Citation: *R.* v. *Malcolm*, 2008 YKTC 45

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07-10089A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

SHANE MALCOLM

Appearances:
Ludovic Gouaillier — Counsel for Crown
Gordon Coffin — Counsel for Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): In this case, Shane Malcolm has entered guilty pleas to a number of offences. The most serious of them was the first in point of time and occurred early last September in Watson Lake. A young man by the name of Kavan Shilling was walking home when a vehicle that Mr. Malcolm was in, pulled up. Mr. Malcolm got out and, to make a long story short, proceeded to lay a vicious beating on Mr. Shilling. Mr. Shilling ended up on the ground and had the boots put to him. He suffered some significant injuries. About the best that can be said about it is that it appears that Mr. Shilling has been able to make a substantial recovery from those

injuries. Perhaps the most chilling thing about this incident is that it appears to have been an entirely unprovoked and gratuitous attack. Either Mr. Malcolm was driving around looking for somebody to assault or he decided on the sudden to assault Mr. Shilling for no reason. Neither of these scenarios is particularly pleasant.

[2] Following quite quickly after the attack on Mr. Shilling, Mr. Malcolm found himself at the Tags convenience store in Watson Lake. Apparently he was intent on complaining about some item he had bought at the store and caused quite a scene, which culminated with him knocking over and damaging the lottery kiosk in the store and assaulting one of the staff who tried to intervene. On his arrest he was found to be in possession of a quantity of cannabis.

[3] After that performance, not surprisingly, Mr. Malcolm was detained in custody for some period of time. However, in late November he managed to gain his release with the intent, I gather at the time, of pursuing the Community Wellness Court option. Unfortunately, within a very few days of his release, Mr. Malcolm was AWOL from the ARC, where he was supposed to be residing, and also failed to keep appointments with his bail supervisor. He was fairly quickly re-arrested and has been in custody ever since.

[4] Ultimately, Mr. Malcolm entered a plea of guilty to the lesser and included offence of assault causing bodily harm, having been originally charged with aggravated assault after the attack on Mr. Shilling. He has also entered a plea of guilty to a charge of mischief in relation to the damage at the Tags store, a plea of guilty to a charge of common assault in relation to the assault on the store employee, and pleas of guilty to

the charge of possession of cannabis under the *Controlled Drugs and Substances Act*, and two charges of breach of recognizance arising from his failure to reside at the ARC and report to his bail supervisor.

[5] Although Mr. Malcolm is still a very young man of 26, he has amassed a very unenviable criminal record, now filling some three pages and containing prior entries for assaults and a robbery, as well as numerous other offences of various stripes, including process offences.

[6] Given the antecedents of this offender, and given the serious nature of what occurred back in September, particularly with the assault on Mr. Shilling, I am of the view, and it is not really disputed by anyone, that a substantial custodial sentence is warranted. The Crown sought a global sentence in the range of 20 to 22 months. Mr. Coffin did not dispute the range, although he urged, of course, that I consider the lower rather than higher end of the proffered range.

[7] In my view, the range of sentence contended for could well have been higher having regard to the serious nature of the attack on Mr. Shilling. However, I take into account that Mr. Malcolm has entered guilty pleas to all of these offences. Particularly, I take it into account with respect to the assault causing bodily harm charge because, as the Crown conceded, although the guilty plea was not offered until the eve of trial, it did serve to alleviate considerable anxiety on the part of the complainant and others who were spared from having to testify. It was further conceded by the Crown that, having regard to some of the witnesses involved, there would have been some difficulties in proceeding. So I think Mr. Malcolm is entitled to a substantial degree of credit for the

plea, notwithstanding that it did not come at the earliest opportunity. However, making full allowance for that and the other guilty pleas, that still leaves us with a sentence in the range suggested.

[8] Perhaps the only real area of dispute between the parties was on the issue of what credit I should give to Mr. Malcolm for the time that he has spent in custody prior to today, which now amounts to something in the order of eight months. The practice of the Court has been to allow credit at the rate of one and a half times the actual time spent, to take allowance of the fact that pre-sentence time is not subject to statutory remission or parole.

[9] There have been occasions on which the Court has awarded credit for pre-trial custody up to two times the actual time spent. One of those occasions was in the case of *R*. v. *Nehass*, 2007 YKSC 47, which was referred to by Mr. Coffin. It appears that in *Nehass*, Mr. Justice Veale was gravely concerned, I think he used the word appalled, by the utter lack of programming at the Whitehorse Correctional Centre during the time of Mr. Nehass' incarceration. He decided to give Mr. Nehass a two-for-one credit based on that, despite the fact, as Mr. Coffin observes, that Mr. Nehass had been anything but a model prisoner. I think the difficulty in relying on *Nehass* in this case is that there is no particular evidence before me as to what the situation is at WCC at this time. Certainly, lack of programming at that institution has been an on-going problem; there is never enough and it seems to go in fits and starts, depending on, I suppose, who personnel are at particular points of time and so on.

[10] I am not convinced that the lack of programming at WCC is an issue to be dealt with with respect to matters of pre-trial custody credit. It seems to me that the issue with respect to bumping up pre-trial custody credit beyond the normal should be looked at in this way. I think we should look at whether or not the person before the Court has been disadvantaged vis-à-vis sentenced offenders, by the fact that he is on remand. If his conditions of confinement or his access to programming and so on are demonstrably less than that of sentenced prisoners, then, in my view, there is a case to be made for giving him extra credit. To make a long story short, or perhaps to put the matter a bit too bluntly, if he is in the same boat as everybody else, then it is difficult for me, logically, to understand why one would give particular credit beyond that normally afforded.

[11] Accordingly, in this case, the sentence of the Court will be, with respect to the assault causing bodily harm; a period of imprisonment of 18 months. On the charge of the assault from the 9th of September, two months consecutive. On the charge of wilful damage, two months, and on each of the counts contrary to s. 145(3), 30 days consecutive to each other and consecutive to any other sentence. The total effective sentence is 22 months. That sentence, however, will be reduced by the time spent in custody, which I calculate at 12 months, leaving a remanet of 10 months yet to be served.

[12] Following Mr. Malcolm's release from imprisonment, he will be subject to a probation order for a period of three years. The terms of the order will be:

1. Keep the peace and be of good behaviour;

2. Report to the Court as and when required;
3. Report within two working days to an adult probation officer and thereafter, as, when and in the matter directed;
4. Advise the probation officer in advance of any change of name or address; promptly notify him of any change of occupation or employment;
5. Reside where the probation officer will direct;
6. No contact, direct or indirectly with Kevan Shilling;
7. Not attend or be found within the town limits of Watson Lake, except with the prior written permission of your probation officer;
8. Take such assessment and counselling as the probation officer directs, including but not limited to substance abuse counselling;
9. Seek and maintain employment and provide your probation officer with full information regarding your efforts in that regard.

[13] There will also be an order whereby Mr. Malcolm will provide samples of bodily substances for the purpose of DNA analysis and banking. It is clearly in the public interest to make such an order.

[14] Similarly, in my view, there should be an order pursuant to the firearms provisions of the *Code*, prohibiting Mr. Malcolm from having in his possession any firearm, crossbow, restricted weapon, ammunition or explosive substance for a period of 10 years following his release from imprisonment.

[15] He is prohibited from having any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, or prohibited ammunition for the remainder of his life.

[16] The surcharges are waived.

[17] THE CLERK: The remaining counts?

[18] MR. GOUAILLIER: Stay of proceedings.

[19] THE COURT: The clerk has noted that I failed to make a disposition on the marihuana charge. Seven days concurrent.

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FAULKNER T.C.J.