Citation: *R.* v. *Kerluke*, 2010 YKTC 35

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Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

BEVERLY ANN KERLUKE

Appearances:
Kevin Komosky — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Beverly Ann Kerluke was convicted after trial on a charge of assault with a weapon and subsequently entered guilty pleas to three charges of breach of recognizance. The first breach was failing to report to her bail supervisor. The remaining two breaches involved Ms. Kerluke with the consumption of alcohol, contrary to an abstinence clause in her recognizance. It is to be noted that on both occasions the police had been called to deal with disturbances of various degrees; so the breaches went beyond the mere consumption of alcohol.

[2] The main charge, of course, is the charge of assault with a weapon. In that case the victim was Ms. Kerluke's husband, who suffered a serious stab wound to his abdomen, as well as other much more minor cuts. I think it is common ground that most of Ms. Kerluke's difficulties with the law are a result of her longstanding alcohol addiction.

[3] With respect to the sentence to be imposed, the parties could not be much further apart. The Crown seeks an effective sentence of 15 months in addition to three months of pre-trial custody, which the Crown concedes should be grossed up at the usual rate of 1.5 to one. The defence contends for a conditional discharge.

[4] Now, as I have already alluded to, the assault was a serious one because it involved a weapon and because that weapon was used to inflict quite a serious injury to the victim. Indeed, I think it could be said that had proper medical evidence been called, Ms. Kerluke could have found herself convicted of aggravated assault. I mention that only to indicate that the injury was, even to a layman's eye, a serious one and required prompt and extensive medical intervention. So the offence is a serious offence.

[5] On the other side of the coin, there are a number of factors to be considered. One of the most astonishing, perhaps, in light of the seriousness of the offence, is that Ms. Kerluke has no prior criminal history of any kind. In addition, the offence must be understood, I think, in the context in which it occurred, and that is that it occurred during the course of the breakdown of what had been clearly a somewhat tumultuous relationship between Ms. Kerluke and Mr. Kerluke, and it occurred in the context of an

argument or dispute in which undoubtedly there was some degree of provocation offered by the victim, as well as by Ms. Kerluke.

[6] Additional factors that have been mentioned by counsel and by the author of the pre-sentence report are that, of course, while Ms. Kerluke has no prior record, she now stands convicted of four offences. It was suggested by Mr. Campbell that Ms. Kerluke had performed better than average while on bail. In my view, three breaches is not a better-than-average performance.

[7] Additionally, the pre-sentence report suggests strongly that Ms. Kerluke is having difficulty even yet in being honest with herself in regard to her current circumstances and what is needed to change them. On the other hand, the pre-sentence report also reveals that Ms. Kerluke, although she is currently unemployed, has a relatively good work history and has at various times held down jobs with a significant degree of responsibility.

[8] With respect to the sentence to be imposed, the Crown provided three cases from this jurisdiction. In my view, none of them are particularly in point of the present circumstances. In the first case, *R.* v. *Dick,* 2002 YKTC 87, the circumstances were obviously much more provocative. Mr. Dick kicked his girlfriend in the face and broke her nose. He then hit her with a cassette player, breaking her arm. He unlawfully confined her so she was unable to get treatment. Additionally, he threatened to inject her with a syringe filled with a cleaning agent. He had a prior record. He was uncooperative in preparing the pre-sentence report, failed to appear for the sentencing hearing, and so on and so on.

[9] In *R.* v. *Charlie,* 2002 YKTC 13, the case involved, really, a completely gratuitous application of violence by Mr. Charlie to a man who was simply walking along the street and the consequences of the assault were very serious and perhaps lifelong.

[10] Finally, in the case of *R.* v. *Glover,* 2003 YKTC 61, Ms. Glover slit her boyfriend's throat as he was asleep. The suggestion in the decision is that what Ms. Glover had done normally would have resulted in her being charged with murder but for the very fortuitous fact that the knife cut stopped one centimetre from the victim's jugular vein.

[11] So all of those are much more serious cases than the present and in most cases involved offenders with a prior criminal history. All that having been said, in my view, the circumstances here are such that a custodial sentence is warranted. A conditional discharge, in my view, would be contrary to the public interest.

[12] Giving full allowance for the prior circumstances of Ms. Kerluke, that is, her lack of prior criminal history and her good work record, in my view, a fit sentence with respect to the assault with a weapon charge would be one of six months. I will, however, allow 60 days credit towards a portion of the time served, leaving a remanet of four months yet to be served.

[13] With respect to the breaches, on each of those I impose a sentence of imprisonment of one day in addition to time served, which I calculate at 45 days.

[14] Following Ms. Kerluke's release from imprisonment, she will be subject to a probation order for a period of 15 months. The terms will be:

1. Keep the peace and be of good behaviour and appear before the Court when required to do so;
2. Report forthwith after release from imprisonment to an adult Probation Officer and thereafter as, when and in the manner directed;
3. Notify the Probation Officer in advance of any change of name or address and promptly notify him of any change of occupation or employment;
4. Remain within the Yukon Territory unless you have prior permission from the Probation Officer to go outside of the Yukon;
5. Reside where the Probation Officer will approve and not change that residence without the prior written permission of the Probation Officer;
6. Abstain absolutely from the possession or consumption of alcohol or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
7. Not attend at any place where alcohol is sold except a restaurant which might be incidentally licensed for the sale of alcohol with meals;
8. Take such alcohol or drug assessment, counselling or programming as directed by the Probation officer including, if directed, attendance and completion of a residential treatment program;
9. Report to the Family Violence Prevention Unit to be assessed and, if directed, to attend and complete the Spousal Abuse Program, and take

such other assessment, counselling and programming as directed by the Probation Officer;

10. Have no contact, directly or indirectly, with Landis Kerluke except with the prior permission of the Probation Officer in consultation with Victim Services and the Family Violence Prevention Unit;

11. Make reasonable efforts to find and maintain suitable employment and provide the Probation Officer with all necessary details concerning your efforts in that regard;

12. Provide the Probation Officer with consents for release of information with regard to participation in any programming, counselling, employment or educational activities you have been directed to partake of pursuant to the probation order.

[15] Given the current financial circumstances of the offender, I will waive the surcharges.

[16] Additionally, there will be an order whereby Ms. Kerluke will provide samples of bodily substances for the purpose of DNA analysis and banking.

[17] Finally, in my view, this is an appropriate case in which to make a firearms prohibition.

[18] THE CLERK: Your Honour, I think it’s mandatory because the Crown proceeded by indictment.

[19] MR. KOMOSKY: I believe that's correct. It's an indictable offence in which violence was used and the sentence -- the maximum sentence is ten years, and as such it would be a mandatory order under s. 109.

[20] THE COURT: There will be an order that the offender not possess any firearm or other items more specifically referred to in s. 109 of the *Criminal Code* for a period of ten years following her release from imprisonment and that she not possess any prohibited firearm or restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for the remainder of her life.

[21] MR. KOMOSKY: Yes, Your Honour, I would ask that the warrant of committal be endorsed with an order to have no contact with Landis Kerluke, and we would also ask that the remaining counts be withdrawn.

[22] THE COURT: Any submissions?

[23] MR. CAMPBELL: No submissions with respect to those two points that my friend just raised. I would ask the Court, just to clarify; she's receiving 60 days time served towards her assault with a weapon conviction and 45 days to cover off the three breach charges. Was it Your Honour's intention not to give her the usual one and a half times credit for her remand? That would only be 105 days here, three and a half months as opposed to four and a half months. So if that was in error, I would perhaps ask that her sentence be reduced by a further month.

[24] THE COURT: If anything turns on it, my intention was to impose sentences which reflected the gravity of the offence. To the extent that it falls short of

allowing 1.5 to one, that can be chalked up to the fact that all of the remand time was spent owing to breaches by the accused of her bail conditions.

[25] The remaining counts are withdrawn, and there will also be an order that the offender have no contact with Mr. Kerluke whilst in custody.

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FAULKNER T.C.J.