] I am going to limit the no contact to that because she appears not to want anything beyond that, but I am absolutely certain that the two of them should not be anywhere near each other when Mr. Kendi has been consuming alcohol.

[24] You are also going to be required to provide your probation officer with consents to release information with regard to your participation in any programming or counselling or other activities that you have been directed to do pursuant to this probation order.

[25] Counsel, any concerns, comments or submissions that relate to conditions?

[26] MS. GRANDY: No.

[27] THE COURT: Okay, I think those are sufficient in the circumstances. I think the only thing that remains are the outstanding charges.

[28] MS. GRANDY: If the other counts could be marked as withdrawn, please?

[29] THE COURT: Okay, thank you.

[30] MS. GRANDY: Your Honour, could I just ask for clarity, is the probation order to follow the s. 267?

[31] THE COURT: Yes.

[32] MS. GRANDY: Thank you.

[33] THE COURT: Okay, Mr. Kendi, I know it is not what you wanted to hear today, but, in my view, with your history, there really is no other choice. I think you want to spend the next few months seriously considering about where you want to go with the rest of your life. There are services out there that can help you. I think you want to work, when you get to probation, with them very closely to access those resources. I wish you good luck with it, but you have got a hard road ahead of you.

[34] MR. CHRISTIE: Thank you, Your Honour.

[35] THE COURT: Thank you.

