

Citation: *R. v. R.J.N.*, 2016 YKTC 55

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Docket: 15-11043
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Registry: Dawson City

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

REGINA

v.

R.J.N.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code*.

Appearances:
Jennifer Grandy
Kelly Labine

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] R.J.N. has entered guilty pleas with respect to three offences: common assault, sexual assault and breach of the terms of his release. Both offences of violence were spousal in nature. The facts are set out in detail in the Agreed Statement of Facts filed as exhibit 1.

[2] On March 15, 2015, L.H., R.N.'s former partner, made a report to the RCMP in B.C., where the two were then living, indicating that R.N. had assaulted her on March

13, 2015. Following a dispute, L.H. attempted to leave the residence. R.N. prevented her from leaving by grabbing her by her clothing. He then grabbed her by the hair and slammed her to the ground. He pinned her down and attempted to choke her. She was able to get away, but R.N. followed her, put his arm around her neck, brought her to the kitchen where he kicked her legs out from under her causing her to fall and hit her head on the floor. L.H. was able to run to a neighbour for assistance. R.N. was arrested and released on a Promise to Appear and an Undertaking, with conditions including that he report to a bail supervisor by 4:00 p.m. on March 16, 2015. His admission that he failed to do so forms the factual basis for the breach.

[3] When giving her statement in relation to the assault, L.H. disclosed that R.N. had sexually assaulted her the preceding spring in Dawson City, Yukon. R.N. returned home at 2:00 a.m. under the influence of alcohol and possibly drugs. He asked her to have sex with him. She told him no as she had to get up early for work. Despite her clear refusal, R.N. grabbed her by the ankles, pulled her to the end of the bed and flipped her around. He proceeded to have intercourse with her without her consent, ignoring her requests for him to stop.

[4] R.N. contacted the RCMP in Dawson City in December of 2015 after learning they were looking for him. He provided a statement admitting to the sexual assault.

[5] R.N. waived the B.C. charges to the Yukon with the intention of accepting responsibility for all matters. On consent, Crown re-elected to proceed by summary conviction. Counsel are agreed that a suspended sentence with a probationary term of 12 months is appropriate on the spousal assault and the breach. With respect to the

sexual assault, counsel are agreed that the appropriate length of sentence is 18 months to be followed by a three-year probationary term. At issue is whether, in the circumstances of both the offence and the offender, a conditional sentence order is appropriate.

[6] I have the benefit of two reports in assessing the circumstances of the offender in this case, including a comprehensive *Gladue* Report and a detailed Pre-Sentence Report. I have considered both at length.

[7] R.N. is a 34 year-old member of the Tr'ondek Hwech'in First Nation.

[8] The *Gladue* Report outlines the history of the Tr'ondek Hwech'in First Nation in the Dawson City area where R.N. has his antecedents and has spent much of his life. As the traditional territory of the Tr'ondek Hwech'in was the site of the Yukon Goldrush, the First Nation was profoundly affected by the influx of the Klondike Stampeders. This included a decision to abandon their traditional home, and establish a new settlement three kilometres upriver at Moosehide.

[9] The creation of the residential school system had an even more devastating impact on the community, with children as young as four being removed from their families to attend residential school in the Carcross area. Given the distance and expense of transport, many Tr'ondek Hwech'in children were required to remain at school year-round. As noted in the K'anacha Scrapbook Project, and quoted in the *Gladue* Report this had a devastating impact on the children, their families and their community:

Separated from their families, the vast majority of children that attended these schools experienced neglect and suffering. The impacts of sexual, mental, and physical abuse, shame, and deprecation endured at Indian Residential Schools continue to affect generations of former students (today known as Survivors), their families and communities to this day. For many students, the transition back home was very difficult. A combination of being deprived of the security, familiarity and love of their families, and [being] taught that the traditions and lifestyles of their families were “backwards”, bred insecurity and shame of their own culture. The loss of language and culture [left] many unable to communicate with parents and siblings or [being able] to partake in the traditional lifestyle. (*Gladue* Report p. 6)

[10] D.N., R.N.’s mother, points out the prevalence of abuse and neglect in the community as a result of the residential school system, noting that it “was just a normal thing because everyone was so angry inside” (*Gladue* Report p. 4).

[11] R.N., did not himself attend residential school, but there is a family history of residential school attendance which quite clearly affected his upbringing and has negatively influenced his behaviour. As is all too common, his childhood was characterized by substance abuse and violence. Indeed, R.N. appears to have been particularly affected by observing his father’s violent behaviour towards his mother, as a young child.

[12] R.N. struggled throughout school, failing two grades, as a result of an undiagnosed learning disability. He dropped out midway through grade 12. However, he went on to obtain his helicopter pilot’s licence, a significant accomplishment, which was tarnished by his father belittling his success. As a result, his employment in his chosen field was short-lived.

[13] He has, overall, a solid employment history including several years as a wildland firefighter. He has held various short-term positions with his First Nation. Most recently, he has been the caretaker for Moosehide village, with an indication that he is being groomed to take over as Supervisor. As his current position is seasonal, it was his hope to secure a position with the Fire Smart Program then move to Whitehorse to find work for the winter. His long term goals include land stewardship.

[14] R.N. began experimenting with alcohol at the age of 14, and soon developed a pattern of binge drinking similar to that of his parents. His abuse of substances has clearly affected his behaviour, with a number of his family members speaking to the difference in his disposition when under the influence. When not drinking, he is hardworking and considerate. When drinking, he has caused harm to others as is evident by the charges he faces. Indeed, R.N. has a history of difficulty in maintaining healthy relationships, which appears to have been influenced by what he observed as a child.

[15] While R.N. has a very close relationship with his mother, historically, his relationship with his father has been a very conflicted one. In addition to the impact of observing his father's violent behaviour, R.N.'s self-esteem appears to have been detrimentally affected by what he saw as his father belittling his accomplishments. He appears to have made numerous attempts to gain his father's approval, only to fall into depression and substance abuse as his efforts continually fell short.

[16] R.N.'s intimate relationships have been characterized by conflict and negatively impacted by his substance abuse. He admits to smacking a woman he was in a

relationship with before L.H., leading to the end of that relationship. The nature of his relationship with L.H. is evident in the facts of the offences for which he is being sentenced. R.N. freely admits he has had difficulty with self-control in his relationships.

[17] On a more positive note, the reports indicate that R.N. has made substantial efforts to address the behaviour that has brought him into conflict with the law. He has maintained sobriety since June 9, 2014. He attended and actively participated in the Jackson Lake Wellness Program, described in the *Gladue* Reports as a month-long intensive land and culture based program that integrates traditional First Nation and contemporary approaches to healing. R.N. was noted to be an asset to the group and a leader among participants. R.N. has also engaged in one to one counselling with Phil Gatensby and Joe Migwans, both connected with the Jackson Lake program, and with Joseph Graham of Northern Counselling and Therapeutic Services. He has spent time with elders in his community, and has become involved in volunteering his time to his community.

[18] A number of letters have been filed which speak very highly of R.N., and the efforts he has made. Roberta Joseph, Chief of the Tr'ondek Hwech'in, highlights R.N.'s potential to be a leader for the youth in the community. Dexter MacRae, Director of Human Resources & Community Training for the First Nation, speaks of his positive performance as an employee. Gary Bailie, head coach of the Kwanlin Koyotes Ski Club, notes R.N.'s dependable and enthusiastic involvement as assistant coach for the club.

[19] Letters from family, in particular, speak to changes observed in R.N.'s behaviour. All agree that there have been dramatic changes in his demeanour. He is more positive, has developed a keen interest in his culture, is motivated to address his well-being, and demonstrates a recognition of how his old behaviour impacted on others. Of particular note, he is actively working on improving his relationship with his father.

[20] It must be remembered, however, that R.N. is only one half of the equation. I am also very mindful of the fact that R.N. has been charged with serious offences of violence against his former partner, someone who should have been assured that she would be safe with him. His actions violated that trust in a profound way, on not one, but two occasions. While I do not have a Victim Impact Statement before me, L.H. has clearly expressed to the Crown her desire to have no further contact with R.N., and, I have little difficulty taking judicial notice of the devastating impacts such offences, particularly sexual offences, have on the health and well-being of the victim. As noted by His Honour Judge Lilles in *R. v. Dick*, 2013 YKTC 107, quoting from his decision in *R. v. G.W.S.*, 2004 YKTC 5:

24 ... [T]ypical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. ...

[21] R.N. himself has recognized the profound impacts of his behaviour in acknowledging to the author of the Pre-Sentence Report that his behaviour would have "affected [L.H.'s] trust and perspective toward men. It's a bad feeling to know I did that. She likely has major trust issues now."

[22] It is against this backdrop that I must determine whether a conditional sentence is appropriate. Section 742.1 of the *Criminal Code* provides that a court may order that an offender serve his or her sentence of imprisonment in the community subject to strict conditions if the appropriate sentence is less than two years and the court is satisfied that service of the sentence in the community would not endanger the community and would be consistent with the fundamental purpose and principles of sentencing.

[23] With respect to the first pre-condition, a sentence of less than two years, as Crown has re-elected to proceed summarily, the maximum sentence I may impose is 18 months, well within the range for a conditional sentence.

[24] With respect to the second pre-condition, all of the information before me supports the finding that allowing R.N. to serve his sentence in the community would not endanger the community. R.N. was subjected to a number of different risk assessment tools. I conclude from the information provided with respect to the results that R.N. is at low risk for sexual recidivism and low risk to re-offend generally. The results of the Spousal Assault Risk Assessment tool appear to be somewhat inconclusive as risk factors relating to potential victim vulnerabilities could not be assessed. However, it is noted that R.N. would be supervised as requiring a low level of intervention and supervision provided he remains connected to appropriate services to mitigate his risk factors.

[25] Overall, the Pre-Sentence Report indicates:

[H]e appears able to abide by conditions set out by the court as evidenced by several factors including his lack of a prior criminal record, his ongoing motivation to engage with a team of service providers, a relatively

consistent history of employment, and an indicated remorse for his actions and expressed desire to work to address his risk factors and better his personal situation.

[26] Furthermore, I did not take the Crown's submissions to suggest that allowing R.N. to serve his sentence in the community would endanger the community in any way. Rather, the Crown argues that a conditional sentence is not appropriate in these circumstances due to the seriousness of the offence, an argument which relates primarily to the third pre-condition, whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 through 718.2 of the *Criminal Code*.

[27] The various principles set out in these sections have very different objectives. Often, it is clear from the circumstances which principles and corresponding objectives should take priority. Such is not true in this case. Indeed, a number of the sentencing principles are at play here, some with diametrically opposed objectives, creating a tension in determining which of these principles should take priority.

[28] On the one hand, it must be acknowledged that these are extremely serious offences. The circumstances are highly disturbing, and the fact that the offences were committed against a spouse is a statutorily aggravating factor. The principles of denunciation and deterrence mandate that a strong message be sent that such behavior will not be tolerated or condoned. This is normally done through the imposition of a custodial disposition as sought by the Crown.

[29] On the other hand, the principle of rehabilitation is raised by R.N.'s full acceptance of responsibility and his considerable efforts to address his risk factors.

Furthermore, s. 718.2(e) of the *Code* must be considered in light of R.N.'s aboriginal heritage. Section 718.2(e) provides that:

(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.

[30] The combined effect of s. 718.2(e) and the principle of rehabilitation would favour the community-based disposition sought by defence counsel.

[31] Counsel have filed a number of cases in support of their respective positions.

[32] Beginning with the Crown's cases, *R. v. White*, 2008 YKSC 34, I understand to have been filed on the basis that it is well established as setting the range of sentences for sexual offences involving penile penetration in the Yukon at between 12 and 30 months, rather than for the purposes of establishing the appropriate disposition in this case. Factually it is largely distinguishable. Mr. White denied responsibility for the sexual offence, forcing the victim to testify in a trial before a judge and jury. Mr. White had a criminal record with 10 convictions, including a conviction for aggravated assault, and he had virtually no prospects for nor interest in rehabilitation.

[33] In *R. v. Rosenthal*, 2015 YKCA 1, the Crown successfully appealed a suspended sentence for sexual assault in relation to digital penetration on the basis that it departed from the established range as set out in the *White* decision. The sentence was varied to 14 months imprisonment. In its decision, the Yukon Court of Appeal noted the importance of denunciation and deterrence in cases of sexual assault, particularly in light of the prevalence of sexual assaults on sleeping victims in the Yukon, a factor, the

Court notes, which has been used as the basis for rejecting the imposition of a conditional sentence in at least one sexual assault case. It should be noted, however, that, as in the *White* case, Mr. Rosenthal was convicted after trial. There is no mention of acceptance of responsibility or efforts towards rehabilitation.

[34] In *R. v. Menicoche*, 2016 YKCA 7, the Yukon Court of Appeal reduced a sentence of 23 months to 17 months on the basis the sentencing judge ignored the appellant's prospects for rehabilitation and failed to give genuine effect to the relevant *Gladue* factors. The aboriginal offender was 27 years old when he sexually assaulted the sleeping 15-year-old complainant. The assault involved unprotected anal intercourse. Mr. Menicoche did enter a guilty plea, but not until the date of trial. He is described as having positive prospects for rehabilitation, but no mention is made of actual efforts towards rehabilitation.

[35] The defence has filed a number of cases, two of which are particularly relevant. Both are from this jurisdiction. In *Dick*, His Honour Judge Lilles imposed a conditional sentence of 16 months followed by 12 months' probation for a full intercourse sexual assault on a 16-year-old victim. The 28-year-old aboriginal offender, like R.N., had no prior criminal record, was maintaining sobriety, had family support, and was low risk to re-offend. Unlike R.N., the offender had cognitive deficits.

[36] In *R. v. Sidney*, 2007 YKTC 51, the Court imposed a conditional sentence in relation to a full intercourse sexual assault on a 25 year old complainant. The 43-year-old First Nation offender had a dated criminal record, a strong employment history, was

at low risk to re-offend, and had support in the community. However, unlike R.N., Mr. Sidney denied the assault and displayed no remorse.

[37] In addition to those cases provided by counsel, I am mindful of the comments of the Supreme Court of Canada in the decision of *R. v. Proulx*, 2000 SCC 5, in relation to the potential for a properly crafted conditional sentence to meet the objectives of denunciation and deterrence as well as rehabilitation:

22 The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspect that distinguishes the conditional sentence from probation...

[38] The Court is clear that there must be a punitive aspect to the conditions imposed to achieve the objectives of denunciation and deterrence, stressing that full house arrest should be the norm not the exception. The Court goes on to say:

105 The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison.

[39] Still, it is clear from a review of the case law that it will be the rare case in which a conditional sentence will be appropriate in a case of sexual assault given the seriousness of the offence and the devastating impact on the victim. The question is whether this is one of those exceptional cases. In my view it is.

[40] The prospects for rehabilitation in this case are not just promising, they are overwhelmingly positive. Firstly, it is notable that R.N. accepted full responsibility for his behavior at a very early stage of these proceedings. R.N. is extremely clear that he, and he alone, is responsible for his behaviour. He has made no effort to minimize his actions, nor in any way to blame his victim for his behaviour. In the *Gladue* Report it is noted that R.N. is appalled by his behaviour and is deeply troubled by the fact that it is disturbingly reminiscent of what he observed as a child. His remorse was echoed in his comments to the Court in which he said that he is anguished by his actions and their impact on L.H.

[41] However, R.N. is clearly committed to using this opportunity as the impetus for making positive change in his life and in the way in which he impacts on those around him. As he puts it, he wants to better himself, not bitter himself. He has already made significant strides towards his rehabilitation on his own initiative, displaying a keen motivation and firm commitment to change his behaviour.

[42] There is every reason to expect that R.N. will continue to be successful in his efforts. He has a close supportive family, and the support of his First Nation. More importantly, he has a surprising level of insight into his own behaviour, and, as noted by the author of the *Gladue* Report, he is disarmingly frank and honest about his personal challenges. In both the Pre-Sentence Report and the *Gladue* Report, it is evident that R.N. does not shy away from acknowledging negative aspects in his own history and behaviour, to the point of disclosing assaultive behaviour not the subject of the offences before me. This level of honesty and self-awareness bode well for his long term prospects of rehabilitation.

[43] When I consider the prospects for R.N.'s rehabilitation through the lens of s. 718.2(e), I am further persuaded that a conditional sentence is the appropriate disposition.

[44] Much has been written about the drastic overrepresentation of aboriginals in our criminal justice system and in our prisons. Pursuant to s. 718.2(e), it is incumbent on judges to explore realistic options to incarceration in an effort to address this growing crisis. In *R. v. Gladue*, (1999) 1 S.C.R. 688, the Supreme Court of Canada noted:

81 ...By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender. ...

[45] In *R. v. Ipeelee*, 2012 SCC 13, the Court said:

66 First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities. As Professors Rudin and Roach ask, "[if an innovative sentence] can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 Sask. L. Rev. 3, at p. 20).

[46] In this case, R.N.'s own efforts towards rehabilitation, in greatly reducing his risk factors and likelihood of re-offending, have created a situation in which it is possible to

give real effect to s. 781.2(e) without endangering the public. It makes little sense to incarcerate R.N., which may well be counterproductive to his ongoing rehabilitation, when the principles of denunciation and deterrence as well as rehabilitation can effectively be met through a properly crafted conditional sentence.

[47] In the result, the sentence will be as follows: With respect to the spousal assault and the breach, I will suspend the passing of sentence and place you on probation for a period of 12 months on the following terms and conditions:

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 Probation Officer in advance, of any change of name or address, and, promptly, of any change of employment or occupation;
4. Have no contact directly or indirectly or communication in any way with L.H.;
5. Do not go to any known place of residence, employment or education of L.H.;
6. Report to your Probation Officer immediately and thereafter, when required by your Probation Officer and in the manner directed by the Probation Officer;
7. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to

the satisfaction of your Probation Officer, for the following issues:
substance abuse, and spousal violence, and provide consents to
release information to your Probation Officer regarding your
participation in any program you have been directed to do pursuant to
this condition.

[48] With respect to the sexual assault, you are sentenced to a term of incarceration of 18 months, but will be entitled to serve your sentence in the community pursuant to a conditional sentence order on the following terms and conditions:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Report to your Supervisor immediately and thereafter, when required by your Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon unless you have written permission from your Supervisor;
5. Notify your Supervisor, in advance, of any change of name or address, and, promptly, of any change of employment or occupation;
6. Have no contact directly or indirectly or communication in any way with L.H.;
7. Do not go to any known place of residence, employment or education of L.H.;

8. Reside as directed by your Supervisor, abide by the rules of the residence and do not change that residence without the prior written permission of your Supervisor;
9. At all times, you are to remain inside your residence or on your property, except with the prior written permission of your Supervisor, or except for the purposes of employment including travel directly to and directly from your place of employment. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition;
10. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;
11. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
12. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, for the following issues: substance abuse, spousal violence, sexual offending, and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition;

[49] The sentence needs to address the principle of reparations as well. Given L.H.'s stated desire to have no contact with R.N., which is certainly her right, it is difficult to craft a sentence with reparations directly to her, so I have decided to include a condition that he perform community service as a means of making reparations to his community. The condition will read:

13. Perform fifty (50) hours of community service as directed by your Supervisor or such other person as your Supervisor may designate.

This community service is to be completed within the first twelve (12) months;

14. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts.

[50] The conditional sentence order will be followed by a three year probation order on the following terms and conditions:

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 Probation Officer in advance, of any change of name or address, and, promptly, of any change of employment or occupation;
4. Have no contact directly or indirectly or communication in any way with L.H.;

5. Do not go to any known place of residence, employment or education of L.H.;
6. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: substance abuse, spousal violence, sexual offending and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition.

[51] In addition, there are several ancillary orders I am required by law to impose. In my view, these orders add an additional layer of denunciation and deterrence to the overall sentence, particularly in a small community. Firstly, there will be an order requiring you to provide such samples of your blood as are necessary for DNA testing and banking. Secondly, you will comply with the provisions of the *Sex Offender Information Registration Act* for a period of 10 years. Thirdly, you will be prohibited from having any firearm, ammunition or explosive substance in your possession for a period of 10 years. Lastly, you will be required to pay a victim surcharge of \$100 on each of the three counts for a total of \$300. Time to pay will be six months.

RUDDY C.J.T.C.