

Citation: *R. v. Ward*, 2009 YKTC 67

Date: 20090519
Docket: 08-00368
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

JAMES JOE WARD

Appearances:
David McWhinnie
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): James Ward is before me having entered a plea of guilty to a single count of assault causing bodily harm which occurred on the 22nd of June 2008.

[2] It appears this was a day following the headstone ceremony with respect to Mr. Ward's father, who had committed suicide the year previous. On this particular evening, Mr. Ward and a number of others were drinking, including his cousin, Trevor Dawson. It appears that Mr. Ward became angry, ostensibly about an historical incident involving a past girlfriend. He proceeded to throw Mr. Dawson to the floor and to punch him in the face a number of times, which resulted in Mr. Dawson's lip being split open, requiring a

number of stitches. He then proceeded to choke Mr. Dawson, who was able, fortunately, to break away. He ran upstairs to where his girlfriend, Ms. McGinty, was, but Mr. Ward pursued him, grabbed him again, punched and choked him until Ms. McGinty intervened. Ultimately, Mr. Dawson was able to get free and run out of the residence.

[3] It is my understanding that Mr. Ward, as a result of his consumption, has no recollection of the incidents that have been described to me.

[4] He comes before the Court with a criminal record. It is not a lengthy criminal record, but what is disturbing about it is the fact that there is a prior conviction for manslaughter on the record, which causes me concern, given the seriousness of the offence that is before me today. There are clearly some considerable concerns based on the information I have about Mr. Ward, both in terms of management of anger and also substance usage.

[5] There has been information provided to the Crown in terms of the impact of this offence on Mr. Dawson and his girlfriend, Ms. McGinty. She, it appears, was extremely frightened by what happened and continues to have some significant concerns as it relates to Mr. Ward, not surprisingly. Mr. Dawson, too, has found this to be a very, very difficult experience.

[6] I have a letter that has been filed from Mr. Dawson's mother, Mr. Ward's aunt; the two of them are cousins, which very clearly sets out the significant rift that this incident has caused within the family. It is clear to me that she is having a great deal of difficulty coming to terms with what happened, as indeed are her son and his girlfriend.

I do not in any way want to minimize the impact that this has had on the family as a whole, but Mr. Dawson in particular.

[2] On the other hand, I have before me a very positive pre-sentence report with respect to Mr. Ward. He is now 30 years of age. Are you Carcross Tagish First Nation?

[3] THE ACCUSED: Yes.

[4] THE COURT: He is a member of the Carcross Tagish First Nation and it appears that the incident that is before me today is one which occurred when Mr. Ward was having some significant difficulty coming to terms with his father's suicide. It is fair to say, based on the information I have before me, that Mr. Ward has a significant number of unresolved issues as it relates to his father.

[5] His father appeared to have raised Mr. Ward, but it was not what one would describe as a loving and supportive environment. It appears it was one in which there was a great deal of violence and abuse, including abuse of Mr. Ward himself. There was also exposure to substance abuse, all of which are factors which have in turn become issues for Mr. Ward as a teen and now as an adult.

[6] On the other hand, there are some very positive aspects to the report. Mr. Ward is a very bright young man. He did very well in school early on but then appears to have started to get in trouble, but to his credit, he ultimately completed his Grade 12, I believe while in custody. He has done work both towards a carpenter's and a plumber's apprenticeship and is currently employed on a full-time basis. He also appears to have support within the community including the support of his grandmother, who has long

been a positive influence to him. He also is in a new relationship which, for all intents and purposes, is described as a very positive and supportive one within the pre-sentence report.

[7] Also of note to me, he is a father to three young children, ages 2, 4 and 6. It appears that he has long been a single parent to those three children and there are extremely positive reports within the pre-sentence report with respect to his role as a father to those children, something it appears that he has learned the importance of, given his own lack of that kind of supportive and caring parental figure in his own upbringing. He is universally described as being a good father and someone who cares very deeply for his children.

[8] The issue for me in this particular disposition, quite frankly, is not whether or not there ought to be custody but whether or not that custody ought to be served conditionally within the community. The seriousness of the offence, particularly in light of Mr. Ward's prior record, is one which, in my mind, requires a period of custody. Whether or not that can be served conditionally within the community, as I indicated, is the primary question.

[9] What I do have is a great deal of information to suggest that Mr. Ward has taken some significant, positive steps. It appears that there is a great deal of stability in his life at this point in time. It appears that he is starting to come to terms with the unresolved issues relating to his father's suicide. I believe we are roughly at the second anniversary of his father's suicide and by all accounts he has managed to respond to it in a much more positive and appropriate manner this year than he did last year, giving

rise to the offence that is before me.

[10] He does not have an extensive history of failing to comply with court orders.

There appears to be one prior breach of a recognizance in 2002, but other than that, I have information indicating that he did very well under supervision while on parole and appears to have done well over the period of time that he has been on conditions since this offence last year.

[11] In determining whether or not a conditional sentence is appropriate I have considered whether it is in his interests, which is not a conclusion I have difficulty reaching; it certainly would be in the best interests of his children as well that he be able to continue as their primary caregiver in all of the circumstances. That is something that I am quite reluctant to disrupt, given the fact that in many ways, we are dealing with Mr. Ward before the Court for the very reason that he did not have the kinds of positive supports that he ought to have had as a child.

[12] I am also required to consider whether or not a conditional sentence would jeopardize the safety of the public and whether it is consistent with the principles of sentencing that I am required to apply.

[13] Given the information that I have in terms of his current circumstances, which appear by all accounts to be stable and positive, and given the information that I have that he has previously performed well on conditions, I am satisfied that a conditional sentence could appropriately manage any of the risk factors such that the safety of the community would not be in danger.

[14] In terms of principles of sentencing, I am satisfied that the dominant principles that need to be balanced here are deterrence and denunciation on the one hand, and rehabilitation on the other. There is a great deal of information before me that would suggest that there are some positive prospects as it relates to rehabilitation, and I am satisfied, and it has been noted in the case law, that a conditional sentence, if appropriately restrictive, can meet the principles of deterrence and denunciation.

[15] For those reasons, I am satisfied that the custodial term can be served conditionally within the community. I am, however, of the view that it needs to be somewhat longer than the range that is suggested by the Crown, firstly, because it will be a conditional sentence served within the community, and also because of the extreme seriousness of the particular offence.

[16] I had meant to indicate as well that the pre-sentence report makes it very clear to me that Mr. Ward is extremely remorseful for what happened. He appears to harbour a fair amount of guilt and shame and has taken full responsibility for his actions and appears to fully recognize and accept the negative impact that his behaviour has had on the family as a whole. He appears to be interested in healing those rifts but also appears to accept that that is something that has to happen at a pace and in a way that the victims dictate in this particular case. Those are factors which I considered as well in determining the appropriateness of a conditional sentence.

[17] I am satisfied that this sentence ought to be one of six months to be served conditionally within the community. I want to make it very clear to you, Mr. Ward, that a conditional sentence is such that it demands absolute and complete compliance with

every single condition. There is no leeway or you could find yourself in custody for the remainder of your sentence, so you need to bear that in mind. It is also a jail sentence, which means it is going to be very restrictive and it is not necessarily going to be fun. It is intended to be a jail sentence and the restrictions are intended to be punitive in nature because of the seriousness of the offence. It is seriously going to restrict your behaviour and your movement and that is something that you are going to have to accept as part of the sentence. Okay?

[18] THE ACCUSED: Yes.

[19] THE COURT: The terms and conditions of the conditional sentence are going to be as follows. The statutory terms:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;

Can he report to you today, Ms. Kitchen?

[20] TAMMY KITCHEN: Yes.

[21] THE COURT:

3. That you report to a supervisor immediately and thereafter when required by the supervisor and in the manner directed by the supervisor;
4. That you remain within the Yukon Territory unless you have written permission from your supervisor;
5. That you notify the supervisor in advance of any change of name or address, and promptly notify the supervisor of any change of employment

or occupation;

6. That you reside as approved by your supervisor and not change that residence without the prior written permission of your supervisor;
7. That you 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;

For the period of time that you are on the conditional sentence, having noted that your counsel had indicated that you are prepared to provide samples, I am also going to include:

8. That you provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;

To help you abstain:

9. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. That you take such alcohol and drug assessment, counselling and programming as directed by your supervisor;
11. That you take such psychological assessment, counselling and programming as directed by your supervisor;
12. That you take such other assessment, counselling and programming as directed by your supervisor;

13. That you make reasonable efforts to find and maintain suitable employment and provide your supervisor with all necessary details concerning your efforts;
14. That you provide your supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this conditional sentence order;

[22] There is also a suggestion of a condition to provide for the support or care of your dependents. Is there any issue with that? The condition is not one of our normal ones, but it seems to me he is doing that.

[23] MS. HILL: Yes, I've never seen it before. I don't --

[24] THE COURT: And there is no suggestion in here that he is not.

[25] MS. HILL: No.

[26] THE COURT: We will leave that out. There is required, however, a curfew condition and in this particular case I am satisfied, given the seriousness of the offence, that it needs to be a house arrest condition. That is seriously going to limit what you can do over the next six months, and it may mean that other people have to step in to assist you a little with the kids in terms of some of their activities.

15. That at all times you are to remain within your place of residence except with the prior written permission of your supervisor or except for the purposes of employment including travel directly to and directly from your

employment. I would also include transporting the children to and from daycare as an exception as well. That you present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

[27] You need to sit down today and talk with Ms. Kitchen about what kind of exceptions that you might need. She will decide what kinds of exceptions you are going to get. Make sure that unless you have express permission written down to do something other than going to and from employment or to and from the daycare, make sure that you have that permission first. You cannot ask after the fact; it is too late, they will breach you and they will take you into custody.

[28] Any other conditions as it relates to the conditional sentence? Is there anything that I have missed?

[29] MR. MCWHINNIE: It might be prudent to include a carry any written permission and produce it on demand of a peace officer, from the conditional sentence supervisor, Your Honour.

[30] THE COURT: Any issue with that?

[31] MS. HILL: No issue.

[32] THE COURT: I will add to the curfew condition then:

16. That you carry any written permission that you have been given on your person so you can then produce it to a peace officer upon demand;

[33] TAMMY KITCHEN: Can the school be added to the condition to attend daycare and school?

[34] THE COURT: For the kids?

[35] TAMMY KITCHEN: Yes.

[36] THE COURT: Okay:

... including transporting the kids to and from daycare or school.

That is fair enough, I do not want to disrupt their schedules any more than absolutely necessary.

[37] The six-month conditional sentence order is going to be followed by a probation order. That probation order is going to be for a period of 18 months. The probation order is intended to support you in your ongoing rehabilitation; so it is not intended to be punitive or restrictive in nature. The terms of it will be as follows:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you notify your probation officer in advance of any change of name or address and promptly notify the probation officer of any change of employment or occupation;
4. That you report to a probation officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the probation officer;
5. That you 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;

[38] I realize that that is something that you feel you might have under control at this point in time. I think from a public safety standpoint, for you, for your kids and for people that are around, you should not be anywhere near it. It is too big a risk factor for you. To help you with abstaining, there's going to be a condition:

6. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
7. That you take such alcohol and drug assessment, counselling or programming as directed by your probation officer;
8. That you take such psychological assessment, counselling or programming as directed by your probation officer;
9. That you take such other assessment, counselling or programming as directed by your probation officer;
10. That you make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;
11. That you provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this probation order.

[39] Those cover what were my concerns in terms of the two orders. The only questions I have relate to whether or not there ought to be, under either order, no contact provisions?

[40] MR. MCWHINNIE: I think under the conditional sentence order, at least, and perhaps under the probation order, a no-contact, except as authorized by the conditional sentence supervisor or probation order. And some courts have included the phrase, for the purpose of a reconciliation program or something of that nature; others have left it just to the probation officer not to grant it unless it's for something positive.

[41] MS. HILL: I would say that given the tone of Mr. Ward's respect for the victims I think that it's appropriate in the conditional sentence including a general exception clause. They are family and there maybe events that they may be at together but that it not be included --

[42] THE COURT: I will tell you my concern and my intention really is about allowing the victims to control the contact, not that I have a concern with respect to his trying to initiate it. He has clearly respected their wishes up to this point, but I want them to have the comfort of being able to control when they have contact, and they can do that through the conditional sentence supervisor, I think.

[43] MS. HILL: And I would suggest that it be a term with the conditional sentence but not, since the probation is 18 months long, I would suggest it not be included on that.

[44] THE COURT: Okay, this is what I am going to do. There is going to be a condition on the conditional sentence order:

17. That you have no contact, directly or indirectly, or communication in any way with Trevor Dawson or Lauren McGinty except with the prior written permission of your conditional sentence supervisor in consultation with Victims Services.

[45] For the purposes of the probation order what I am going to do is include a condition:

12. That you have no contact, directly or indirectly, or communication in any way with Trevor Dawson or Lauren McGinty if you are under the influence of alcohol.

[46] You are already on an abstain condition, you would be in breach if you were, but the important thing I think for the probation order is that you not be anywhere near them if you are under the influence, particularly not after what has happened.

[47] It is a primary designated offence for the purposes of a DNA order so I will make the order, Mr. Ward, that you provide such samples of your blood as are necessary for DNA testing and banking.

[48] A firearms prohibition is discretionary. I am advised that he is currently subject to a firearms prohibition so I would decline to make a further one at this point in time.

[49] With respect to victim fine surcharges, it would appear that he is working full time and in a position to pay so I would make the order that he pay a victim fine surcharge in the amount of \$50. How long does he need to pay that?

[50] MS. HILL: Two weeks?

[51] THE COURT: Two weeks time to pay. Actually, we will make it one month time to pay just in case there might be some logistical issues around his making the payment by virtue of his conditional sentence. I do not want there to be conflicting expectations on him. So that gives him time to work that out with the conditional sentence supervisor.

[52] Anything further?

[53] MR. MCWHINNIE: I think that completes the matter, Your Honour.

RUDDY C.J.T.C.