# SUPREME COURT OF YUKON

Citation: *R. v. MacKenzie*, 2013 YKSC 64

Date: 20130705
S.C. No. 12-AP006
Registry: Whitehorse

**BETWEEN:**

**HER MAJESTY THE QUEEN**

Appellant

**AND**

**TROY ALEX MACKENZIE**

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

| | |
|---|---|
| Noel Sinclair | Counsel for the Appellant |
| Karen Wenckebach | Counsel for the Respondent |

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] Mr. Mackenzie was found guilty after a summary conviction trial on one charge of assault against his former partner and three breaches of undertakings to peace officers that prohibited contact with her, all of which took place between August 31 and September 21, 2011.

[2] Instead of convicting Mr. Mackenzie, the trial judge granted him a conditional discharge pursuant to s. 730(1) of the Criminal Code on the conditions prescribed in a

probation order of 15 months. The trial judge considered the conditional discharge to be in the best interests of the accused and not contrary to the public interest.

[3] The Crown appeals the granting of the conditional discharge and seeks a conviction and a six-month conditional sentence to be served in the community.

**FACTS**

[4] The trial judge found the evidence of the former spouse to be credible and believable. He found the evidence of Mr. Mackenzie should be rejected when it contradicted his former spouse.

[5] In his Reasons for Sentencing, *R. v. Mackenzie*, 2012 YKTC 109, the trial judge stated at paras. 2 and 3:

> [2] I found, with respect to the assault, that Mr. Mackenzie was at [his former spouse's] residence in the presence of her children at the conclusion of their relationship, and that there was a dispute and [his former spouse] wanted Mr. Mackenzie to go. At the door he grabbed her and put her in what has been called a chokehold, in that his arm was around her neck restraining her and holding her, but that there was no evidence that she, in fact, had her breathing cut off. So it was more in the nature of a restraining use of the arm than a choking and cutting off air supply. Her children were present. [His former spouse] struggled and Mr. Mackenzie let her go and left.
>
> [3] Then on the September 3rd evening into the morning of the 4th, he made a number of phone calls to her house. On September 13th, he pulled up and spoke to her at a parking lot when she was unloading groceries. On September 21st, in Superstore, he again spoke to her. All of these were breaches of the requirement that he have no contact or communication with her.

[6] The assault took place on August 31, 2011. The relationship was off at the time.

[7] The trial judge did not go into the factual details with respect to the three breaches of undertaking in his Reasons for Sentencing. Mr. Mackenzie remained on conditions without breaches until he was sentenced on October 30, 2012.

[8] With respect to the breach of the no contact order on September 4, 2011, the contact was made by repeated telephone calls, which started on September 3rd and went until 4:00-4:30 in the morning of the 4th.

[9] The September 13, 2011 breach occurred in the parking lot of the former spouse's residence while she was unloading the car in which she got a ride home from shopping. Mr. Mackenzie passed her in his vehicle, turned around and pulled up behind her. He called her names, made threats with respect to her children being taken away and then left. When she called the police, he had already called them.

[10] On September 21, 2011, while the former spouse was at the checkout at a local Superstore, Mr. Mackenzie came up and got right in front of her and started yelling things to her, calling her names, like "dirty bitch", "whore" and "skank". He said that he would wait outside to see which guy was picking her up and beat the crap out of him. Then, he waited outside in his car across from the entrance to the store. He was still there when she left in a cab. When she called the police, he had already let them know about the incident.

**The Pre-Sentence Report**

[11] The Pre-Sentence Report indicates that Mr. Mackenzie, now 37 years old, has held a variety of jobs since 1996. He has been a correctional officer at the Whitehorse Correctional Centre since 2008. He has been on medical leave since September 2010 in order to get help for his obsessive-compulsive disorder and alcohol abuse. His

employer refused to comment on his job status after sentencing. Mr. Mackenzie indicated that he is very stressed about being fired if he has a criminal record.

[12] Mr. Mackenzie stated to the Probation Officer that there was never any violence in his relationship with his former spouse and that he was not guilty of the assault charge for which he has been found guilty.

[13] The Mental Health clinician assigned to Mr. Mackenzie has been seeing him since May 2011, on matters unrelated to these family violence offences. She focusses on his obsessive-compulsive disorder and substance abuse. She has seen him a total of 15 times since May 2011 and he has cancelled 17 appointments. At the time of the Pre-Sentence Report dated October 30, 2012, she had not seen him since June 2012. Mr. Mackenzie scored in the low range on the Level of Service/Case Management Inventory appraisal of risk with a 20% probability of re-offending.

[14] The Probation Officer indicated that Mr. Mackenzie's reporting to him was problematic and he needed constant reminders concerning his reporting requirements.

[15] The Probation Officer recommended a community-based disposition but indicated that Mr. Mackenzie's denial of guilt precludes him from being accepted into any spousal abuse program offered at the Offender Supervision and Services. The spousal abuse program requires taking responsibility for one's violent actions in order to participate in the group.

[16] There was no Victim Impact Statement filed.

**The Sentence**

[17] Mr. Mackenzie has no criminal record. As indicated in the Pre-Sentence Report, Mr. Mackenzie is struggling with alcohol abuse and mental health issues. The trial judge

noted that there is no indication that alcohol is directly related to the offences for which he was convicted.

[18] Mr. Mackenzie has completed his GED to obtain the education he failed to complete in high school.

[19] The trial judge noted that it is Mr. Mackenzie's obsessive-compulsive disorder, in combination with alcohol, that has caused him to miss work and stated that he has to deal with these issues.

[20] The trial judge stated the following at paras. 9, 10 and 11 in the Reasons for Sentencing:

> [9] I note in the Pre-Sentence Report, that Mr. Mackenzie continues to deny having committed the index offence, and I mention that only to point out that that is not an aggravating factor. He is entitled to do that. It simply means that there is no mitigation available in the same sense there would be, had he accepted responsibility early on. It also precludes certain options in a probation order because certain programs require an admission of responsibility. But I want to make it clear that it is not an aggravating factor.
>
> [10] The sentences available for domestic assaults, which, of course, are statutorily aggravating for the breach of trust, range widely, and, as indicated, the positions of counsel before me today range widely. The aggravating factors certainly are the presence of the children, the breach of trust, and the fact that this took place in her own home. The mitigating factors are that, at 36, Mr. Mackenzie has no prior criminal history. He has been under conditions of recognizance or process since September of last year, and it seems that he understood finally what he was supposed to be doing and has not breached since then.
>
> [11] I note that these events took place within about a three-week period, which differentiates them from something that takes place over a long period of time, a sustained course of conduct, in a life that otherwise, although troubled, has not, other than one occasion, brought Mr. Mackenzie before the courts before. The Crown has filed their internal

> documentation, which is not disputed by Mr. Mackenzie, showing that in 1995, he received a conditional discharge with respect to an assault charge.

[21] With respect to the conditional discharge, the trial judge stated at para. 13:

> [13] The test for discharge, as set out, is that it really needs to be in the best interest of Mr. Mackenzie and not contrary to the public interest. When I consider all the principles of sentencing set out in s. 718, including the aggravating principles and the need for denunciation and deterrence in the context of domestic assaults, and when I consider the life of Mr. Mackenzie and the potential for rehabilitation, I am satisfied that a jail sentence is not necessary in this case. Possible, yes. Necessary, no. When I look at the issue of a discharge, which, more commonly, is dealt with in cases of domestic violence through, or are imposed more commonly in cases of domestic violence when an individual has built up a track record of successful completion of spousal abuse programs, such as the Domestic Violence Treatment Option Court, I nonetheless must remind myself that they are not out of the question if a person does not proceed through that court. (my emphasis)

[22] The trial judge references the leading cases on conditional discharges: *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (Ont. C.A.), *R. v. MacFarlane*, [1976] A.J. No. 441 (C.A.), and *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.). He also quotes extensively from *R. v. Shortt*, 2002 NWTSC 47.

[23] The trial judge had no difficulty in concluding that a criminal conviction "detrimentally impacts" on Mr. Mackenzie and would have a greater impact on his job potential "than it would on any other or the general population."

[24] In answer to the public interest issue, the trial judge asked whether a conviction is required to maintain public confidence. He answered in paras. 20 and 21 as follows:

> [20] Breaches of no contact orders in domestic relationships quite generally attract custodial dispositions because the risk of escalation and violence is considerable when contact takes place, in what are the emotionally strained and difficult

> circumstances that take place after an allegation of domestic assault. It is very critical that people do not have contact. In this case, Mr. Mackenzie did have contact. Now, other than the phone calls, which were made three or four days later, the other two contacts were less; there is less indication that they were planned and premeditated, the one at Superstore clearly appears that it could have been coincidental, but nonetheless, the obligation on an individual is to walk away when those circumstances present themselves, and Mr. Mackenzie did not.
>
> [21] Again, it took place in three weeks. There is a context to this that I think allows me to find that a discharge is not contrary to the public interest in this case. (my emphasis)

[25] As indicated, the trial judge granted a conditional discharge of 15 months with 11 conditions which included the following three:

> 6. Take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer.
>
> 7. Take such psychological assessment, counselling and programming as directed by your Probation Officer.
>
> 8. Have no contact directly or indirectly or communication in any way with [former partner].

[26] The trial judge did not include an abstention clause, as the issue of alcohol would be dealt with through his counselling. He made no DNA order and no firearms prohibition order.

[27] He imposed a victim fine discharge of $50 on each offence.

**ISSUES**

[28] The following issues must be addressed:

1. What is the standard of review on a sentence appeal?
2. Did the trial judge err in finding that it is in the best interests of Mr. Mackenzie to be discharged conditionally?

3. Did the trial judge err in concluding that a conditional discharge is not contrary to the public interest?

**Conditional Discharge Law**

[29] The *Criminal Code* section for a conditional discharge reads as follows:

> 730. (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, 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).

[30] In *R. v. Fallofield*, cited above, the British Columbia Court of Appeal said at para. 21:

> 21 From this review of the authorities and my own view of the meaning of s. [730(1)], I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.
>
> (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
>
> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
>
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
>
> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
>
> (7) The powers given by s. [730(1)] should not be exercised as an alternative to probation or suspended sentence.
>
> (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases. (my emphasis)

[31] The Court of Appeal found no difficulty in imposing a conditional discharge on the facts of that case without conditions. The accused pled guilty to a charge of being in unlawful possession of five leftover pieces of carpeting of a value of $33.07. The accused was delivering refrigerators to a new apartment building and took the left over pieces of carpeting. When contacted by the police, he turned over the five pieces of carpet and stated that he thought they were scraps. The accused testified that a conviction “could very possibly affect his future career in the navy.”

[32] In *R. v. Shortt*, cited above, Vertes J. set aside a conditional discharge granted in the Territorial Court of the Northwest Territories on four offences arising in the context of domestic violence. In that case, the evidence at trial revealed a history of domestic conflict between the offender and the victim, his estranged spouse. Each had entered

into a peace bonds. The facts were that the offender came to his estranged spouse's home while the peace bonds were still in effect. He called her derogatory names and started grabbing at her clothing. She slapped him and he punched her in the mouth knocking her to the ground. The following evening the offender called the victim twice and threatened to kill her and her new companion. The offender was found guilty of assault, uttering threats to kill his estranged spouse and her new companion, and breach of the peace bond.

[33] Vertes J. indicated that the fundamental aim of a conditional discharge is the avoidance of a criminal record and stated at para. 23:

> … As a general proposition, discharges are granted in circumstances where the nature of the offence, and the age, character and circumstances of the offender, are such that the recording of a criminal record would be disproportionate and unjust in relation to the offence. In this case, Crown counsel has candidly conceded that it is the fact of no conviction being recorded, for these crimes, that is the focus of the Crown's appeal. Essentially the Crown says that the use of the discharge provision in these circumstances is wholly inappropriate and therefore the sentence under appeal is demonstrably unfit.

[34] At para. 26, Vertes J. noted that offences involving violence are generally not amenable to the granting of a discharge, particularly cases involving domestic violence because:

(a) Domestic violence cases involve considerations of general deterrence;

(b) The prevalence of such crimes in all communities; and

(c) The vulnerability of the victims of domestic violence.

[35] The applicable principles of sentencing are set out in ss. 718 – 718.2 of the *Criminal Code* as follows:

718. The fundamental purpose of sentencing is 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;

(b) to deter the offender and other persons from committing offences;

(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 and to the community.

…

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

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

…

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

…

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

…

> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

**Issue # 1: What is the standard of review on a sentence appeal?**

[36] Pursuant to *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appeal court should only intervene to vary a sentence imposed after trial if it is demonstrably unfit.

[37] Deference must always be shown to the sentencing judge and the comments of Iacobucci J. in *R. v. Shropshire,* [1995] S.C.J. 52, at para. 46, are particularly apt:

> … An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

**Issue # 2: Did the trial judge err in finding that it is in the best interests of Mr. Mackenzie to be discharged conditionally?**

[38] There is no doubt that the trial judge was in the best position to assess whether a conditional discharge was in the best interests of Mr. Mackenzie. His finding that a conviction will detrimentally affect his employment is clear from the record. It is not necessary that he will lose his employment but simply that the detrimental impact will exceed the impacts incurred by every person convicted of a crime. The fact that Mr. Mackenzie's job is directly related to the administration of justice makes it likely that a conviction may have a greater impact on his job potential.

[39] However, as stated in *Fallofield*, this condition requires "that it is not necessary to deter the accused from further offences or rehabilitate him." In this respect, the trial judge found that when he considered "the life of Mr. Mackenzie and the potential for rehabilitation", "a jail sentence" is not necessary. I note that the trial judge also found that Mr. Mackenzie's refusal to accept responsibility was not an aggravating factor.

[40] In my view, the trial judge has erred in his analysis of the assault offence. It is aggravating by s. 718.2(a)(ii) and (iii) and also aggravating because it was committed in the presence of children and took place in his former spouse's home, all of which were acknowledged by the trial judge. In my view, specific deterrence is required by virtue of the aggravating factors. I do not rely on the fact of his previous conditional discharge as it is not a conviction and there are no details of the nature of that assault to determine its relevance to this assault.

[41] There is no issue that a jail sentence was not required as the Crown agreed that a conditional sentence to be served in the community was appropriate. The real issue is

whether deterrence or rehabilitation is required. The trial judge appears to say that there is potential for rehabilitation when he says “when I consider the life of Mr. Mackenzie and the potential for rehabilitation”. But that statement can only refer to Mr. Mackenzie’s obsessive-compulsive disorder or alcohol problem. It cannot refer to the assault on his former spouse, which he neither acknowledges nor takes responsibility for. When the offender denies responsibility for the four offences, his “potential for rehabilitation” cannot be determined. It is not a question of whether his denial of responsibility is neither a mitigating nor an aggravating circumstance but rather that it prevents the court from making an appropriate assessment of two fundamental purposes of sentencing; to assist in rehabilitating offenders and promoting a sense of responsibility in offenders and the harm done to the victim. In this respect, I view the assault as a serious and violent offence that is not diminished by the fact that the victim was not choked to the point of cutting off her breath. Further, the breaches of no contact are not mere “process” offences but rather required deliberation on his part and were clearly intimidating which takes on great significance in domestic violence cases.

[42] In my view, the trial judge did not give sufficient consideration to deterrence of Mr. Mackenzie and overemphasized the potential for rehabilitation when the offender denied the offences occurred. I do not suggest that a conditional discharge can never be considered in this type of case, but in this particular one, Mr. Mackenzie failed to satisfy the first condition that it is in his best interests and it is not necessary to deter or rehabilitate him.

**Issue # 3: Did the trial judge err in concluding that a conditional discharge is not contrary to the public interest?**

[43] In *Fallofield*, the public interest issue is considered in the context of the deterrence of others. I also agree with Vertes J. in *Shortt* that this condition includes the need to maintain the public's confidence in the system of justice.

[44] This is also the view of the Newfoundland Court of Appeal in *R. v. Elsharawy,* [1997] NJ No. 249 (N.F.C.A.), at para. 3, which sets out the following factors to consider whether general deterrence of others is necessary:

1. the gravity of the offence;
2. the prevalence of the offence in the community;
3. public attitudes towards the offence; and
4. public confidence in the effective enforcement of the criminal law.

[45] I do not need to repeat my view that the four offences in this case are serious both in terms of the physical and mental harm inflicted. In my view, the trial judge has erred in his assessment of the gravity of the offences. The aggravating factors and the statutory aggravation of this domestic violence suggest that a conditional discharge is not appropriate.

[46] The prevalence of domestic violence in Yukon is a very serious matter. So serious in fact that a ground-breaking Territorial Court and Yukon Government supported program, called the Domestic Violence Treatment Option, has been set up on the basis of accepting responsibility, pleading guilty and undertaking treatment. This does not mean Mr. Mackenzie should be penalized for not pursuing the Domestic

Violence Treatment Option program, but it does attest to the importance of taking responsibility in domestic violence cases in Yukon.

[47] The prevalence of domestic violence remains exceptionally high in Yukon. The rate of family violence in Yukon is 842 against a Canadian average of 294 per 100,000 population. See Sinha M. (2012), Family Violence in Canada: A statistical Profile, 2010, *Juristat* (Cat. No. 85-002-x), Ottawa, ON: Statistics Canada.

[48] In *R. v. Taylor*, 2001 YKTC 511, Lilles J. addressed the issue of domestic violence in this way:

> [26] Domestic violence is a very serious problem in the Yukon, exacerbated by isolation, limited services in parts of the Territory, a persistence of a macho, frontier-mentality among some and the highest per-capita alcohol consumption in Canada. During the past decade, at least 10 Yukon women have died at the hands of their partners. This is a shocking statistic when one considers the small population base in the Territory.
>
> [27] As noted by the Alberta Court of Appeal in the case of R. v. Brown, Highway and Umpherville (1992), 73 C.C.C. (3d) 242, domestic violence is a broad social problem, which cannot be solved by the courts alone. It must be addressed by society as a whole, and because of the inter-generational aspect of domestic violence, there is no short-term fix. Yet, when cases come to the court and result in a conviction, there is an opportunity to denounce domestic violence in clear terms and to steer those offenders who are clearly motivated to address their problems into court supervised programming and treatment. Those who are not motivated or refuse programming, should be sentenced in a way which reflects the seriousness of their offence, and the continuing risk they present to society, with the hope that they will be specifically deterred from repeating similar offences in the future.
>
> [28] Many courts have noted that domestic assaults are more serious than other assaults because they involve a breach of trust between spouses. When men assault their wives or girlfriends, they use their greater size, weight and

> strength on someone who is generally smaller and weaker. Domestic violence represents an abuse of power and control. Spousal violence is therefore considered an aggravating factor in sentencing cases of assault. (my emphasis)

[49] I also conclude that public attitudes towards the offence and the public confidence in the effective enforcement of the criminal law require that serious offences of this nature be denounced and deterred.

[50] In my view, granting a conditional discharge in the circumstances of this case is contrary to the public interest and a demonstrably unfit sentence for the crimes Mr. Mackenzie has committed.

**DISPOSITION**

[51] The Crown submits that a six-month conditional sentence is the appropriate sentence. This is consistent with the Crown's submission at trial that a sentence to be served in the community rather than in jail is appropriate.

[52] The real focus in this case has been whether a conviction should be entered rather than a conditional discharge.

[53] Although I might prefer a conditional sentence to make the Court's denunciation of domestic violence in strong terms, I am cognizant of the fact that Mr. Mackenzie has already served a period of eight months probation.

[54] I therefore set aside the conditional discharge, enter convictions on all four offences and impose a suspended sentence with a probation order of 15 months from the date of the original order with the same conditions as the original probation order.

VEALE J.