

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Smarch*, 2007 YKSC 43

Date: 20070718
S.C. No. 06-01506
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

GARY ADRIAN SMARCH

Before: Mr. Justice L.F.Gower

Appearances:

David McWhinnie
Nils Clarke

Counsel for Her Majesty the Queen
Counsel for Gary Smarch

REASONS FOR SENTENCE

Introduction

[1] GOWER J. [Oral]: This is the sentencing of Gary Adrian Smarch on charges of unlawful confinement and assault against A.D. on November 7, 2005. The guilty plea to the charge of unlawful confinement, contrary to s. 279(2) of the *Criminal Code*, was entered on November 7, 2006. A pre-sentence report with a psychological risk assessment was ordered at that time. Mr. Smarch originally hoped to have this matter heard before a sentencing circle in the Kwanlin Dun village. However, I am told the funding for such a process is no longer available. At the outset of this sentencing

hearing before me, Mr. Smarch entered his guilty plea to the charge of assault, contrary to s. 266 of the *Criminal Code*.

The Facts

[2] The facts, as substantially admitted by the offender, are as follows:

1. The victim, A.D., was acquainted with Mr. Smarch for about 6 months prior to the offence date and considered him a friend. She resided next door with her common-law spouse.
2. In the late evening of November 6, 2005, around midnight, A.D. entered Mr. Smarch's residence. Her expressed purpose was to seek refuge for a short period because of an argument that she had with her common-law spouse. She also said that she wanted to watch TV.
3. At some point after she arrived, she went into Mr. Smarch's bedroom, where he was laying on the bed. She asked him for some papers to roll cigarettes. Mr. Smarch grabbed A.D. and told her how beautiful she was. She perceived him as showing an interest in her physically and she told him to stop.
4. Mr. Smarch became angry and physically violent. He threw her on the bed and held her there by the neck, choking her. The victim was having difficulty breathing, but did not lose consciousness.
5. By various words and controlling conduct, Mr. Smarch kept A.D. in his residence until about 4 p.m. the following afternoon.

6. During the early morning hours, he required her to stay in the same bed with him in his bedroom, although nothing of a sexual nature occurred. He would not let her leave his residence and told her that if she tried he would get her again.
7. At one point, the victim wanted to go to the washroom and Mr. Smarch initially denied this request. He later relented, but accompanied A.D. to the washroom and refused to leave in order to allow her privacy. Eventually, A.D. persuaded Mr. Smarch to do so.
8. Mr. Smarch's home was "boarded up" in the back and A.D. perceived that the only way out was either through the front door or through a front window.
9. At various times, during Mr. Smarch's confinement of A.D. in the residence, he told her that he had killed before. He also asked her if she wanted to "wind up in the river" or "in the mountains". He threatened to put her "head in the toilet" if she tried to leave.
10. A.D. said that she was frightened for her life and safety.
11. At one point, Mr. Smarch used the washroom, which allowed A.D. to put her shoes and clothes on and to leave the residence. However, he followed her, grabbed her and threw her against a truck, causing a bruise to her cheek. Mr. Smarch then took A.D. back into his residence and warned her not to try that again or she would get it worse the next time and that "something could get broken", which A.D. understood to mean bodily harm.

12. At another point, Mr. Smarch talked with A.D. about making a trip together down south, which A.D. did not understand.

13. At various times, A.D. called out for help, but without results.

14. Eventually, A.D. did sleep on Mr. Smarch's bed, with him holding on to her to prevent her from leaving. Again, it is not alleged that anything of a sexual nature occurred at this time.

15. Later, A.D. persuaded Mr. Smarch to drive her downtown to Shoppers Drug Mart to get some things. Prior to leaving the truck to go into the store, he warned her not to try to get away or he would find her again and she would get it worse. Once inside the store, A.D. was able to leave by the side entrance, without detection or pursuit by Mr. Smarch, and eventually connected with some friends. Two days later, she made her complaint to the RCMP.

16. The police executed a warrant at Mr. Smarch's residence and found A.D.'s backpack there.

17. A.D. had various bruises on her cheek, arm and chest and neck area. The latter she said were caused by the offender punching or striking her. None of her injuries required medical attention.

[3] Mr. Smarch admitted that all of these facts were substantially correct. However, he pointed out that, from his perspective, his initial motivation was to do an "intervention" with A.D. He said through his counsel that he was aware that A.D. and her common-law spouse were in the throes of a crack cocaine addiction problem and that they had a

dysfunctional relationship. He believed that she had consumed some cocaine that evening. As her friend, he says that he was attempting to “scare her straight”. The Crown was not in a position to comment on the offender’s state of mind at the time that the offences were committed, but pointed out that there is no reference to any type of an intervention context in the victim’s statement to the RCMP.

The Offender’s Circumstances

[4] Mr. Smarch has an extensive criminal record dating from 1972 through to and including 2000, totalling some 35 convictions and one conditional discharge. According to the pre-sentence report, the offender admits that most, if not all of those offences occurred when he was intoxicated. Indeed, a number are for drinking and driving, driving while disqualified and failing to provide blood alcohol samples. There is a dated conviction for possession of a narcotic. There are some nine process-related offences. Importantly, there is a manslaughter conviction from 1979 and an assault causing bodily harm from 1986.

[5] Mr. Smarch is a 53 year-old aboriginal male. He was raised in Teslin with his family until he was about 6 years old, when he was sent to the Lower Post residential school. His family stayed in Teslin at that point and the children would come home at Christmas for approximately two weeks and then again in June for the summer holidays. Mr. Smarch remained at Lower Post until he was 14 years old and then moved to Whitehorse with his parents. He is the second oldest boy of a large family of 13 children. One of his sisters passed away in 1980 and his father died about 18 years ago. His mother, age 71, is still alive, and lives in her own home in the Kwanlin Dun village in Whitehorse, with Mr. Smarch’s disabled adult brother, Gabriel, age 52. He says that he

had a fairly stable relationship with his family and a very close relationship with his mother's side of the family.

[6] He reports that he was very traumatized by his eight years in residential school and is currently working with a support group and a lawyer to collect restitution from the federal government. This is a very emotionally-charged subject for the offender.

[7] Mr. Smarch completed Grade 9 in the mainstream school system, but left school soon after. He briefly attempted completing his GED while in a federal penitentiary in 1980, but did not finish it. In 2004, Mr. Smarch attended the Yukon College and was working towards a two-year diploma in a home support worker program, completing only one year of that program. He reports that he was unable to complete his practicum for that program because of his manslaughter conviction.

[8] Mr. Smarch has had a total of about six serious relationships with women. His first was with Darlene Etzel, who was with Mr. Smarch from the age of 16 until she died at the age of 24, as a result of a drunken fight between herself and Mr. Smarch. That was the occasion that resulted in the manslaughter conviction in 1979. He had three children with Ms. Etzel, only one of whom continues to reside in the Yukon. He is not particularly close with any of his children.

[9] After Ms. Etzel's death, Mr. Smarch had a series of relationships which usually involved alcohol abuse and violence. However, in about 1993, he met his most recent common-law spouse, Andrea Schlupp, who is a registered nurse and a steady positive influence in his life. During that relationship, Mr. Smarch turned his life around and made a number of positive changes in terms of his education and employment. Ms. Schlupp encouraged him to rediscover his cultural roots and took him to Germany on two

occasions so that he could experience her culture and background. That relationship lasted approximately 10 years, and during that time Mr. Smarch attended a number of courses in the area of substance abuse and life skills counselling. He filed a booklet of materials confirming the various courses, programs and conferences he attended, as well as related certificates of attendance, achievement and merit. Towards the end of his relationship with Ms. Schlupp in 2003, Mr. Smarch had progressed from courses focussing on his own personal healing to obtaining the skills necessary to assist others as a counsellor himself. Mr. Smarch emphasizes that he and Ms Schlupp are still friendly and often get together for family visits.

[10] Mr. Smarch has an admitted alcohol abuse problem. Although he experimented with marijuana and some psychedelic drugs several years ago, this stopped in the early 1990's. The author of the pre-sentence report conducted a Drug Abuse Screening Test on Mr. Smarch and he scored zero, indicating no problems. On the other hand, his alcohol abuse appears to have started when he was still a young man in high school and continued until 1993, when he began his relationship with Ms. Schlupp and stopped drinking.

[11] When the relationship with Ms. Schlupp came to an end in around 2003, Mr. Smarch suffered a regression. He went into a significant depression. Also around that time, he discovered that he was unable to complete the home support worker program because of his manslaughter conviction. That only added to his depression and ultimately led to him falling off the wagon and drinking for a period of four or five days.

[12] According to Mr. Smarch, that is the only time he has had an alcoholic slip since 1993. This contrasts with the assumption made by Dr. Boer, at pp. 4 and 8 of the

psychological assessment, that Mr. Smarch was using alcohol and probably drugs at the time of the current offence. While that may have been suggested in the police report, it was not alleged as a fact in the sentencing hearing before me. To the contrary, Mr. Smarch clearly indicated that there were no drugs or alcohol involved in the current offence. Indeed, this confusion may have affected Dr. Boer's overall risk assessment of Mr. Smarch, which I will return to in a moment.

[13] Further, since Mr. Smarch was arrested and released on the current charges in mid-November 2005, he has been drug and alcohol free and has not violated any of the terms of his release, with the exception of a failure to appear allegation in early January of this year.

[14] Mr. Smarch has had a number of jobs in his lifetime, but all seem to have been for very short periods of time. Prior to his relationship with Ms. Schlupp, he worked principally in the areas of forestry, renovation projects, and carpentry. However, after beginning his period of extended sobriety in mid-1993, Mr. Smarch began to take on roles and positions associated with the Kwanlin Dun justice system. From 1992 to 1997, he was a volunteer support person with the Kwanlin Dun justice committee, assisting clients through the court system, speaking on their behalf and attending circle sentencing and other court appearances as required. From 1994 to 1997, he held the position of support worker with the Kwanlin Dun community justice department. In 2000 and 2001, he worked for about one year as a community outreach worker with the Kwanlin Dun community wellness program. Throughout these years, he continued to volunteer with community members as a counsellor, support person and role-model. According to the pre-sentence report, Mr. Smarch currently describes himself as a

person with a very positive outlook and one who likes to talk to people, especially in a counselling role.

[15] A Criminogenic Risk Assessment of Mr. Smarch was performed by Dr. Boer, who used two instruments, the Psychopathic Checklist – Revised (“PSL – R”) and the Historical Clinical Risk – 20 (“HCR – 20”). According to Mr. Smarch’s score on the PSL – R, Dr. Boer placed him in the bottom of the high risk range for both general and violent re-offending. This instrument also noted that Mr. Smarch has a number of anti-social personality characteristics.

[16] The HCR – 20 instrument raised items of clinical concern, including a lack of insight, impulsivity and a history of being unresponsive to treatment. According to that instrument, Mr. Smarch’s risk is high, even if he manages to stay sober, and the risk would only escalate if he relapses into alcohol abuse.

[17] Overall, Dr. Boer stated that Mr. Smarch’s risk for future violence is high and that his risk of imminent violence to women in particular increases with alcohol and drug use. However, that opinion appears to have been based, at least in part, on the incorrect assumption that Mr. Smarch was drunk and likely using drugs at the time of the offence.

[18] Dr. Boer also appears to have failed to give Mr. Smarch appropriate credit for the significant gap in his criminal record from 1992 until 2000, when he received a conditional discharge for an offence of possession of stolen property. There was a further gap from 2000 to 2005, when the current offences were committed. Although Dr. Boer focused on the dangerous combination of alcohol abuse and violence in Mr. Smarch’s history, in fact, Mr. Smarch only has two convictions for violence prior to the current offences. The first was the manslaughter conviction some 25 years ago and

the second was an assault causing bodily harm some 19 years ago. To my mind, these long gaps his are reflective of Mr. Smarch's ability to refrain from criminal behaviour for extended periods of time and therefore should have worked to his credit on the issue of his overall risk assessment.

[19] Dr. Boer went on to express the opinion that a period of community disposition, without incarceration, would likely be an insufficient deterrent for Mr. Smarch. At p. 8, Dr. Boer said:

“A period of probation with very close supervision following incarceration, involving an Elder to provide guidance would be a good idea in terms of deterrence and rehabilitation.”

[20] The pre-sentence report, Dr. Boer's report and Mr. Smarch himself in his submissions before me, all mention his involvement with the AA program. At one point, Mr. Smarch was instrumental in organizing AA meetings within the Kwanlin Dun village in Whitehorse. Dr. Boer has suggested that Mr. Smarch would benefit from continuing involvement with an elder with whom he could meet on a regular basis and who could provide him with ongoing guidance and consultation on his sobriety. Mr. Smarch has indicated that he has such a person in mind, who would likely serve as in the position of an AA sponsor, since this named individual is an active member of the AA program and has about 30 years of sobriety.

Offender's Attitude

[21] One of the most difficult aspects of this sentencing was getting a clear understanding of Mr. Smarch's attitude towards the offence. The pre-sentence report confirms that Mr. Smarch has not seen the victim since the charges were laid. According to that report, Mr. Smarch also feels that the victim told the story she did because she

wanted to be romantic with him or alternatively to get back at him, because he wanted to be with his past girlfriend rather than the victim. The pre-sentence report also states that Mr. Smarch thinks that the victim took advantage of his generosity. Finally, the report states that Mr. Smarch did not ever show empathy towards the victim, but rather portrayed himself as a victim, largely because of his residential school background.

[22] In a similar vein, Dr. Boer noted that Mr. Smarch did not show any concern for the victim at any point in the interview and that he was doubtful as to the seriousness which Mr. Smarch gives to the current conviction. On the other hand, Dr. Boer did note the following at p. 2:

“In general, Mr. Smarch took responsibility for his offences and admitted to aspects of all three counts as listed in his file.”

[23] Mr. Smarch’s counsel submitted that the negative comments in the pre-sentence report and the risk assessment could be due in part to Mr. Smarch’s quiet demeanour, which is sometimes mistaken for a lack of concern or engagement; particularly, in this case, about the victim.

[24] As I indicated earlier, Mr. Smarch’s counsel also took some time to point out that Mr. Smarch’s motivation in acting the way he did towards the victim was to do an intervention, because he believed her to be in the throes of a crack cocaine addiction with a similarly addicted and dysfunctional boyfriend. He submitted that, as Mr. Smarch had been a friend of the victim for some time, when he found her in his home that evening, he was attempting to “scare her straight” by restraining and confining her, while the two of them had an extensive conversation over several hours about the dangers of drug use and addiction.

[25] The facts admitted by Mr. Smarch initially suggested to me that there may have been an overtone of sexual violence to the offence. In particular, when he grabbed her and told her how beautiful she was; and then, when he threw her on the bed and held her there. He would not let her leave his residence and initially prevented her from going to the washroom in privacy. He told her that he “had killed before” and also asked her if she wanted “wind up in the river” or “in the mountains”. He also threatened to put her “head in the toilet” if she tried to leave.

[26] However, Mr. Smarch also addressed the Court and attempted to explain further why he did what he did. As a result, I am left with the impression that the facts admitted by Mr. Smarch are as consistent with his explanation of attempting to do an intervention, as they are with any alternative and more incriminating explanation. To begin with, Mr. Smarch concedes that he wanted to have a closer relationship with the victim, but in the “father-daughter” sense and not in a romantic way. Thus, when he commented to the victim that she was “beautiful”, he says he was speaking in that context and also about how much at risk she might be within the drug culture. Further, his confinement of the victim on the bed and preventing her from leaving and going to the washroom, could have been Mr. Smarch’s misguided attempt to prevent her from consuming any more drugs while out of his presence. Further, the fact that he told the victim that he had “killed before”, is consistent with Mr. Smarch attempting to explain how extreme the consequences of substance abuse were for him in his own life. Similarly, the statements that she could “wind up in the river” or “in the mountains” could conceivably have been warnings to her of the potentially disastrous consequences which might befall her if she continues to abuse drugs. His statement that he wanted to make a trip down south

together with the victim is consistent with wanting to take her to some type of residential treatment program. Finally, all this must be understood in the context that Mr. Smarch was admittedly very angry with the victim because he believed that she had consumed cocaine that evening. He stated to me that he has seen many friends who have died because of alcohol and drug use and he knows first hand the pain and suffering that it can cause people.

[27] Having seen and heard Mr. Smarch explain his motivation and his feelings about the offence, I am satisfied that he has genuine remorse for his conduct towards the victim. However, let me be very clear, in no way whatsoever do I condone what Mr. Smarch did. As I pointed out to him during the sentencing hearing, his criminal behaviour, no matter what his original motivation, went way over the line and caused this young 15 year-old to be fearful for her life. Nevertheless, despite the ambiguous statements that Mr. Smarch made to the author of the pre-sentence report and Dr. Boer, I am satisfied that Mr. Smarch now understands that his actions were wrong, that they caused great pain and suffering to the victim, and that he is sorry for what he did.

Analysis

[28] The Crown's position on sentence is that, for the unlawful confinement charge, I should impose a true jail term of between 10 and 12 months, and for the assault charge, a consecutive conditional sentence of 10 to 12 months, all of which should be followed by two or more years on probation.

[29] Defence counsel agrees that I should consider a "blended" sentence, involving both true incarceration and a conditional sentence. However, the defence suggests that

the jail term and the conditional term should each be of six months duration, for a total 12 months, to be followed by a period of probation of 18 months.

[30] The defence position is very strongly influenced by my previous decision in *R. v. Joe*, 2004 YKSC 82. There, the offender was convicted following a trial. He assaulted the victim by carrying a knife, unlawfully confined her, and threatened to cause bodily harm to her. The offences occurred at Pelly Crossing at the offender's home. The offender attempted to remove the victim's pants on two occasions. She kicked and yelled at him to get out of the room both times. After that, he made a series threats to the victim, while holding various weapons, which included a bow, a rifle-styled airgun and, on one occasion, a knife. He also threatened to rape, kill and cut up the victim. About 15 such incidents occurred over the course of 30 to 60 minutes.

[31] When the victim challenged the offender and attempted to leave the room she was in, he blocked her exit from his house while holding a knife. He later stuck the point of the knife in the kitchen table between the victim's thumb and forefinger. Ultimately, the victim was able to escape the residence and to obtain assistance. The next day, the offender apologized to the victim and to her boyfriend.

[32] In that case, the offender was 33 years old, of aboriginal descent, and a life-long resident of Pelly Crossing. He had a grade 9 education and had completed two courses in carpentry, as well an elementary plumbing course. He never had full time permanent employment. At the time of sentencing, he had a serious addiction to alcohol. He took no responsibility for the offences and had shown no degree of remorse. There was evidence that the offender was in the "low / moderate" risk category of reoffending.

[33] Although my reasons for sentence did not indicate whether or not the offender had a criminal record, the pre-sentence report filed at the sentencing hearing confirmed that there was such a record, although it was dated and unrelated, consisting of a single conviction in 1995 for driving over .08. For the assault with a weapon, I imposed a jail term of six months. For the unlawful confinement, I imposed a consecutive conditional sentence of six months and for the uttering threats offence, I suspended the offender's sentence and placed him on probation for a period of 18 months, to follow the completion of both the jail term and the conditional sentence term.

[34] That decision was appealed by the Crown to the Yukon Court of Appeal and was upheld, subject only to a variation of one term of the probation order dealing with the submission to alcohol testing upon demand by a peace officer.

[35] I have also considered the other sentencing authorities referred to by counsel.

[36] In *R. v. Martin*, 2006 YKTC 7, Faulkner C.J.T.C. was dealing with an offender who was convicted of assault causing bodily harm and unlawful confinement. After an evening of drinking with his mother at a local bar, the offender returned home and inexplicably attacked his mother, pushing her into a chair, grabbing her glasses. He then kned his mother in the face, causing significant bleeding. When she tried to get up to attend to her wound, the offender wrapped a phone cord around her neck and proceeded to choke her with it. Eventually, the offender allowed his mother to go up to her bed in her room, but laid down in the doorway to prevent her from leaving. He also rigged up a contraption to act as an alarm system, should she try to leave the apartment. Some hours later, after the offender had fallen asleep, the victim was able to leave and call for help. She suffered associated bruising and bleeding, as well as a fractured nose,

which ultimately required surgery to repair. The offender had a substantial criminal record, but only one prior conviction for a crime of violence. The trial judge referred to the case as a “most egregious breach of trust” and noted that the guilty plea came only after the trial commenced and the mother had testified. Crown and defence counsel essentially made a joint submission on a global sentence of 16 months in jail. While Faulkner C.J.T.C. said that he would have started at a higher point, he did not depart from the submissions of counsel and imposed imprisonment of 16 months, followed by a period of probation of 18 months.

[37] In *R. v. King*, [1993] Y.J. No. 146, upheld in [1993] Y.J. No. 241, the intoxicated offender confined his wife and two children to a bedroom over the space of about one hour, where he threatened to kill them. After he pretended to stab himself, his family fled. The incident occurred after the offender and his wife had separated and after he found out she was entering into a new relationship. He had no previous convictions. The offender pled guilty to charges of possession of a knife for a dangerous purpose and unlawful confinement. The sentence of two years less a day, followed by probation for two years, was upheld by the Yukon Court of Appeal, which agreed with the trial judge that general deterrence for crimes of such violence was a paramount consideration.

[38] In *R. v. Morris*, 2004 BCCA 305, the offender pled guilty to assaulting and unlawfully confining his common-law wife, as well as threatening and pointing a firearm at her male friend. The offender was a person of aboriginal descent who had a dated criminal record for a single firearms offence and two common assaults. He was noted to have limited insight into his problems and a lack of sympathy for his victims. He was considered to be at a high risk for future spousal violence. The offender had located his

common-law wife and a male friend sleeping in the wife's vehicle. He forced the friend out of the vehicle, cocked the action of a rifle, pointed it directly at the male's head and threatened to kill him. As the friend ran away, the offender threatened to kill his common-law wife. He eventually grabbed her from her car, threw her to the ground and began hitting her. He then forced her into his truck and drove to a nearby gravel pit, where the offender forced the victim out of the truck again and began punching and kicking her all over her body. At one point, she agreed to have sexual intercourse with him if he would stop beating her. After the sexual intercourse, the offender continued to assault her for a total period of about two hours. The victim spent three days in the hospital recovering from her injuries and eight months later she continued to suffer ongoing difficulties, such as occasional blurring of her vision. The sentencing judge suspended sentence on all counts and imposed a probation order for two years. The British Columbia Court of Appeal overturned that decision and imposed a custodial term of 12 months, to be followed by probation for two years, plus a firearms prohibition.

[39] At para. 54 of that decision there is a discussion by the British Columbia Court of Appeal of the principle of sentencing under s. 718.2(e) of the *Criminal Code*, which requires the Court to pay particular attention to the circumstances of aboriginal offenders when considering all available sanctions other than imprisonment. There is also a reference there to the Supreme Court of Canada decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Wells*, [2000] 1 S.C.R. 207. The Court of Appeal quoted Chief Justice Lamer, at para. 80 of the *Gladue* decision, as follows:

“As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or case-by-case) basis: For this offence, committed by this offender, harming this victim, in

this community, what is the appropriate sanction under the Criminal Code?”

[40] Later, at para. 55 of *Morris*, Mr. Justice Iacobucci in *Wells* was also quoted:

“As held in *Gladue*, at para. 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.”

[41] The Court of Appeal in *Morris* then went on to say, at para. 56:

“...The fundamental principle of sentencing requires, for aboriginals and others alike, that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1”

[42] I find that the facts in the cases of *Martin*, *King*, and *Morris* are all significantly more serious than the case at bar. While the overall length of the confinement by the offender here was significant, totalling about 16 hours, the violence used was relatively minor and none of the victim’s injuries required medical attention. Further, I am satisfied that Mr. Smarch’s original motivation was to do an intervention with the victim in an attempt to dissuade her from continuing to abuse drugs. While his conduct clearly crossed the line from innocent to criminal, involving the use of force in circumstances which caused significant trauma to the victim, it was not the type of violence seen in the other cases I referred to, which variously involved brutal, protracted and premeditated actions.

[43] That leaves me to compare the case at bar with that of *R. v. Joe*, cited above. In both cases, the offenders are aboriginal persons with limited education and serious addictions to alcohol. While aspects of Mr. Joe’s conduct were arguably more serious

than those of Mr. Smarch, the latter nevertheless punched and struck the victim, held her down on the bed by her neck and threw her against his truck. On the other hand, Mr. Joe showed no responsibility for his offences and no degree of remorse. That is contrasted with Mr. Smarch, who pled guilty to the charges, has accepted responsibility for his conduct and has shown remorse.

[44] Mr. Joe had a dated and unrelated criminal record. Mr. Smarch, on the other hand, has a very extensive and significant criminal record, including convictions for manslaughter and assault causing bodily harm. On the other hand, that record is now quite dated and includes significant crime-free gaps between 1992 and 2000, and again between 2000 and 2005. In addition, Mr. Smarch has a significant and creditable history of having turned his life around from crime and substance abuse in the early 1990's to becoming a skilled, contributing and valued member of the Kwanlin Dun community, serving in the roles of mentor, justice worker, community support worker and counsellor.

[45] In all of the circumstances, I agree with defence counsel that the case at bar and that of *R. v. Joe*, are generally comparable. Pursuant to s. 718.2(b), "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". While there are differences between the two cases, they tend to balance each other out and I am satisfied that the overall sentence for Mr. Smarch should be similar to that of Mr. Joe.

[46] As for Mr. Smarch's aboriginal background, there is evidence in the pre-sentence report that his experience in residential school has left him very traumatized. That was corroborated by the statement of his mother, Sophie Smarch, at the sentencing hearing.

I am satisfied that Mr. Smarch's residential school experience was likely a contributing factor to his alcoholism, and less directly, to the current offences.

[47] For offences of this nature, I agree with the Crown that the principles of deterrence and denunciation are paramount. I further agree with the common position of both counsel that this is an appropriate case for a blended sentence. An initial period of incarceration will serve to satisfy the principles of deterrence and denunciation, and a consecutive conditional term of imprisonment, while continuing to deter and denounce Mr. Smarch's conduct, will also facilitate his rehabilitation. Coupled with an appropriate period of probation, such a blended sentence will satisfy the purpose and principles of sentencing in ss. 718 through 718.2 of the *Criminal Code*, in particular s. 718.2(e).

[48] Mr. Smarch, please stand. For the offence of unlawful confining the victim for about 16 hours, contrary to s. 279.2 of the *Criminal Code*, I impose a jail sentence of 8 months. For the offence of assault, contrary to s. 266 of the *Criminal Code*, I impose a consecutive sentence of 6 months imprisonment, to be served conditionally in the community, pursuant to s. 742.1 of the *Criminal Code*. Following the completion of the conditional sentence, I place you on a period of probation of two years, the focus of which will be to ensure that you stay sober and pursue a healthy and productive lifestyle.

[49] The terms of the conditional sentence will be as follows:

- (1) You will keep the peace and be of good behaviour and appear before the Court when required to do so.
- (2) You will report to a sentence supervisor within two working days after your release from actual confinement and then as required by the supervisor and as directed by the supervisor.
- (3) You will remain within the jurisdiction of the Court unless written permission to go outside the jurisdiction is obtained from your supervisor.

- (4) You will notify the supervisor in advance of any change of name, address or employment.
- (5) You will take such psychological assessment, counselling, programming and treatment as and when directed by the supervisor.
- (6) You will take such other assessment, counselling, programming and treatment as directed by your supervisor.
- (7) You will identify a particular counsellor, elder or AA sponsor to your supervisor and meet with that person as directed by your supervisor.
- (8) You will take such steps towards upgrading your education and life skills as directed by your supervisor.
- (9) You will take such alcohol counselling, assessment, programming and treatment, including residential alcohol treatment programs, as directed by your supervisor, and abide by the rules of any alcohol treatment residence.
- (10) You will abstain absolutely from the possession, consumption and purchase of alcohol, and submit to a breathalyzer or urinalysis or bodily fluids or blood test, upon demand by a peace officer or your sentence supervisor, if they have reason to believe that you have failed to comply with his condition.
- (11) You will have no contact directly or indirectly with A.D. without prior written permission from your supervisor, and only for the purpose of apologizing or reconciling with A.D.
- (12) You will make reasonable efforts to find and maintain suitable employment and provide your supervisor with all necessary details concerning your efforts.
- (13) You will reside as such a place as approved by your supervisor and not change that address without prior written permission.
- (14) You will not have in your possession any firearms, knife or other weapon or ammunition or explosive substance.
- (15) You will remain within your residence for the four months of your conditional sentence, that is, specifically the first 120 days of that sentence, subject to the following exceptions only:
 - (a) to meet with your supervisor following a pre-arranged appointment;
 - (b) to attend court if required by the Court;

- (c) for religious purposes at a specific place and time in writing by your supervisor;
 - (d) for medical treatment for yourself or your immediate family;
 - (e) to shop for groceries and items required for daily living during a period of no more than two hours, twice a week, on Wednesday and on Saturday, from 2:00 p.m. to 4:00 p.m., or with written permission during any other periods allowed by your supervisor;
 - (f) to exercise every evening for one hour between 7:00 p.m. and 8:00 p.m., or at any other time authorized in writing by your supervisor;
 - (g) for the purposes of your employment, should you obtain employment, or as approved in writing by your supervisor;
 - (h) to pursue any educational studies, on the days and at the times approved in writing by your supervisor; and
 - (i) to meet with any persons such as relatives, therapists, attending AA meetings or the like, provided your supervisor has approved in advance and in writing, the nature, place, time and duration of those meetings.
- (16) You are to have at all times in your possession, the conditional sentence order and any written permission given to you by your sentence supervisor, and at the request of any peace officer, you must show both documents.
- (17) While being detained at your residence, providing you have a phone, you must answer all telephone calls that you receive so that your supervisor can check that you are inside your residence. In order for you supervisor to be able to verify that you are inside your residence, you are not to talk on the telephone for more than 15 minutes at a time.
- (18) In addition, when a supervisor comes to your residence, or an RCMP officer, during the time that you are to be inside your residence, you must allow him or her to enter in order to ensure that the conditions of your conditional sentence are being abided by.
- (19) For the last two months of your conditional sentence, the last 60-day period, you will not be subject to house arrest, as I have indicated, but you will be subject to a curfew; to be in your residence between the hours of 10:00 p.m. and 7:00 a.m. daily, unless with the prior written permission of your sentence supervisor.

[50] Following the completion of your conditional sentence, you will be placed on probation for a period of 24 months, subject to the statutory terms:

- (1) you will keep the peace and be of good behaviour and appear before the Court when required to do so;
- (2) you will notify the Court or your probation officer in advance of any change of name, address or employment;
- (3) you will report to a probation officer within two working days after the making of the probation order and then as required and directed by that probation officer; and
- (4) you will remain within the jurisdiction of the Court.

The other probation conditions are similar to those of the conditional sentence, as follows:

- (5) You will take such psychological assessment, counselling and treatment as directed and such other assessment, counselling and treatment as directed by your probation officer..
- (6) You will pursue your education and life skills as directed.
- (7) You will pursue alcohol assessment, counselling, programming and treatment, as well as residential treatment as directed.
- (8) You will abstain absolutely from the possession or consumption of alcohol and non-prescription drugs.
- (9) You will identify a particular counsellor, elder or AA sponsor to your supervisor and meet with that person as directed by your probation officer.
- (10) You will continue to have no contact directly or indirectly with A.D., without prior written permission from your probation officer, and only for the purpose of apologizing or reconciling with A.D.
- (11) You will continue to make reasonable efforts to find suitable employment.
- (12) You will reside at such place as approved by your probation officer and not change that residence without prior written permission.
- (13) You will continue to abide by a curfew, remaining within your place of residence between the hours of 11:00 p.m. and 6:00 a.m. daily, unless with the written permission of your probation officer.

[51] It is also mandatory that, under s. 109(2)(a) of the *Criminal Code*, I prohibit you from possessing any firearms, ammunition or explosives for a period of ten years.

[52] The Crown has also asked for an order under s. 487.051 for a DNA order, requiring you to provide samples for DNA analysis and registration. I will make such an order.

[53] The victim surcharge will be waived in all of the circumstances.

[54] The clerk will explain the conditional sentence and probation order to you in more detail in a few minutes. Do you have any questions?

[55] THE ACCUSED: No.

[56] THE COURT: Counsel, do you have any questions or comments?

[57] MR. CLARKE: There could be a subsequent application, but given the submissions we have heard at the original sentencing hearing and today, with respect to Mr. Smarch assisting extended family and friends in a reasonably traditional lifestyle, whether the Court would consider a lifting of the prohibition order or sustenance, pursuant to s. 113 of the firearms order?

[58] THE COURT: Well, I think you are right that you are free to make application subsequent to this hearing, but what I took from the pre-sentence report was that the *Criminal Code* speaks in terms of sustenance. I always understood that to mean with reference to the offender himself or herself. If Mr. Smarch is gathering meat for others, and I am not so sure that it neatly falls under that category, but that is an argument that you can think about and perhaps be prepared to address if you make that application in the future.

[59] MR. CLARKE: Yes, My Lord. The section, s. 113(1)(a) does contemplate the person's family as well.

[60] THE COURT: It does.

[61] MR. CLARKE: It says "or the person's family". I am not sure whether --

[62] THE COURT: I do not have a copy.

[63] MR. CLARKE: I am virtually certain that I or future counsel would not be stopped from making that application somewhere down the road.

[64] THE COURT: No, I am pretty clear on that.

[65] MR. CLARKE: Yes. Mr. Smarch and I can discuss this on his release.

[66] THE COURT: All right. Anything else?

[67] MR. CLARKE: Just to be clear, you have ordered a curfew with respect the probation order as well?

[68] THE COURT: Yes, but it is 11:00 to 6:00 so it is a bit more liberal.

[69] MR. CLARKE: No further comments.

[70] THE COURT: Again, if Mr. Smarch is doing well on this probation order, he can apply to have that looked at.

[71] MR. CLARKE: Yes.

[72] THE COURT: Mr. McWhinnie.

[73] MR. MCWHINNIE: More technical matters, My Lord, I think I understood you to say that the accused was to report to a conditional sentence supervisor within two days of the making of the order. I think given this is a blended sentence, it may be more effective to have it within two days of his release from imprisonment under Count 1 of

this particular matter, because the order is made today. He will not be able to report within two days of today's date. I think that was perhaps just a standard form order. The other issue is that with respect to the firearms prohibition, and of course that will all be subject, at a later date, to any applications we may bring. My recollection of the section is that the prohibition commences immediately and expires 10 years after his release from imprisonment. So it could be, in the Crown's submissions, worded that way so that it conforms to the section.

[74] THE COURT: All right. So the firearms prohibition will be ordered as you have submitted. The amendment to reporting to the sentence supervisor will be that Mr. Smarch is to report within two working days after his release from actual confinement. Anything more, Mr. Clarke?

[75] MR. CLARKE: No, My Lord.

[76] THE CLERK: The outstanding charges?

[77] MR. MCWHINNIE: They will be stayed at the conclusion of these proceedings.

[78] THE COURT: That is the s. 145(2) charge?

[79] MR. MCWHINNIE: Yes, and I think there is a s. 264.1 floating around that should also be stayed.

[80] THE COURT: Right, the remaining charges will be stayed.

[81] MR. CLARKE: My Lord, just for clarity, the probation order attaches to both substantive charges or does it attach -- logistically, perhaps it should attach to the sentence -- the charge to which the conditional sentence was imposed because then it would be dealt with consecutively after the conditional sentence.

[82] THE COURT: That seems to make sense. I do not know if the Crown has a view on that.

[83] MR. MCWHINNIE: To the extent that I ended up litigating the *Joe* matter, my understanding of the law is that the two sentences you have made are to be considered one period of imprisonment, one part of which is to be served in actual confinement, one part of which is to be served as a conditional sentence. Coming as they do both in the same indictment, it strikes me that it would be appropriate to have both matters reflected on the order. For clarity, the probation order could say "upon the completion of the conditional portion of your sentence, you shall be on probation for", and then proceed in the usual fashion.

[84] THE COURT: All right, so the probation order will attach to the conditional sentence for the s. 266 Count 3, is that in effect what you are asking?

[85] MR. MCWHINNIE: The way the orders are generated, My Lord, they likely should show both counts because they come from the same Information, but it should make it clear that the probation order does not engage until he has completed his conditional portion of the sentence for Count 3.

[86] THE COURT: Madam Clerk, are you clear on that?

[87] THE CLERK: Yes.

[88] THE COURT: All right, I will make that order. Anything more?

[89] MR. CLARKE: No, My Lord.

[90] MR. MCWHINNIE: No.

[91] THE COURT: Mr. Smarch?

[92] THE ACCUSED: No.

[93] THE COURT: Good luck to you Mr. Smarch. I hope you will soon be able to put this behind you and get back to being a constructive and helpful member of your community.

[94] MR. MCWHINNIE: Thank you.

[95] THE COURT: Thank you.

GOWER J.