

Citation: *R. v. McLeod*, 2006 YKTC 118

Date: 20061204
Docket: T.C. 06-11067
06-11069
Registry: Whitehorse

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

REGINA

v.

BENJAMIN JOSEPH MCLEOD

Appearances:
Kevin Komosky
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] OVEREND T.C.J. (Oral): The accused is charged in two Informations: in the first with assault; in the second with the assault, uttering threats and with breach of his undertaking. The facts as recited by counsel for the Crown are not in dispute and I will not spend much time repeating them. It is a very straightforward case in which on the 18th of September, the accused was observed by a police officer yelling at Mr. Otto Cutts that he was going to kill him. Mr. Cutts said that he had been punched in the chest and that the "I'll kill you" statement had been made several times by the accused, Mr. McLeod.

[2] On the second occasion, on the 28th of September, after Mr. McLeod had been released on an undertaking, once again, he was at the First Nation's office and assaulted Ms. Brenda Maude by spitting in her hair, after indicating to her that he was "going to blow her fucking head off." Mr. McLeod does not dispute either of these sets of facts as, having consumed alcohol to excess, he has no recollection of the facts in either situation.

[3] The accused has a long criminal record, including a number of assaults dating back to 1976. He also has a significant number of breach charges, both on probation orders and failing to comply with recognizance. His most recent assault charge for which he was convicted, is in 1996, and on that occasion, at Dawson City, he received a term of imprisonment of six months consecutive to other charges which he faced at the same time, for assault causing bodily harm.

[4] Since then, he has been convicted on four separate occasions of other offences, described by his counsel as nuisance offences. I do not take great exception to that terminology applied to the kinds of offences that Mr. McLeod has been committing over the last number of years. I do not take exception to it except that threats to kill are not, undoubtedly, taken lightly by the recipient of those threats. Section 264.1.1(a) is the charging section for uttering threats and has a maximum term of imprisonment of 18 months where the Crown chooses to proceed summarily. The other offences are also proceeded summarily in this case.

[5] The Crown suggests that an appropriate term of imprisonment for Mr. McLeod is three months on each of these counts, the counts in the second Information 11069 to be

consecutive to the sentences in the first Information, 11067, which would mean a total term of imprisonment of six months. He acknowledges, or has placed before the Court, at least, the fact that Mr. McLeod has been in custody since the 28th of September and that he should be given credit for the time he has served while awaiting disposition of this matter.

[6] Mr. McLeod is 48 years old, a member of the Tr'ondek Hwech'in First Nation, and one of those persons whose experience in the residential school system is unfortunate, to say the least. He spent ten years in a residential school, following which, at the age of 15, he commenced drinking. At the time of his parents' death, when he was 25 years of age, he commenced to drink heavily, and has continued for the last 23 years.

(Proceedings adjourned)

(Proceedings reconvened)

[7] Alcohol is clearly the root of all of Mr. McLeod's difficulties. I have no doubt that alcohol could probably be attributed to most, if not all, of his prior convictions. Mr. McLeod, through his counsel, has submitted a letter, obviously supporting him. That letter, for the most part, appears to be a polemic against the historical treatment of aboriginal persons and present day treatment of the accused by the Tr'ondek Hwech'in First Nation administration. Much of the contents of that letter probably should not be before the Court and are not properly in support of Mr. McLeod or telling me about Mr. McLeod.

[8] However, looking at the letter as a whole with respect to its impact on Mr. McLeod, it clearly indicates that he has suffered a lot from his abuse of alcohol and that

when he is not subject to alcohol, he has much to offer the community. Curiously, he suggests in that letter he is better able to express himself while under the influence than when he is entirely sober. The Court is not here to tell Mr. McLeod how to conduct his life and whether or not he should be drinking other than as it affects the rest of society. Regrettably, he appears unable to drink in a socially acceptable manner. Once he starts drinking, his alcoholism takes over and he becomes a person who has antisocial inclinations as exhibited on these two occasions in September of this year.

[9] This is a sad case. Cases where people are so subject to the alcohol abuse that they are unable to control their behaviour often come before the courts. The Court has an obligation to protect society. Mr. McLeod has had the opportunity on prior occasions to take counselling and presumably get treatment for his alcohol abuse. He has been through programs. He continues to abuse alcohol.

[10] Section 718 of the *Code* mandates how I am to deal with sentencing and:

The purposes of sentencing are, among other things, to denounce unlawful conduct; to deter the offender and other persons from committing offences; to separate offenders from society, where necessary; to assist in rehabilitating offenders;... to promote a sense of responsibility in offenders...

Clearly, I have to, in this case, denounce his unlawful conduct. One hopes, but I am not confident, that any sentence I impose will deter him from committing other offences.

[11] Clearly, to protect the public he needs to be separated from society, as is necessary on this occasion. I would like to assist in his rehabilitation but given his age, his prior history, his substance abuse, his rehabilitation is less important to me than it might be were he a younger man and had some better hope for improvement. His

improvement is in hands, at this stage. He has not shown any reasonable response in the past to probation orders, as his nine breaches of probation orders would demonstrate. So if he wishes to be rehabilitated, I wish him well, but it is not a significant factor in the sentences I am going to impose.

[12] I know the accused has, despite his long criminal record, had sentences to be served in the community on two occasions in the last five years, that is on the 6th of February, 2001, in Dawson, he got a 30 day conditional sentence order. On the 28th of November, 2003, in Dawson, he again got a 30 day conditional sentence order, plus probation. His counsel acknowledges that a conditional sentence order would not be appropriate today, and that is an acknowledgement of the overwhelmingly obvious.

[13] Mr. McLeod, would you stand please, sir. Mr. McLeod, as I said earlier, I find this a very difficult case to deal with. It is sad because of your alcohol abuse. As you stand before me as a sober person, I am sure that I would not see you committing this kind of offence. You have to deal with your alcohol abuse. It is your problem. I cannot allow it to be the community's problem. I wish you well in trying to deal with your abuse of alcohol, but you must deal with it or you will be back here again.

[14] Now, on this occasion, the assaults were, as counsel have said, of a less serious kind of assault, but that does not mean that in the future some more serious assault would not happen if you continue to abuse alcohol.

[15] I am sentencing you on Count 1 in Information 11067 to a term of imprisonment of three months. I am sentencing you on Count 2 to a term of imprisonment of three months concurrent. On Information 11069, I am sentencing you on each of the counts

on the Information to a term of imprisonment of three months. They will be concurrent with each other, that is Count 3 and 4 will be concurrent with Count 1, but consecutive to the charges in Information 11067. In saying that, I have taken into consideration the time spent in pre-trial custody. The important thing here, sir, is you must recognize there will be terms of imprisonment. Those terms of imprisonment may well be longer than in the past.

[16] There will be a DNA order arising out the assaults. There will not be a firearms prohibition.

[17] MS. HILL: Your Honour, there was just one issue. I believe you sentenced Mr. McLeod with regard to Count 1 on the 67 Information. He did not enter a plea to that count.

[18] THE COURT: I am sorry, you are right. My apologies. It is Count 2 only and it is three months on that count and then it is the 1, 3 and 4 on the second Information; that is correct.

[19] MR. KOMOSKY: Perhaps with that, the Crown would apply to withdraw the remaining counts.

[20] MS. HILL: Thank you.

[21] THE COURT: All right.