

Citation: *R. v. McLean*, 2012 YKTC 11

Date: 20120112
Docket: 11-00113
Registry: Whitehorse
Heard: Mayo

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

REGINA

v.

ALLAN JOHN MCLEAN

Appearances:
Jennifer Grandy
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): I am dealing with the sentencing of Mr. Allan John McLean. He has been found guilty of an assault on Daniel Roy Lucas, causing bodily harm to him, contrary to s. 267(b) of the *Criminal Code*. This finding was made after trial.

[2] I have described the circumstances of the assault causing bodily harm in my trial decision. I will highlight several important aspects of that assault. The assault was on Daniel Roy Lucas when Mr. Lucas was intoxicated and lying on the couch. He was essentially defenceless. The assault was unprovoked. It included stomping on Mr. Lucas's ankle and fracturing that ankle, and it also included several blows to the face

resulting in significant swelling, black eyes, a cut and a right eye almost swollen shut.

[3] Mr. McLean is 52 years of age. He has significant medical issues. The assault took place in the home of Ms. Johnny who, at the time, was Mr. Lucas's partner. I did not receive any information as to whether or not Mr. Lucas resided there full time, but one can infer that if he did not reside there full time, it was certainly his second home, described, as he was, as Ms. Johnny's partner. The fact that this assault took place there, I think, is an aggravating factor in this sentencing.

[4] Mr. McLean comes to the Court with a lengthy criminal record which includes three previous assaults and one of uttering threats. Alcohol, in my view, was a factor in this assault, as it apparently has been in a number of other convictions on his record. The injury to Mr. Lucas was very significant. It incapacitated him for a lengthy period of time.

[5] Mr. McLean submits, through his counsel, that a conditional sentence of imprisonment would be appropriate in these circumstances. He takes no issue with the fact that a 12-month term would otherwise be appropriate. There are some circumstances that support the imposition of a conditional sentence in this case. Mr. McLean was on probation last in 2008. He received an 18-month probation order. I do not have that order in front of me, but it is noteworthy that there are no subsequent breaches of probation on his record. On the matter that brought him before the Court today, he has been on an undertaking including no alcohol and no contact, which he has been able to abide by.

[6] I have come to the conclusion that the seriousness of the offence and the

seriousness of the record require me to pay special attention to the fundamental purposes and principles of sentencing, in this case, denunciation and deterrence. I have come to the conclusion that serving his sentence in the community would not be consistent with these principles. Defence counsel is quite right in pointing out that denunciation and deterrence are very much a part of a conditional sentence, but the cases are clear that they do not send the same strong message that an actual custodial period would. The circumstances of this offender and the circumstances of this offence are extremely serious. In my view, denunciation and deterrence will not be sufficiently emphasized with a conditional sentence.

[7] I am, however, taking into account the fact that Mr. McLean has successfully been on conditions since May of last year. I am also taking into account that he has significant medical issues that would make a lengthy custodial period greater hardship to him than someone else who does not have the same medical conditions. Therefore, I am imposing a period of incarceration of nine months.

[8] That is to be followed by 16 months probation. The terms of that probation order will be the statutory terms. Is there a probation officer here today?

[9] UNIDENTIFIED SPEAKER: Yes.

[10] THE COURT:

1. Report within two working days upon your release from custody to a Probation Officer and thereafter as and when directed by the Probation Officer;
2. Reside as approved by your Probation Officer and not change that

- residence without the prior permission of the Probation Officer;
3. Abstain absolutely from the possession or consumption of alcohol;
 4. Take such assessment, counselling and programming as may be directed by your Probation Officer;

I am making this a general order to permit Mr. McLean and his Probation Officer to discuss whether there might be some programming that might be suitable, but I take Mr. Campbell's suggestion that at his age there is probably little merit in directing a particular program that he may not be interested in.

5. You are to have no in-person contact with the complainant, Mr. Daniel Roy Lucas, unless you have prior written permission of your Probation Officer.

[11] Madam Crown, is there anything else you would suggest?

[12] MS. GRANDY: No.

[13] THE COURT: Mr. Campbell, anything that would create a problem for him in what I have put in the probation order?

[14] MR. CAMPBELL: I don't believe so.

[15] THE COURT: The victim fine surcharge will be waived. Are there any other orders that need to be made, Madam Crown?

[16] MS. GRANDY: The DNA order does apply, although I do notice from the CPIC printout that Mr. McLean is already in the databank. The firearms prohibition is discretionary.

[17] THE COURT: Can Mr. McLean speak to a firearms prohibition? Do you hunt?

[18] THE ACCUSED: Your Honour, I need a rifle and a hunting gun.

[19] THE COURT: You do?

[20] MR. CAMPBELL: He's also a trapper. He's got a trap line out at Mayo Lake or Janet Lake.

[21] THE COURT: All right. I am going to, in the circumstances, decline to make that order. I think the abstain order will go some way in satisfying me that the community concerns will be met. So I will not make that order.

LILLES T.C.J.