Citation: *R. v. Sas*, 2018 YKTC 8

Date: 20180131
Docket: 17–00343
17–00363
17–00343A
17–00343B
17–00343C
17–00343D
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Digby

REGINA

v.

CAMERON SAS

Appearances:
Amy Porteous — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR SENTENCE

[1] DIGBY J. (Oral): Mr. Sas is before the Court for sentencing on a charge of common assault. The facts are that he threw a shoe at Ms. Clarke, his partner at the time, in the residence when small children were present.

[2] After being released with conditions restricting his contact, on September 2, 2017, he had contact as described in the facts that are part of the record. When released on September 14, 2017, he further breached his release conditions, as noted in Counts 2 and 3 on Information 1700363.

[3] The Crown and the defence agree that I can take into account facts of further contact or attempted contact pursuant to s. 725(1)(c) of the *Criminal Code*.

[4] I have before me briefs from the Crown and the defence. The defence is asking that Mr. Sas be granted a conditional discharge, being placed on probation for six months. The Crown is asking for a conviction to be entered with a period of probation. The Crown is not asking for further incarceration, as I understand it, based on the fact that Mr. Sas spent 30 days in custody.

[5] The principles of sentencing are set forth in s. 718 of the *Criminal Code*. For the benefit of those who are not familiar with those provisions, I will read them into the record. Section 718 states that:

> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[6] Among the other principles of sentencing that have to be taken into account in this case, there is s. 718.2(a)(ii): "evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner." That is relevant to the plea of guilty to the offence under s. 266 of the *Criminal Code*, i.e. assaulting Ms. Clarke by throwing and hitting her with the shoe.

[7] There is also s. 718.2(a)(iii): "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim." Although the Crown has mentioned that as applicable to this case, I do not see that as really being applicable to these particular circumstances, where the very more specific factor of him assaulting his spouse is covered by the section dealing with abusing one's spouse or partner. Subsection (a)(ii) is more primarily directed at abuse of children or someone in authority over children, such as a teacher, where they are in a position of trust.

[8] The defence has asked for a discharge under s. 730 of the *Criminal Code*. Section 730(1) states that for this particular type of offence, which has no minimum or maximum sentence:

> Where an accused . . . pleads guilty to . . . an offence . . . the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[9] The essential difference between the Crown and defence submissions is whether a discharge or a conviction is the appropriate sentence.

[10] There are leading cases which have been cited for a number of years with respect to the application of s. 730. The Crown has noted them, as has the defence. These cases are noted in *Martin's Criminal Code*, which is one of the leading texts used by practitioners of criminal law, the other being *Tremeear's Criminal Code*. The cases referenced are *R. v. Sanchez-Pino*, [1973] 2 O.R. 314 (CA), and *R. v. Fallofield,* [1973] 6 W.W.R. 472 (BCCA), which set out the basic principles.

[11] Unlike counsel who are here in court, I was actually practising law at the time when those cases were decided. At that time, a discharge was a very rare thing. Times have changed.

[12] First of all, the principles of sentencing under s. 718 — just looking quickly at the amendment dates on those — came into play in 1995, so the landscape in which s. 730 was set has changed.

[13] Also, in the 40 years that have gone by since 1973, we have restorative justice programs and we have the principles set forth in s. 718, particularly 718.2(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.

[14] There has been a shift in the application of sentencing principles from the early 1970s, which is evidenced by the principles that were set forth in *Sanchez-Pino* and *Fallofield*. And to illustrate that, from the time, two hours ago, when I found out that I was going to have the privilege of presiding in this Court this afternoon, I have looked

up some cases from various other jurisdictions — not to ignore the cases which are cited in your briefs — but to simply mention additional cases to what counsel have discussed in their briefs.

[15] There is the case of *R. v. Marsh* (2011), 317 Nfld. & P.E.I.R. 215, a decision of Gorman J., who is noted among his provincial colleagues across the country as a prolific writer. In that decision he cites a number of circumstances where discharges have been granted involving offences of violence, stated at para. 23.

[16] There are also a number of cases from the Ontario Court of Appeal by Justice Doherty and also by Justice Casey Hill, where discharges have been granted for offences of violence; discharges have been granted to people who have had previous discharges; and discharges have been granted for persons who have committed offences involving domestic violence.

[17] I make reference to those, because if one simply looks at the principles of *Sanchez-Pino* and *Fallofield*, as they were imposed in the early days, one sees a very restrictive application. The granting of discharges and the application of the principles surrounding discharges have become much more liberal as time has gone on.

[18] This is a case which involves a low-end case of domestic partner violence. It is not a situation where someone has been left with bruises or broken bones or black eyes or hair ripped out or scratches. It is also a situation where it appears that the two individuals wish to try and pick up and resume the relationship if possible — not that that is a major determinative factor, because there is the public interest to consider.

[19] With respect to Mr. Sas' position, he is a relatively young man. He does not have a criminal record. He has participated in counselling to some degree. I do have to say that the two letters that are contained in the defence brief are not terribly informative and make absolutely no prediction about how events may unfold in the future. In other words, there is no risk assessment.

[20] The Crown says the defence has not brought any evidence to show that Mr. Sas will be particularly affected by a record of criminal conviction, and that he is in the same position as any other individual who receives a record of a criminal conviction. I think that is accurate in the circumstances here. But there are many instances, probably on a daily basis, where young persons are granted discharges, either absolute or conditional, in the various provincial courts across the country where no particular harm can be seen. In other words, they do not have to demonstrate that they will lose a career. They do not have to demonstrate that they will be deported.

[21] Life is uncertain. You do not know what paths individuals will take. It may be a simple matter of Mr. Sas having to seek other employment from his current employment. Businesses expand and contract and you do not know what is going to happen.

[22] The Crown is not advancing the proposition that one's employment prospects are unaffected by a criminal record. Part of the deterrent effect of the criminal record is that you have to take responsibility and others will be aware of your shortcomings. It is very common in employment applications that people are asked if they have a criminal record. Certainly if someone was operating a small business or a store where a

potential employee had access to cash or business property, they would want to know whether that person had a record of criminal conviction. That could result in somebody without a conviction on their record getting the job.

[23] Mr. Sas' involvement with the law previously did not involve a crime of moral turpitude in the sense it was not a theft or a breach of trust or lying or fraud. It would appear that it was probably somewhat similar to this case, an inability or failure to control his emotions, i.e., his anger.

[24] With respect to the Crown comment that there is no evidence that he would not be barred from entry to the United States, it is probably correct. I doubt that he is statutorily barred. However, it is my understanding that American border authorities, through the good auspices of the Canadian government, have access to criminal records of Canadians wanting to travel to the United States. A border official still has the discretionary ability to refuse someone admittance to the United States. I suspect they probably have their own issues with domestic violence and that could be a contributing factor.

[25] Given the steps that Mr. Sas has taken in terms of getting himself counselling so that he can be a better partner and thus a better father to his two children, I take that at face value that he is sincere. He may not have been as open to counselling at the very beginning as he is now, but sometimes 30 days in jail does have a sobering effect on people, giving them time to reflect on why they are there, how long they are going to be there and the like.

[26] The more difficult aspect of determining whether or not a discharge would be granted is whether it is not contrary to the public interest. The onus is on the Crown to show that it is contrary to the public interest. The argument of the Crown here is that domestic abuse is rampant in the Yukon. I have not been presented with any figures. Figures cited in previous cases are not facts before me, but defence does not seem to take issue with that. It is a problem across the country. There is no reason to think that domestic violence issues in the Yukon should be any less than elsewhere in the country. Due to other factors, it could well be greater, so I am prepared to accept that as given in this particular circumstance.

[27] The question, of course, is whether the public interest can still be protected in consideration of the particular sentencing provisions set out in s. 718. I do not take issue with the fact that, in crimes involving violence, there has to be denunciation of unlawful conduct and deterrence of the offenders and other persons from committing offences. However, the cases which I read indicate that one has to take into consideration that someone looking at these circumstances before they lose faith in the administration of justice should know the full circumstances behind this.

[28] I am satisfied that Mr. Sas has been deterred by virtue of going through the process. Time spent in custody awaiting sentence can be considered as part of the sentence. And by that I mean the effects of incarceration on an individual can be taken into account in assessing the appropriate penalty. Thirty days in custody arising from the event where you threw a shoe at someone and hit them is not an insignificant loss of liberty.

[29] There is also the prospect of losing one's partner, and by the texts which the Crown has read in, Mr. Sas clearly has a great love and affection for Ms. Clarke.

[30] One of the effects of incarceration can be loss of employment. There is the financial impact that he lost employment, no doubt while he was incarcerated. Although I do not have any evidence of that, it seems to be something that is rather self-evident.

[31] He has had to pay extra rent, at the same time keeping up with the bills as best he could for the domestic home. So in terms of Mr. Sas, I think he has suffered consequences, be them of his own making. He brought them on himself.

[32] The options for a court are jail, conditional sentences, fines, and probation. Mr. Sas has really had a taste of most of the options, or will when I am finished today. He will have suffered incarceration. He will have suffered economic loss. He will have suffered separation from his partner and his children. He will have probation. He has undergone some counselling. I intend to put a provision for more counselling in the probation order.

[33] Will this act as a deterrent to others? Well, if others look at the whole picture of the consequences to Mr. Sas and the fact that they could suffer like consequences, it is not a particularly attractive option to someone who is sober enough to think about what they are doing.

[34] Again, I emphasize this is a low-end offence in terms of the originating offence, which was one of violence. As I said previously, many cases of this type of offence involve physical harm or choking. None of that existed in this case. People are not

perfect; they make mistakes. An individual, absent very serious offences, is not defined by that one act in their life.

[35] No doubt, the Crown will say that there has been more than one act. However, there is a connection between all of them. With respect to the breaches of his release condition, it is not uncommon that people who are charged with domestic violence try and reconcile with their partner. For those who do not have extensive involvement with the criminal law, I think there is often a failure to grasp the significance. One can make the argument that they might grasp the significance more if they knew that they were likely facing a jail sentence, and for some, that might be the case. As I pointed out repeatedly in my remarks, Mr. Sas has had a deprivation of liberty.

[36] What would be best for all concerned and in the best interest of society is that, if Ms. Clarke and Mr. Sas want to resume their relationship, it be done in a way which will enable Mr. Sas to be employed. He is not the only contributor to the family income, but perhaps given the uncertainty of Ms. Clarke's income as noted in the Pre-Sentence Report, his steady income would be an asset in the two of them raising their children and providing them with opportunities. Anything which might adversely affect his chances for employment should this relationship continue the way they say they would like it to go could have adverse impacts on Ms. Clarke and their children.

[37] Having said all that, I think this case can be differentiated on the facts and on the basis of the criminal history from those cases mentioned by the Crown, and the logic that the judges used in those cases to overturn conditional or absolute discharges and impose a period of probation.

[38] Mr. Sas, I am going to grant you conditional discharges on all of these offences.

[39] I am going to place you on a period of probation for 18 months. That period of time is longer than has been suggested by both Crown and defence because, frankly, as I mentioned, the two reports that the defence presented do not give me a great deal of depth of understanding of the counselling that you have received and the impact it has had on you.

[40] I am taking you at your word that it has had some impact, but I think the option should be there that you take further counselling and programming. I am not familiar with the parameters and guidelines of your domestic violence court, but it strikes me that you and Ms. Clarke are in a situation where your participation in that program or a program very similar to what it has to offer would be of great benefit and comfort to both of you.

[41] The conditions in the probation order are you are to:

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 court or your probation officer in advance of any change of name, address, employment, or occupation;

[42] Those are conditions which have to appear by law in every probation order. The other conditions are:

4. You are to abstain from the consumption of alcohol to the point of intoxication;

5. You are to refrain from the possession and consumption of all drugs under the *Controlled Drugs and Substance Act* which require a doctor's prescription unless you have a prescription for that drug; (There has been no suggestion that you have a drug problem, and if you do not, this should not cause you any difficulty whatsoever.)

6. You are to participate in a domestic violence and spousal/partner anger management based program as directed by your probation officer;

7. You are not to possess or acquire any firearms as defined in the *Criminal Code*;

8. You are to cease any contact or communication with Ms. Clarke if requested by her and remain a distance of a hundred feet away from her for such period of time as she requests;

9. You are to remove yourself from the family home if requested to do so by Ms. Clarke for such period of time as she requests;

10. You are to report to a probation officer within two business days and thereafter as directed and required by a probation officer.

[43] Other Informations are withdrawn by the Crown.

[44] With respect to these offences, they are all summary offences, so there will be a $400 victim surcharge.

[45] You have six months to pay.

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DIGBY T.C.J.