

Citation: *R. v. Vaneltsi*, 2019 YKTC 1

Date: 20190122
Docket: 17-00532
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

JOEY PIERRE JASON VANELTSI

Appearances:
Keith Parkkari
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] Joey Vaneltsi pleaded guilty to the offence of assault causing bodily harm, contrary to section 267(b) of the *Criminal Code* (“*Code*”) and to one count of failing to keep the peace, contrary to s. 733.1 of the *Code*.

[2] I heard facts with respect to these offences in the context of a robbery allegation, which arose at the same time as the two offences to which Mr. Vaneltsi had pleaded guilty. After hearing the robbery allegation, I acquitted him of that charge but found him guilty of the 267(b) and 733.1 offences.

[3] The Crown proceeded by indictment with respect to these charges and as a result, the maximum sentence for the offence of assault causing bodily harm is 10 years of imprisonment.

[4] Subsequent to these findings of guilt, the Crown applied, pursuant to s. 752.1(1) of the *Code*, for an order remanding Mr. Vaneltsi for an assessment to be relied upon in an application to have him declared a long-term offender. The defence did not oppose the assessment application.

[5] A forensic psychiatrist conducted the assessment of Mr. Vaneltsi and filed his report with the Court. On August 22, 2018, pursuant to s. 754(1)(a) of the *Code*, the Crown filed the consent of the Attorney General of Canada to an application to have Mr. Vaneltsi found to be a long-term offender pursuant to s. 753.1(3) of the *Code*.

[6] At the hearing, the Crown argued that Mr. Vaneltsi satisfied the prerequisites of s. 753.1(1) of the *Code* and that I should exercise my discretion to find him a long-term offender. The Crown argued that the assault causing bodily harm offence warranted a two-year sentence of imprisonment followed by a long-term supervision order (“LTSO”) of three or more years.

[7] On the other hand, counsel for Mr. Vaneltsi submitted it would be inappropriate to impose a sentence of two years or more for the predicate offence. The defence also contends that although there may be a likelihood of Mr. Vaneltsi reoffending, it is not a substantial likelihood, a requirement of s. 753.1(1). The defence argues that an appropriate sentence is 16 to 18 months’ imprisonment plus a lengthy period of probation.

Circumstances of the Predicate Offence

[8] On November 13, 2017, Mr. Huang, the victim, attended the 98 Bar in Whitehorse after work. After consuming one beer, he exited the bar. He interacted with a younger First Nations female outside of the establishment. Mr. Huang gave the young woman 20 dollars after which she gave him a kiss. He indicated that he believed she wished to have sexual relations with him.

[9] Mr. Vaneltsi was outside the bar and observed what he believed to be Mr. Huang's inappropriate interactions with two younger First Nations females. He observed Mr. Huang give one of the two women some money, after which he began grabbing her buttocks.

[10] Mr. Vaneltsi intervened and in so doing, he ended up viciously attacking Mr. Huang. It is not disputed that Mr. Vaneltsi struck the victim multiple times with a closed fist. I accept the victim's evidence that Mr. Vaneltsi struck him approximately five times.

[11] He knocked out three of Mr. Huang's upper teeth, loosened some of his lower teeth, and left him with a bloody and battered face, including what a consulting ophthalmologist in Vancouver assessed as a severe subconjunctival hemorrhage of his left eye. This latter injury did not require surgical intervention.

Mr. Vaneltsi's Criminal History

[12] Mr. Vaneltsi has a substantial criminal history. The youth portion of his record includes one assault in 1997, a number of property offences, failures to comply with court process, and finally, an obstruction of a peace officer and mischief convictions.

[13] Additionally his adult criminal record contains a number of property offences, failures to comply with court process, a drinking and driving offence, and escape lawful custody and unlawfully at large offences. He also committed offences of violence as set out below:

- 2007: assault (55 days' jail);
- 2009: robbery (three years' imprisonment);
attempted robbery (two years' imprisonment concurrent);
- 2011: assault peace officer (90 days' jail); and
- 2016: robbery (two years' of imprisonment and two years' probation).

[14] The 2009 robbery conviction entailed Mr. Vaneltsi accosting a man outside of a bar, assaulting him, and stealing his wristwatch. Mr. Vaneltsi also committed an attempted robbery during which he assaulted a bar patron outside the bar. The robbery attempt was unsuccessful as the victim broke free and fled the scene. He was sentenced to these two charges, and additionally, a break and enter offence to a local business, as well as process offences. The sentencing judge imposed a global sentence of three years' imprisonment as suggested jointly by counsel (2009 YKTC 70).

[15] The 2016 robbery conviction involved an intoxicated Mr. Vaneltsi breaking a window of a tour van and taking a purse and another bag containing a computer and money. One of the victims approached him, he apologized and the two became embroiled in a tug of war over the stolen bag. Mr. Vaneltsi stated he needed 40 dollars, which the female victim gave to him. Her male partner, having seen the altercation, arrived and started to wrestle with Mr. Vaneltsi. He broke free and attempted to flee with the bag. The male victim caught up with him and Mr. Vaneltsi finally dropped the

stolen bag. The sentencing judge imposed a twenty-four month term of imprisonment followed by two years' probation (2016 YKTC 14).

Circumstances of Mr. Vaneltsi

[16] Mr. Vaneltsi is 35 years of age. He is a member of the Tetlit Gwich'in First Nation of Fort McPherson, NWT. However, he is a long time resident of the Yukon.

[17] Mr. Vaneltsi never met his biological father. However, he enjoyed a positive relationship with his mother and stepfather. He describes his upbringing as mainly positive, although he did find himself involved with older children in school as a result of being accelerated into a higher grade. This association ultimately led to his engaging in alcohol and drug abuse, as well as petty crime to support these habits.

[18] Mr. Vaneltsi grew up in Whitehorse, but as outlined in a 2016 Pre-Sentence Report, he was not raised with traditional First Nation practices. Although his mother advised that her family practiced some First Nation traditions while she was growing up in the NWT, the family moved around leading to the loss of traditional practices and much of her First Nation language. As a result, she did not pass on her traditional knowledge to Mr. Vaneltsi. His step-father attended residential school after undergoing a traumatic upbringing.

[19] As an adult, Mr. Vaneltsi was involved in a significant long-term (13-year) relationship which ended relatively recently. This relationship was unhealthy and involved the abuse of licit and illicit substances.

[20] Mr. Vaneltsi has a grade ten education. He has worked as a driller's assistant for a number of years, most recently for Barrick Gold. He was employed in a dry camp in this capacity during the summer of 2017, prior to the predicate offence. As a result, he accumulated enough money to buy a vehicle. However, after this sustained period of employment, he unfortunately resumed his dysfunctional spousal relationship and fell back into his abuse of substances.

[21] Mr. Vaneltsi intends to pursue further education and while on remand for the offences for which I am sentencing him, he has been attending school twice a week. He advised Dr. Lohrasbe, the author of his psychiatric assessment, that he intends to further upgrade his education so that he can apply to become a plumber.

[22] Mr. Vaneltsi has taken advantage of available programming at the Whitehorse Correctional Centre while on remand, including violence prevention programming. Since February 2018, he has been attending sessions with a psychologist, Svenja Weber, through funding from the Indigenous Health Support Program.

[23] Mr. Vaneltsi's stated intention is to attend residential alcohol treatment. According to Ms. Weber, Mr. Vaneltsi has completed preparatory work for such treatment and has submitted referral packages to Tsow Tun Lelum and to Northwind Wellness Centre Society, residential alcohol treatment centres in British Columbia.

Psychiatric Assessment

[24] Dr. Lohrasbe found that Mr. Vaneltsi does not have any major mental disorder, but diagnosed him with a Substance Use Disorder, including, most recently, alcohol and

crack cocaine. The criminal lifestyle associated with this disorder has been longstanding. Mr. Vaneltsi also qualifies for a diagnosis of Antisocial Personality Disorder, however, his antisocial behaviour “has been intimately intertwined with the drug subculture”. The antisocial personality disorder is more “behavioural and situational and not especially severe or entrenched”.

[25] Mr. Vaneltsi’s risk for future violent offending is high unless effective treatment occurs. Dr. Lohrasbe finds that Mr. Vaneltsi will likely be a good candidate for ongoing treatment and risk management. However, he cautions:

It will do Mr. Vaneltsi no favors to allow his likeability, contrition, and currently high motivation to minimize the risks to the community and himself if he does not ‘turn things around’. Mr. Vaneltsi has repeatedly presented relatively positively to various assessors and has repeatedly made commitments to avoid old habits and break the destructive cycles of substance abuse, crime and violence. He has received much support and by his own account has received breaks ‘from the Court’. He has been regarded as being sincere when he has expressed remorse and it is likely that he was sincere at the time.

However, he has not ‘internalized’ the self-awareness and self-regulation to follow through and break the pull of old habits. It takes time and immersion in a therapeutic milieu for deep changes to occur. All things considered therefore my view is that a high intensity program is indicated, in particular I anticipate that a high intensity multi-target program in the Aboriginal stream will be the most likely to be helpful. This can be followed by a range of less-intensive programs, and finally the substance abuse programs at Tsow Tun Le Lum (or something similar). Such a plan would involve a period of time away from Whitehorse and away from the influences that can drag him back. Although it will take him away from his primary supports, they will be there for him when he returns. pp 19-20

Information Received from Correctional Services Canada and from Adult Supervision

[26] As indicated, Mr. Vaneltsi is in need of treatment. At the hearing, no *viva voce* evidence was called with respect to programming available in either the federal or territorial correctional system.

[27] Crown filed, with the defence's consent, a summary of programming available within the territory through Yukon Community Corrections. As set out in writing by the supervisor of the Community Corrections' unit, the local programming targets medium to high-risk offenders, but is "not designed to meet the needs of individuals who require a longer period of intensive interventions and treatment".

[28] Crown also filed, with consent, an e-mail from an employee of Correctional Services Canada ("CSC") with respect to programming available for an offender who is subject to an LTSO. Although CSC programming is available to such an offender, in the Yukon only psychological counselling is available through referrals to outside agencies. If CSC directs a long-term supervision offender upon release to live outside of the Yukon, other programming may be available, however, no specifics were provided in this regard.

Long term Offender Criteria

[29] The pre-requisites for a long-term offender designation are found at s. 753.1(1) (a)-(c) of the *Code*. In summary, they are as follows:

The judge must find that a sentence of two years or more of imprisonment for the predicate offence is appropriate;

The judge must be satisfied that there is a substantial risk that the offender will reoffend; and

The judge must find that there is a reasonable possibility of eventual control of the risk of the offender in the community.

Sentencing Principles

[30] The first issue to be decided is the appropriate sentence for the assault causing bodily harm offence.

[31] As stipulated in *R. v. Ipeelee*, 2012 SCC 13, and *R. v. Gladue*, [1999] 1 S.C.R. 688, a sentencing court must impose a sentence that fits the offence, the offender, the victim, and the community. Sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender (see *Ipeelee* at para. 38 and *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 92). Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion (*R. v. L.M.*, 2008 SCC 31 at para. 15; see also *R. v. Lacasse*, 2015 SCC 64 at para. 11).

[32] A sentencing court must consider all relevant sentencing principles in determining an appropriate sentence. The fundamental principle of sentencing is set out at Section 718.1 of the *Code*. It stipulates that a sentence is to be proportionate to the seriousness of the offence and the degree of blameworthiness of the offender.

[33] Section 718 of the *Code* provides as follows:

The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[34] A sentencing principle that applies in any sentencing is the principle of restraint, which means, in the context of a jail sentence, that the length should not be more than is necessary to achieve the relevant sentencing objectives.

[35] I must also be cognizant when dealing with Aboriginal offenders of the principles enunciated by the Supreme Court of Canada in *Ipeelee* and *Gladue*. The presence of *Gladue* factors may diminish the offender's moral blameworthiness. As stated recently in *R. v. Sellars*, 2018 BCCA 195, at para. 33:

...However, the unique circumstances of Aboriginal offenders can diminish their degree of moral blameworthiness for an offence and therefore the weight to be given to those principles of sentencing.

[36] Section 718.2(e) of the *Code* also stipulates that:

all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[37] I have considered the principle of restraint and Mr. Vaneltsi's overall circumstances in my deliberations on this matter.

[38] It is important in this case to emphasize that Mr. Vaneltsi's conduct must be denounced and deterred. He viciously attacked and injured an older man based on what he believed to be the victim's inappropriate behaviour. The attack was completely unwarranted.

[39] At the same time, I must not overlook the principle of rehabilitation in the case of Mr. Vaneltsi. He has commenced efforts, especially while incarcerated, to break the cycle of criminality. That being said, Dr. Lohrasbe noted Mr. Vaneltsi's previous unfilled commitments at turning his life around. He is of the opinion that in order to be successful, Mr. Vaneltsi must remain away from his ex-girlfriend and the substance abuse lifestyle to which he succumbed. He must also rely on the support of his sober family and the other positive role models in his life.

[40] Despite Mr. Vaneltsi's failed efforts in the past to extricate himself from a negative peer group and his lifestyle of substance abuse, rehabilitation is, in my view, nonetheless an important sentencing principle that is still in play for this offender.

[41] As noted by Dr. Lohrasbe, Mr. Vaneltsi also requires a lengthy period of supervision following his release from custody. He states:

...For offenders such as Mr. Vaneltsi, who have an established pattern of poor self-regulation, external guidance and control is crucial to their rehabilitation, and the longer the period of support and supervision, the better the prospects for effective risk management in the community. (p. 20).

[42] In an ideal world, I could construct a sentence for Mr. Vaneltsi that included intensive treatment and follow-up. However, as earlier mentioned, the availability of appropriate treatment options, even within the federal correctional system, is quite uncertain.

[43] In any event, I would be in error to sentence Mr. Vaneltsi to a federal sentence solely for him to access programming (*R. v. Smarch*, 2015 YKCA 13 at para. 59; *R. v. White*, 2018 ABPC 158 at para. 302).

Case Law

[44] Sentences for the offence of assault causing bodily harm are wide ranging, from a suspended sentence and probation (*R. v. Balla*, 2015 YKTC 15; *R. v. Webb*, [1992] 18 W.C.B. (2d) 83 (Y.K.T.C.)) to a lengthy period of imprisonment.

[45] In *R. v. Townsend*, 2015 BCCA 209, the Court upheld a sentence of 22.5 months' imprisonment for one of three assault causing bodily harm convictions perpetrated by the offender one evening outside of a nightclub. For the other two assaults, the Court of Appeal endorsed an effective global sentence of 13.5 months for a total sentence of 36 months' imprisonment.

[46] The offender, who pleaded guilty, had a significant record, including offences of assault, and one of aggravated assault. The offender was of Aboriginal heritage and had suffered some difficult circumstances in his life. The victim of the most serious assault "suffered ongoing concussive symptoms, a fracture to his cheekbone, a non-displaced fracture of his nose and two broken teeth" (para. 5).

[47] In *R. v. Matonovich*, 2007 BCCA 472, the Court found that based on the case law before it, the higher end of the range for assault causing bodily harm was a term of two years' imprisonment.

[48] The Court of Appeal reduced a two-year sentence of imprisonment to one of 18 months, as the sentencing judge may have improperly considered the victim's lengthy hospitalization as an aggravating circumstance. The circumstances were that the offender punched the frail victim until he was unconscious, resulting in a broken nose, blackened and swollen eyes, and bruises to his back and arm. The offender had an extensive criminal record, including four previous assault convictions. In each previous assault, a lower end period of imprisonment had been imposed.

[49] When discussing the higher end of the range for assault causing bodily harm offences, the Court stated:

Such sentences typically involve aggravating factors involving the use of a weapon, or are committed in the spousal context, or are committed by offenders with more serious records of violent assault.

[50] Of course, sentencing ranges are simply guidelines to assist judges in the exercise of their discretion of crafting an appropriate sentence (*R. v. Lacasse*, 2015 SCC 64, at para. 69). As such, there are occasions when a sentence may fall outside of normal sentencing ranges.

[51] For example, in the case of *R. v. Good*, 2010 YKTC 96 (affirmed on appeal at 2012 YKCA 2), the offender was convicted after trial of assault causing bodily harm and uttering death threats with respect to her spouse. The sentencing judge described the

assault, which resulted in the victim suffering a broken jaw and other injuries, as “vicious”.

[52] In coming to his decision, the sentencing judge reviewed the forty-year criminal record of the offender. It consisted of numerous offences of a serious assaultive nature on a variety of victims, including men, women and children. In one attack she disfigured her victim, and in another, the victim lost one eye while the other was damaged. Many of the assaults were premeditated and perpetrated against defenceless victims.

[53] As the sentencing judge commented, “one of the most remarkable features of [the offender’s] history of violence is its sheer persistence” (para. 24).

[54] The judge found that despite repeated treatment, the offender had little insight into her violent nature. Also, he noted that many assessments over the years confirmed that her risk of further serious violence was high when under the influence of alcohol.

[55] Considering the “forty-year-plus history of violent offending” and the seriousness of the index offence, the sentencing judge determined that the offence warranted three years’ imprisonment. He also found that the offender should be subject to a LTSO of 10 years.

[56] At the sentencing hearing, counsel provided me with a number of sentencing precedents and I have reviewed many others. The decision in *R. v. K.B.Q.*, 2012 YKTC 49 is relevant as the 32-year-old Aboriginal offender had a substantial record, including a serious prior history of assaultive behaviour. He pleaded guilty to offences of assault

and assault causing bodily harm in relation to his spouse. In 2010, a court had sentenced him for an assault on the same victim.

[57] Regarding the circumstances of the assault causing bodily harm offence, the offender entered the bedroom where the victim was sitting. The offender threw a plank-type piece of wood at her, striking her in the temple area, causing it to bleed. He then continued to assault her by striking her at least 10 times to the head and body while she was on the ground. The victim had extensive swelling and bruising. She also required three stitches to repair a torn lip. The offender was in breach of release conditions at the time of this assault.

[58] The Court sentenced the offender on this charge to 14 months' imprisonment. The Pre-Sentence Report noted that he was at high risk of reoffending violently. However, the Court also highlighted that he had participated in violence treatment programming while in custody awaiting sentencing.

[59] In *R. v. B.S.C.*, 2002 YKTC 13, the offender committed a very serious and unprovoked assault, which led to brain trauma and serious permanent consequences for the victim. The 20-year-old Aboriginal offender had a criminal record, including one prior assault conviction. The Court imposed a 12-month custodial sentence followed by 24 months of probation.

Aggravating Factors

[60] Mr. Vaneltsi has a persistent criminal history, including acts of violence. He has previously received a penitentiary term for offences of robbery and attempted robbery,

respectively, although the violence employed in each of those cases was on the lesser end of the spectrum.

[61] The assault on Mr. Huang was unprovoked and occurred when the victim's actions offended Mr. Vaneltsi's sensibilities.

Mitigating Factors

[62] Mr. Vaneltsi pleaded guilty. Additionally, he expressed remorse to Dr. Lohrasbe for his actions. While on remand, he has taken advantage of programming and is working with a psychologist.

The Appropriate Sentence

[63] Although Mr. Vaneltsi's record is very serious and includes previous acts of violence, having considered the circumstances of this offence and offender, as well as the relevant case law, I do not find that a sentence of two years' imprisonment or greater is warranted.

[64] Based on the aggravating and mitigating factors and the pertinent sentencing principles, I conclude that a sentence of 21 months' imprisonment is warranted. For the offence of failing to keep the peace, I impose a one-month concurrent sentence.

[65] Mr. Vaneltsi has been on remand for a little more than 14 months. He shall receive credit for one and one-half to one for the time on remand, resulting in 21 months' credit.

[66] In addition to the sentence of imprisonment, I place Mr. Vaneltsi on probation for a period of three years. In addition to the statutory conditions, he will also be subject to the following terms:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify the court or Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;
4. Have no contact directly or indirectly or communication in any way with Jing Huang;
5. Do not go to any known place of residence or employment of Jing Huang;
6. Report to a Probation Officer immediately upon his release from custody and thereafter, when and in the manner directed by the Probation Officer;
7. Reside as approved by his Probation Officer;
8. For the first 12 months of this order abide by a curfew by being inside his residence or on his property between 9:00 p.m. and 6:00 a.m. daily. He must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;
9. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for him by a medical doctor;

10. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
11. Attend and actively participate in all assessment and counselling programs as directed by his Probation Officer, and complete them to the satisfaction of his Probation Officer, for the following issues: substance abuse, alcohol abuse, anger management and any other issues identified by his Probation Officer, and provide consents to release information to his Probation Officer regarding his participation in any program he has been directed to do pursuant to this condition;
12. Make restitution by paying into court the amount of \$1,319, in trust, for Mr. Jing Huang within 12 months of the start of this order;
13. Make reasonable efforts to find and maintain suitable employment and provide his Probation Officer with all necessary details concerning his efforts.

[67] I also make the following ancillary orders with respect to Mr. Vaneltsi:

1. A 10-year firearms prohibition pursuant to s. 109 of the *Code*;
2. An order, pursuant to s. 487.051 of the *Code*, authorizing the taking of the number of samples of bodily substances that is reasonably required for DNA analysis and recording.

[68] I also strongly recommend that Yukon Community Corrections undertake a comprehensive programming and monitoring strategy in relation to Mr. Vaneltsi.

[69] Finally, I direct that Mr. Vaneltsi attend court for a review of his probation order within the first six months of its commencement.

CHISHOLM C.J.T.C.