Citation: *R.* v. *Murphy,* 2014 YKTC 58

Date: 20141210
Docket: 08-01518B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

ALICIA ANNE MURPHY

Appearances:
David McWhinnie — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

REASONS FOR SENTENCING

[1] Alicia Murphy has entered guilty pleas to having committed two offences contrary to s. 145(3) of the *Criminal Code*. These charges are set out in the Information as follows:

> Count #2: On or about the 28th day of September in the year 2014 at the City of Whitehorse in the Yukon Territory, did being at large on her recognizance given to or entered into before a justice or a judge and being bound to comply with a condition of that recognizance, abstain absolutely from the possession or consumption of alcohol, without lawful excuse failed to comply with that condition, contrary to Section 145(3) of the Criminal Code.
>
> Count #3: On or about the 28th day of September in the year 2014 at the City of Whitehorse in the Yukon Territory, did being at large on her recognizance given to or entered into before a justice or a judge and being bound to comply with a condition of that

> recognizance, reside at the residence of Cindy Chaisson in Whitehorse, without lawful excuse failed to comply with that condition, contrary to Section 145(3) of the Criminal Code.

[2] Crown counsel has elected to proceed by Indictment on these charges.

[3] Upon agreement of counsel, and after submissions, Count #3 was amended to read that the words “reside at the residence of Cindy Chiasson in Whitehorse: be replaced by the words “remain within the residence under house arrest unless with the prior written permission of the bail supervisor”.

[4] Counsel agree that the waiving of the reading of the charges, the choice of English as language, the Crown election to proceed by Indictment, the defence election to be tried in Territorial Court, the guilty plea to Count #3, and the prior submissions of counsel would apply to the Count as amended.

[5] With these agreements by counsel, I make a finding of guilt in respect of Count #3.

Circumstances

[6] The background to and circumstances of these offences, are as follows.

[7] Ms. Murphy was convicted of second degree murder on November 17, 2009. Her conviction was overturned by the Yukon Court of Appeal on June 11, 2014 and a new trial was ordered (***R.*** v. ***Murphy***, 2014 YKCA 7).

[8] Ms. Murphy sought judicial interim release pending the commencement of the new trial. Crown counsel opposed Ms. Murphy's release, citing both secondary and tertiary ground concerns.

[9] On July 3, 2014, in ***H.M.Q.*** v. ***Murphy***, 2014 YKSC 37 (unpublished), Justice Gower of the Yukon Supreme Court ordered that Ms. Murphy be released from custody on a Recognizance as follows:

Sureties:

- Patrick James (Ms. Murphy's non-biological father) - $5,000.00 no deposit
- Joanne Murphy (Ms. Murphy's mother) - $3,000.00 no deposit
- Shawna Murphy (Ms. Murphy's sister) - $1,300.00 no deposit and
- Cindy Chiasson (Patrick James' partner) - $3,000.00 no deposit

Terms:

1. The accused shall keep the peace and be of good behaviour and appear before the court when required to do so.
2. The accused shall report within 12 hours of her release from custody, in person, to a bail supervisor or the Royal Canadian Mounted Police (RCMP), and thereafter shall report as and when directed by the bail supervisor, and in any event not less than once per week, in person.

3. The accused shall reside at the residence of Cindy Chiasson in Whitehorse and shall not change her address without first obtaining the permission of her bail supervisor.

4. When first reporting to her bail supervisor, the accused shall provide her phone number and shall not change that phone number without first advising her bail supervisor.

5. The accused shall register the number of any cell phone or portable telecommunication device with her bail supervisor.

6. The accused shall obey all rules and regulations of her residence.

7. The accused shall remain within the Yukon, unless she has the prior written permission of her bail supervisor.

8. The accused shall remain within Cindy Chiasson's residence under house arrest, unless she has the prior written permission of her bail supervisor, for such purposes as:

    - Meetings with defence counsel;
    - Visiting with one of the sureties;
    - Volunteering;
    - Employment;
    - Attending counselling;
    - Shopping;
    - Education;
    - Medical or dental needs; or

- Such other purpose as the bail supervisor may approve.

9. The accused shall present herself at the door of her residence when any peace officer or bail supervisor attends there for the purpose of determining her compliance with this order.

10. The accused shall respond personally and immediately to the phone when any peace officer or bail supervisor makes a phone call to her residence for the purpose of determining her compliance with this order.

11. The accused shall abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances, except in accordance with a prescription given to her by a qualified medical practitioner.

12. The accused shall not enter any liquor store, bar, lounge or other business premise whose primary purpose is the sale of alcohol.

13. The accused shall not possess any pipe, syringe or other drug paraphernalia.

14. The accused shall provide samples of her breath or urine, for the purposes of analysis, upon demand by a peace officer who has reason to believe that she may have failed to comply with this order.

15. The accused shall make reasonable efforts to find and maintain suitable employment and provide her bail supervisor with all necessary details concerning her efforts.

16. The accused shall have no contact directly or indirectly or communication in any way with:

- Tanya Murphy;
- Rae Lynne Gartner;
- Denise Pegg;
- Jack Ollie;
- Warren Edzerza;
- Mercy Devillers;
- Roz James;
- Lynn Johns;
- Leah Issac;
- Lenore Minet;
- Mohammed Abdullahi;
- Sally Nukon; and
- Scott James.

17. The accused shall take such alcohol, drug, psychological or other assessment, counselling and programming, as directed by her bail supervisor.

18. The accused shall provide her bail supervisor with consents to release information with regard to her participation in any

programming, counselling, employment or educational activities that she has been directed to do by her bail supervisor.

19. The accused shall not possess any weapon as defined in section 2 of the Criminal Code.

20. The accused shall not possess any knife, except for the purposes of preparing or eating food.

21. At all times when the accused is outside of her residence, she shall carry with her a copy of this recognizance as well as a copy of any written permission provided to her by her bail supervisor.

[10] Justice Gower stated the following in regard to the secondary grounds in para. 34:

> Having regard to all the circumstances, including the proposed release plan, I am satisfied by the accused that her detention is not necessary for the protection or safety of the public and that there is no substantial likelihood that she will, if released from custody, commit a criminal offence or interfere with the administration of justice. Thus, the accused has met her onus on the secondary ground.

[11] Justice Gower stated the following in regard to the tertiary grounds in para. 45:

> The Crown submits that this is an extraordinary case with a constellation of exceptional factors, and thus meets the threshold for the application of the tertiary ground. I disagree. In my view, a reasonable member of the community would not likely conclude that it is necessary to detain the accused to maintain confidence in the administration of justice, assuming that reasonable person is apprised of all the circumstances here, including the *Gladue* and *Ipeelee* factors and the proposed release plan, and that such person is also cognizant that the right to reasonable bail is necessary if the presumption of innocence is to have any meaning.

[12] On September 28, 2014, Ms. Murphy left her residence shortly after 11 p.m., contrary to the terms of the Recognizance she was bound by, and went to a residence at the Barracks in Whitehorse. Shortly before midnight, the RCMP attended at the residence after receiving a complaint that "Alicia" was intoxicated and causing a disturbance. Upon arrival, the RCMP found Ms. Murphy in an intoxicated state after having consumed alcohol. Initially when asked, Ms. Murphy provided a false name to one officer, however the second officer recognized her. While Ms. Murphy is admitting to being outside of her residence and consuming alcohol, contrary to the terms of her recognizance, she is not admitting to having caused any disturbance while at the Barracks' residence. Crown counsel is not seeking to prove that she was doing so.

[13] Ms. Murphy was arrested and has been in custody on consent remand since, a total of 74 days. Counsel agree Ms. Murphy is entitled to be credited for her time in custody at a rate of 1.5:1.

[14] Ms. Murphy's counsel, Jennifer Cunningham, subsequently brought an application to the Supreme Court seeking a conditional stay of proceedings until the Crown agrees to fund Ms. Cunningham as counsel, in what is known as a ***Rowbotham*** application (***R.*** v. ***Rowbotham***. (1988), 25 O.A.C. 321 (C.A.)), or, alternatively an order that Ms. Cunningham be appointed and funded by the Crown as Ms. Murphy's counsel of choice, in what is known as a ***Fisher*** application (***R.*** v. ***Fisher***, [1997] S.J. NO. 530 (Q.B.)).

[15] On November 21, 2014, Justice Gower, in ***R.*** v. ***Murphy***, 2014 YKSC 62, ordered a conditional stay of proceedings on the second degree murder charge, stating in para. 43:

> … Accordingly, I conclude that I am able to direct a conditional stay of proceedings on the charge of second degree murder, until the necessary funding of Ms. Cunningham is provided.

[16] Justice Gower also stated in para. 44 that, alternatively:

> … I find that this case is sufficiently unusual to justify a *Fisher* order appointing Ms. Cunningham in particular as the accused's counsel. I further direct that she be paid by the Crown…

[17] On November 27, 2014 Crown counsel filed a Notice of Appeal of Justice Gower's decision.

[18] It is agreed by both counsel that, as of the date of the sentencing proceeding before me, the conditional stay of proceedings had, in effect, become the equivalent of a stay, to the extent that Ms. Murphy was no longer facing a second degree murder charge.

Positions of Counsel

Crown

[19] Crown counsel submits that a period of three to six months custody on each charge, to be served consecutive to each other would be an appropriate disposition, less credit for time served in custody on remand.

[20] Counsel submits that, as a general proposition, given the serious nature of the underlying offence with which Ms. Murphy had been charged, a significant sanction should be imposed to maintain the public's confidence in the bail system. There is a high public expectation that the bail system be used effectively, and that breaches be enforced effectively.

[21] The crux of the Crown submission is that a breach of a condition of release on a charge as serious as murder should attract a sanction more significant than a breach of a condition of release on a less serious charge.

[22] Crown counsel also notes, as aggravating features of these breaches, that there was an element of premeditation in how Ms. Murphy chose to wait until her surety was asleep before leaving her residence, and how she provided a false name to the first RCMP officer who dealt with her.

[23] Crown counsel submits that there is little case law which appears to deal with the appropriate sentencing range for offences of this nature committed in circumstances similar to this case. He submits that his research indicates that three to six months is an appropriate range.

Defence

[24] Defence counsel submits that a sentence of 30 days should be imposed for each offence, these sentences to be served concurrent to each other. Counsel submits that the presumption of innocence and the principle of proportionality support this sentence.

[25] Given the circumstances of this offender, in particular her lack of any prior related convictions, even a thirty day sentence is already at the high end of the range.

[26] Counsel notes that Ms. Murphy was incarcerated from 2008 until her release in July, 2014. Until the date of the breaches, Ms. Murphy had been diligent in following her release conditions. She had just started working at Challenge. Her release conditions had already been relaxed due to her positive performance and there was discussion regarding easing them even more.

[27] Notwithstanding Ms. Murphy's positive performance, there was considerable stress on her, including being back in Whitehorse, meeting her children who she had only seen twice since being incarcerated in 2008 and trying to work out a co-parenting plan. Ms. Murphy was on the waiting list for Many Rivers counselling and unfortunately missed her first appointment due to being in custody on these breaches.

[28] While acknowledging that this was a dramatic slip, counsel points to her client's actions being more thoughtless and impulsive than premeditated, the relatively brief time between leaving her residence and being arrested, her guilty plea and acceptance of responsibility, her recent steps in seeking counselling while in custody on remand and her working on an integration plan for when she is released, as factors that support the sentence she submits is appropriate.

[29] A letter from the programs officer at Whitehorse Correctional Centre was provided. This letter indicates that Ms. Murphy had completed the Substance Abuse Management program while in custody, noting that she "…was an active participant attending all sessions and showed good understanding of the material".

[30] Also provided was a letter from Evann Lacosse, Clinical Counsellor for Kwanlin Dun Counselling Services. Ms. Murphy requested Ms. Lacosse's assistance in applying to the Tsow Tun Le Lum Residential Treatment Center for alcohol and drug treatment. It is Ms. Lacosse's opinion that Ms. Murphy has been thoughtful, honest and respectful throughout their sessions together, disclosing much in regard to the issues she has struggled with.

[31] Ms. Lacosse points to Ms. Murphy's experiencing emotional, physical and sexual abuse and other forms of interpersonal violence as a child and youth. She notes that members of Ms. Murphy's extended family attended residential school and he makes reference to the resultant trauma and its impact upon Ms. Murphy.

[32] Counsel points to the presence of these and other ***Gladue*** factors that are to be considered in sentencing Ms. Murphy. In an affidavit, prepared for the judicial interim release hearing before Justice Gower, as were the affidavits of Joanne Murphy and Alicia Murphy, Patrick James states that Ms. Murphy (Alicia) suffered from the gaps Mr. James had in parenting and the abuse he and his family suffered as a result of his attendance at residential school. Joanne Murphy, in her affidavit, states that her children, including Ms. Murphy, were taken into care due to her struggles with the impacts of the trauma she suffered in her life. In her own affidavit, Alicia Murphy speaks about the negative impacts of the residential school system on her father, Patrick James, and her extended family and her community. She speaks about the abuse she herself suffered and her struggles with substance abuse and addictions.

[33] Defence Counsel filed a casebook in order to illustrate a range of sentences for breaches of court orders. These cases range from a high of six months to a low of 15 days.

[34] At the high end is ***R. v. Durocher*** (1992), 131 A.R. 239 (C.A.), a case where the offender, having been charged with an assault and released on a no-contact condition, subsequently breached the no-contact condition and committed an aggravated assault against his wife. On appeal, the sentence for the aggravated assault was increased to three years and for the breach it was increased to six months consecutive. The Court stated in regard to the breach on p. 3:

> The sentence for the breach of the recognizance should be consecutive to mark the added seriousness of the accused's disregard for the order of the court forbidding him from having contact with the complainant. Having regard again to the aggravating feature of the breach represented by the relationship of trust, we are of the view that the sentence for the crime should be 6 months rather than 3 months .

[35] The remainder of the cases filed involved sentences for breaches of court orders from 15 days to three months. I note that the cases filed by defence counsel were generally dealing with sentences for breaches imposed at the same time as sentences being imposed for other substantive offences, sometimes concurrent and sometimes consecutive. They did not include any explanation for why the breach sentences were what they were. Overall, I find that these cases are not of great assistance in the particular circumstances before me, as I am sentencing Ms. Murphy for the breaches alone, independent of any other substantive offences.

[36] This said, there is a broad range of sentence in the Yukon for breach offences, generally within the range of sentences imposed in the cases that were provided. What the sentence is in any particular case takes into account a number of factors particular to the circumstances of the particular case. While a 30 day sentence is often put forward as being the "norm", in reality there is no normal sentence for a breach as the circumstances of the offence and the offender can be so variable. A breach of a probation or judicial interim release order is not the same as the commission of a s. 259 offence for driving while prohibited, which does, in general, attract a jail sentence in the 30 day range for a first offender (***R.*** v. ***Battaja***, [1990] Y.J. No. 208 (T.C.)).

[37] The crux of the issue before me is this: Does the fact that Ms. Murphy was on judicial interim release for the offence of murder when she breached the terms of her recognizance require that she be sentenced within a range higher than that normally found for breaches for less serious offences?

[38] Clearly, if an individual is released on bail for an underlying alleged offence of shoplifting, the apprehended risk of serious harm to a victim or to the community in the event of a breach would, on the surface, differ from that of an individual released on bail for an alleged offence of aggravated assault. To the extent possible, judicial officers releasing alleged offenders on judicial interim release are trying to assess risk while balancing the presumption of innocence against the potential harm that could result from a breach of the release conditions.

[39] However, the moral culpability or moral blameworthiness of the offender for breaching a bail condition can vary. Proportionality is the fundamental principle of

sentencing and must take into consideration the moral blameworthiness of the offender as well as the severity of the offence.

[40] Section 718.1 reads:

> A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.

[41] Consider a hypothetical: An accused individual is charged with break and enter into a dwelling house. The alleged facts are that the accused was consuming alcohol and at 1:00 a.m., while intoxicated, decided to commit the break and enter. The accused is released on an abstain condition with a requirement to abide by a curfew, two factors directly related to the alleged commission of the offence. The accused is subsequently arrested and charged for being intoxicated while in breach of the curfew condition of the release, and is now before the court for sentencing.

[42] In one case the accused in fact had committed the break and enter offence as charged and alleged. This offender, knowing that being intoxicated and out at 1:00 a.m. were factors in the commission of the break and enter offence, nonetheless decided to breach his bail conditions by being intoxicated and out in the early morning hours. Clearly this offender made a conscious choice to breach his release conditions and put himself in a position of being at a high risk to reoffend and thus cause harm.

[43] In the other case the accused had in fact not committed the alleged offence. He was intoxicated and out at 1:00 a.m. but it was in fact another individual who had committed the offence with which he was charged. This person, while knowingly breaching his release conditions, did not, however, therefore put himself in a position

where he was at risk of committing an offence of break and enter, having not committed one in the first place, and thus not in the position of causing harm.

[44] The moral blameworthiness of these two offenders is not the same. The first, choosing to run the risk of re-offending and causing harm, by breaching his release conditions, is more morally blameworthy than the second offender, who did not pose a risk of re-offending having not committed an offence in the first place.

[45] With respect to the moral blameworthiness in regard to ignoring court orders, the two offenders are the same, but with respect to the issue of risk they are not.

[46] An offender being sentenced for committing a breach while at the same time being sentenced for the underlying offence could therefore, depending on the circumstances, be considered to be more morally blameworthy than an individual being sentenced for a breach after having been acquitted of the underlying offence or having had the charge withdrawn or stayed.

[47] In the same vein, an offender being sentenced for a breach while the underlying offence remains outstanding with no guilty plea entered, is being sentenced while the presumption of innocence is in place. Hence, as there has been no determination that the accused has or has not committed the underlying offence, the moral blameworthiness of the offender must be assessed in light of the presumption of innocence. Thus the offender cannot be said to be as morally blameworthy as the guilty offender, in relation to the underlying offence, with respect to the issue of risk. As stated earlier, the moral blameworthiness with respect to the breach of the court order is the same, presuming similarly situated offenders.

[48] How does this apply to Ms. Murphy? In her case she is currently not facing a charge of murder, this having been conditionally stayed. Even if she were facing the charge of murder, she would still be entitled to the presumption of innocence. She is not in the same position as an offender who has been determined to be guilty of the underlying offence at the time of being sentenced for the breach.

[49] I have considered the notion that an accused individual who is released on bail conditions for a serious offence could be held to a higher standard of expectation with respect to the accused's legal and moral obligation to take steps to remain in compliance with the conditions he or she has been released on. Thus a breach could attract a more severe sanction. There is both a legal component and a public perception component to this notion.

[50] In the normal course, an individual who has breached the conditions of release on a charge as serious as murder would find themselves in a precarious, if not almost impossible, situation with respect to obtaining further release. Thus the public's trust and confidence in the bail process would not be undermined. Ms. Murphy was brought into custody and not released after her breach charges.

[51] In this unusual situation, Ms. Murphy, while the murder charge has been stayed, may yet face this murder charge again in the future. Should I therefore, sentence her to a period of custody that reflects not only this possibility, but the fact that the underlying charge at the time of the breaches was murder?

[52] Sentencing is an individualized process particular to the circumstances of the offender and the offence. Sentencing, however, occurs within a legislative scheme and

the development of the law under the legislated scheme. So, while individualized, there cannot be a randomness or arbitrariness to sentencing.

[53] In the circumstances of these offences and of Ms. Murphy, and within the framework of sentencing as legislated and developed in the common law, I am not persuaded that Ms. Murphy should receive a sentence outside of the normal range for an offender being sentenced for the first time for breaching court–ordered conditions.

[54] I find that it would be contrary to the fundamental purposes, objectives and principles of sentencing to do so. Ms. Murphy is entitled to the benefit of the presumption of innocence. In this case she is not facing a murder charge, although I cannot ignore the fact that the Crown has appealed Justice Gower's ruling and that Ms. Murphy may face this murder charge again.

[55] Ms. Murphy is 34 years old and of First Nations ancestry. She has suffered the negative impacts all too often associated with Aboriginal ancestry, in particular those associated with the residential school system. While Ms. Murphy did not attend residential school, the individual who has for all practical purposes been her father did, as did other members of her family and her community. There is both a horizontal and downstream ripple effect that extends well beyond those who actually attended residential schools and is passed down through the generations.

[56] Ms. Murphy has no prior related criminal record. She has taken significant steps to deal with her issues of substance abuse. She was able to make progress in complying with her strict release conditions until the date of these breaches. The

breaches themselves were not associated with the commission of any further substantive offence.

[57] I find that the appropriate sentence for each of these offences is 30 days custody. The step principle of increasing the sentence for a subsequent offence based upon an expectation that the offender would have been deterred from the commission of a further offence by being sentenced for an earlier offence does not apply, as these two offences occurred contemporaneous to one another and Ms. Murphy is being sentenced for them at the same time.

[58] I find, however, that it is appropriate that these sentences be served consecutively. The curfew breach was complete prior to Ms. Murphy consuming alcohol. This is a separate and distinct offence and, while in some instances concurrent sentences could be imposed, I find that this is not one of those instances.

[59] As such, Ms. Murphy is sentenced to 30 days time served for each of these offences, these sentences being consecutive to each other. I will credit her at a rate of 1.5:1 for her time in remand, therefore 20 days of her time in custody on remand will be apportioned to each of these offences.

[60] In addition I am fining Ms. Murphy $20.00 on each count with a fine surcharge of $6.00 for a total of $52.00. I will give her six months time to pay these fines and surcharges.

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COZENS T.C.J.