

SUPREME COURT OF YUKON

Citation: *R. v. Buyck*, 2009 YKSC 54

Date: 20090702
Docket S.C. No.: 05-01514A
Registry: Whitehorse
Heard: Mayo

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ROY KENNETH BUYCK

Before: Mr. Justice C.S. Brooker

Appearances:
Noel Sinclair
Jennifer Cunningham

Counsel for the Crown
Counsel for the Accused

REASONS FOR SENTENCING DELIVERED FROM THE BENCH

[1] BROOKER J. (Oral): I must say that I have found this case one of the most difficult cases to sentence in my career, and it is not just talking about it today, I have been thinking about it for a while. But I have arrived at my decision, and it is this. I have considered the purpose and principles of sentencing as set out in the *Criminal Code*, and I will not repeat the sections here, we are all familiar with them. I have also considered the *Gladue* principle, as well as s. 718.2(e) of the *Code*, since Mr. Buyck is a First Nations person.

[2] Mr. Buyck, these are serious offences, particularly the assault with a weapon on a police officer who was engaged in the lawful execution of his duty. Police officers,

particularly in smaller communities, are entitled to the full protection of the law as they go about their duties, often under trying circumstances. I adopt the comments from Justice Jessup in *R v. MacKay*, [1970] O.J. No. 920, quoted in *R. v. McKenzie*, [1990] O.J. No. 2658, as follows:

It is not to be expected that a police officer is to be subjected to physical assaults in the execution of his duty for the protection of the public at large. Nor is it any part of the duty of policemen to adopt discretion in place of valour in the discharge of their duties in the many hazardous circumstances in which they have to act. In my view it is of the utmost importance that this Court express its deep disapproval of the conduct of people in assaulting police officers, and it is our duty and responsibility to protect the police who carry on their function for the protection of all of us.

[3] As was made clear in the arguments and submissions made before me, your actions that night may have resulted in very different and far more serious consequences, either with the constable being injured if you had connected with the shovel, or you being shot if the officer had drawn his pistol and been obliged to use it, but he should never have been placed in that position to start with.

[4] According to the precedents that have been referred to me, generally, a term of imprisonment in jail or a penitentiary is mandated for this type of offence. So I have looked at that, and certainly that is my initial reaction, that you should be subjected to a term of imprisonment in jail. So I have looked at the circumstances which might have a bearing on that initial impulse on my part.

[5] First, let us look at the aggravating circumstances in this case, and we have the following: the person you assaulted was a police officer; he was engaged in the lawful

execution of his duty, that is to say arresting you; and the third aggravating factor is that you have a significant prior record which includes similar types of offences.

[6] Then I have looked to see what mitigating factors there are in this case, and I note the following. Firstly, your record is dated. You have managed to keep out of trouble since you stopped drinking more than ten years ago, and thus this offence appears to be an aberration, since you have turned your life around by stopping drinking. Second, it is fortunate that the constable was not hurt. The shovel, although swung at the officer, did not connect. Third, and this is significant, you turned yourself in to the police shortly after the incident. Fourth, you have some community support, as evidenced by the letters submitted and marked as an exhibit, as well as the people that have spoken today on your behalf. Fifth, you are a single parent and sole provider for your daughter. Sixth, you provide constant support for your aging mother, an elder. Seventh, you are gainfully employed. Eighth, you were subjected to some significant pre-trial conditions with respect to your release, the most significant of which is that you were, for a period of approximately three months, as I understand it, prevented from living in your hamlet of Mayo. Lastly, and this is mitigating in the sense of a somewhat neutral factor in the sense that it is not because of you or in spite of you, but the fact remains that these offences took place three and a half years ago. So there is a certain timeliness element to whatever I do today.

[7] For these offences the Crown seeks a prison term for you of 16 to 18 months, followed by probation. The defence, on the other hand, seeks a conditional sentence of six months followed by one year of probation. I repeat what I said at the very beginning, I have given this matter earnest and much consideration, not just since today, but,

indeed, since your conviction.

[8] There is much merit in the Crown's submission that the sentence must reflect significant denunciation because this is a small community, people know what happened, and if you are seen to get a light sentence and are spared jail, everyone in the community will know of it and it may make it more difficult for the RCMP to do their job, which is already, I am sure, difficult enough. There is also much merit in the defence counsel's submission that there can in fact be a greater effect on the community if you are allowed to serve your sentence in the community under strict conditions, because your presence in the community under strict conditions is a constant reminder to the community of the cost of such criminal conduct.

[9] Since the defence is looking for a conditional sentence, I am required to examine whether or not the preconditions for a conditional sentence are met. I start by noting that the Crown does not seek a jail sentence of more than 18 months, and as that is under the two-year period and I do not propose to impose a sentence greater than two years, that precondition for a conditional sentence order is met.

[10] The second precondition is that I be satisfied that serving a sentence in the community would not endanger the safety of the community. Having regard to the representations made to me by Chief Mervyn, as well as the fact of Mr. Buyck's otherwise good behaviour for the last ten years, I am satisfied that this condition is met, and I say this in spite of the pre-sentence report assessment which seems to suggest, perhaps, otherwise. But without more explanation, I do not find that particularly helpful in the face of the actual *viva voce* -- it is not evidence, but the actual representations

made to me by the Chief on behalf of the community.

[11] Here I have two options before me, realistic options. Do I send you to jail for a period which would probably be in the area of nine to 12 months, or do I sentence you to a term of imprisonment to be served in the community for a longer period of time, since serving a sentence in the community is not generally regarded as being as onerous as jail, although some might argue that? After earnest consideration I have decided to impose a sentence to be served in the community. I am satisfied that it could be crafted to demonstrate to one and all the Court's denunciation of your criminal conduct and I am satisfied it could be crafted in such a fashion as to act as a deterrence to others who may be thinking of repeating it.

[12] I have decided on a conditional sentence order for the following reasons. First, it is quite obvious to me that the accused has strong community support, as evidenced by Chief Mervyn's comments, as well as the others who spoke, as well as the letters that were filed as exhibits. Second, sending Mr. Buyck off to jail will have a serious negative impact on two innocent bystanders, as it were: Mr. Buyck's daughter, who he is raising as a single parent, and his mother, who relies on his daily assistance. Third, I think there is a better chance of Mr. Buyck getting the treatment he requires through the itinerant programs available in the community rather than in prison. Fourth, Mr. Buyck has been gainfully employed at the mine since April 1, 2009. Going to prison now will mean the end of that employment, and he might not be able to get it back. With a conditional sentence order Mr. Buyck will be able to maintain his employment and be a self-sufficient and productive member of this community.

[13] Therefore, Mr. Buyck - stand up - on the charge of assault with a weapon I sentence you to a term of imprisonment of 18 months to be served in the community under the conditions of a conditional sentence order which I will outline shortly. On the charge of escaping lawful custody I sentence you to two months imprisonment to be served in the community, and to be served concurrently with the sentence for assault with a weapon. Following the 18-month term of imprisonment in the community you will serve a further 12 months under a probation order. You can sit down.

[14] The terms of the conditional sentence order, aside from the statutory terms which the counsel will go over with you, are these; and, counsel, I am prepared to entertain any other suggestions you might have, but these are the ones that I have decided on:

1. You will report to a probation officer (sic) at the first opportunity --

And since I do not know when that is, I have said:

-- and, in any event, no later than seven days from today.

I assume there will be a probation officer in this community within seven days?

[15] MR. SINCLAIR: He can phone-in report as well.

[16] THE COURT: Okay, so do it by phone.

Thereafter you will report to your probation officer when and in the manner that he or she directs.

2. You will take and complete all treatment programs and counselling that your probation officer directs, including anger management programs and counselling.
3. You will complete 200 hours of community service such as your probation

officer directs.

4. You will reside in Mayo at --

And I do not know the address of his home.

[Discussion re address of accused]

[17] MS. CUNNINGHAM: He does not have a house number; he has a PO box and he lives on Duncan Street.

[18] THE COURT: On Duncan Street.

4. You will reside in your home on Duncan Street, your present, existing home, or such other address as your probation officer may permit in writing in advance.

If for some reason there is a reason to move.

5. Within 30 days of today's date you will provide to Constable Rollie Smith a written letter of apology for your actions on the night in question, and you can deliver a copy to your probation officer and a copy to the RCMP detachment, who will then forward it on to Constable Smith.
6. You will refrain absolutely from the purchase, possession or consumption of alcohol or non-prescription drugs.

That includes marihuana, unless someone can give you a prescription for it; I do not think they can.

7. You will use your best efforts to continue to be employed.

In other words, I am making this order understanding that you are presently employed.

I anticipate you will continue to be employed, but if for some reason you get laid off, you will use your best efforts to obtain and maintain employment. Do you understand?

[19] THE ACCUSED: Yes.

[20] THE COURT:

8. For the first six months of this sentence you will be under house arrest, during which time you will remain on your property at the Duncan Street residence except for going directly to and from your place of employment and participating in your employment thereat, and for a period of one hour each day between 6:30 p.m. and 7:30 p.m., in which time you are to visit your mother.

In other words, what I am saying there is I understand from the representations that you visit your mother once a day to provide her with assistance. That visit will be between 6:30 and 7:30 if you are going to make it. If for some reason you are not going to go, then, fine, you will be under your house arrest. But you have this window of opportunity to visit your mother between 6:30 and 7:30 p.m. each day.

9. For the following six months, after the initial six months of house arrest, you will be subject to a curfew from 10:00 p.m. to 5:00 a.m., seven days a week, except for such times as you are involved in community service projects as directed by your probation officer.

I am having a little difficulty trying to figure out how you would be doing projects after 10:00, but since I am not aware of what projects they are going to be, you have that exemption and that exemption only.

[21] Those, then, are the conditions of the conditional sentence order. For the probation of one year following the 18-month conditional sentence order, the only conditions I make, other than the statutory ones, are that:

1. You attend upon your probation officer as and when he or she directs.
2. You enrol in and complete such treatment and counselling as your probation officer directs.

[22] In addition, there will be a DNA warrant for the taking of your DNA. With respect to the firearms prohibition, I will come back to that in a moment, because hopefully you two counsel have figured that out over the break, as to whether it is mandatory or discretionary, unless you can tell me now, by agreement, it is mandatory or discretionary; do you agree?

[23] MR. SINCLAIR: I don't think we agree.

[24] MS. CUNNINGHAM: I think we'll need a moment. We didn't discuss it and it's still just --

[25] THE COURT: All right. I am going to continue.

[26] I want you, sir, and particularly the members of the community, to know that I certainly do not view this sentence as a soft one. To the contrary, had I sentenced you to jail for nine months or a year, you would be out of jail and back in the community probably within four or five months, with good behaviour, maybe six. But with the conditional sentence order I have imposed, while you will be at home, you will be under strict conditions for one and one-half years, followed by a further one year of probation,

and, as your counsel will explain to you, if you breach any of the conditions of the conditional sentence order, I can collapse the order and send you to jail to complete all or any part of the 18-month sentence, and there is no remission, there is no time off for good behaviour for a conditional sentence order. You will be under this strict supervision and under these conditions for a full year and a half.

[27] Let me say this, also. In agreeing to impose a conditional sentence order instead of jail, I have relied considerably on the submissions made by Chief Mervyn and the others about the community supporting Mr. Buyck, and therefore, you, the community, have an obligation and the responsibility to ensure that Mr. Buyck lives up to his obligations and complies with the conditions I have set out. I am satisfied from what I heard this morning that you will do so.

[28] Mr. Buyck, I have taken you at your word with respect to your submission that you sincerely want to deal with this demon that seems to be present in you, and while you have controlled it for ten years, it got out of hand, it got out on December 10, 2005, and you now realize it is not simply a matter of alcohol, that there is something else there, and that you want to deal with it. You have a daughter. You have a new life that you have started ten years ago when you stopped drinking alcohol. You do not need the marihuana. You can take up running or something to get the same good feelings. So I am taking you at your word, and all I can say is, if you do not come through, you will have only yourself to blame and you will suffer the consequence.

[29] So that is my decision. Are there any other conditions that are usual that I have overlooked?

[30] MS. CUNNINGHAM: There's just -- I may have heard you wrong, but just in terms of clarifying, the first six months he can visit his mother at a specific time.

[31] THE COURT: Between 6:30 and 7:30. I thought he got home from work at 6:00; that is why I said 6:30 to 7:30.

[32] MS. CUNNINGHAM: I think he works much, much later, and he --

[33] THE ACCUSED: Well, no. Yeah, I get home about 6:00, either ten to or ten after 6:00, but around six o'clock I usually get home.

[34] MS. CUNNINGHAM: Okay.

[35] THE COURT: If there is another time, if he wants 7:00 to 8:00, it does not matter to me particularly. The point is there is only one hour in which to do this, and it has to be a specified hour so that the police can monitor.

[36] MS. CUNNINGHAM: And also the next six months you speak of a curfew.

[37] THE COURT: Curfew. 10:00 p.m. to 5:00 a.m.

[38] MS. CUNNINGHAM: I understand that. Now, there is just one other condition, is that sometimes things might arise that we haven't contemplated today, in terms of change of employment or different things, and often there's a condition that, unless there's written permission of your conditional sentence supervisor, so I would request that and --

[39] THE COURT: Any objection to that, Crown?

[40] MR. SINCLAIR: No.

[41] THE COURT: All right, then that will be added in as to both the curfew and the house arrest:

8. ... In terms of the timing, it can be adjusted in writing in advance by the conditional sentence order supervisor.

[42] MS. CUNNINGHAM: And there was one other person, besides his mother and his daughter, who is dependent on him as well, and that's Freddy (phonetic) Moses, who he often takes care of. And we don't have to --

[43] THE COURT: I cannot do anything about that. If, in fact, the conditional sentence - I am going to call him the probation officer, it is easier to say - if the probation officer wants to make that as part and parcel of his community service then that seems to fall within some of this anyhow.

[44] MS. CUNNINGHAM: And for the first six months, that's not --

[45] THE COURT: Not contemplated.

[46] MS. CUNNINGHAM: -- contemplated, okay. Thank you. I just want to make that clear.

[47] THE ACCUSED: I had a question. About my trapping there, can I still do that or --

[48] THE COURT: Only in these hours.

[49] THE ACCUSED: Only in those hours.

[50] THE COURT: You could not be doing it if you were sitting in jail, at all, could you?

[51] MR. SINCLAIR: We sometimes see a condition requiring the offender to carry a copy of the order on their person at all times when they're outside of their house.

[52] THE COURT: Yes. Although realistically, in Mayo, I assume everybody will know about the order; certainly the police will.

[53] MR. SINCLAIR: It might be a worthwhile reminder to Mr. Buyck himself.

[54] THE COURT: All right.

10. You will carry a copy of the order on your person at all times when you are away from the home.

So that if someone asks you to see it, maybe a new policeman or something, you can give it.

[55] MR. SINCLAIR: In the past we have seen conditions which require the subject of the order to provide a breath or a urine sample to a peace officer with reasonable grounds to believe that the -- it's usually an abstain alcohol condition; in this case it might be the abstain marihuana condition, to provide a sample. There is some case law from the Supreme Court of Canada, *R. v. Shoker*, [2006] S.C.J. No. 44, that says that that type of condition is not valid with respect to probation orders but the

jurisprudence is unsettled with respect to conditional sentence orders. And certainly he wouldn't be allowed to smoke pot in prison.

[56] THE COURT: Right. And I have made a condition he cannot smoke it on the CSO. What I have not done --

[57] MR. SINCLAIR: Right. But to detect that --

[58] THE COURT: What I have not done is, basically, done away with his privacy right in that regard, in terms of self-incrimination. So I do not -- I have never done that kind of a provision; I do not intend to start now, until the Court above me tells me otherwise.

[59] MR. SINCLAIR: All right. That's fine. Then those were my only comments. With respect to the firearms prohibition order, s. 109 says that:

Where a person is convicted ... of

- (a) an indictable offence in ... which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

...

the court ... shall

[60] THE COURT: But was that the law when this offence took place?

[61] MR. SINCLAIR: Yes. Section 109 hasn't --

[62] THE COURT: Has not changed?

[63] MR. SINCLAIR: -- hasn't changed, no.

[64] THE COURT: Then how is it --

[65] MS. CUNNINGHAM: I thought I read the section that the offence that we were dealing with was -- the maximum was ten years, not offence of ten years or more, which made it mandatory. But I could read through that further, if I need to.

[66] THE COURT: Well, it seems to me if the maximum is ten, that equals ten or more, because the ten is the figure, is it not?

[67] MS. CUNNINGHAM: Well, I thought, when I read this last night, that ten years or more, there's under ten years and then there's ten years plus a day, as in the sentencing regime. And since his offence, that's the maximum, that I thought it contemplated as a -- as a mandatory prohibition order things that were over ten years, not under ten.

[68] THE COURT: No, I think the way I read that it is ten years or more.

[69] MS. CUNNINGHAM: Well, if that's the case, then that would be a mandatory order. I thought it was a discretionary order.

[70] THE COURT: I did not think it was discretionary, so there will be a firearms and explosives prohibition.

[71] MR. SINCLAIR: Ten years.

[72] THE COURT: Ten years. And I am not sure what you do here. I know in Nunavut there are sometimes provisions or you can make an application if you have --

[73] MR. SINCLAIR: Section 113.

[74] MS. CUNNINGHAM: That's s. 113, and I would make an application, based on the evidence we've heard today about Mr. Buyck being a subsistence provider for family members and community, that there be an exception for the purposes of subsistence hunting only.

[75] MR. SINCLAIR: In my submission, based on Mr. Buyck's antecedents, he's not someone who should be allowed the privilege of possessing a firearm whatsoever and --

[76] THE COURT: Has he possessed one already?

[77] MR. SINCLAIR: He has in the past. He doesn't now, that I know of, and I don't know whether he's licensed to possess one. I mean this is largely going to be an administrative decision by the chief firearms officer.

[78] THE COURT: Right. Why does that decision have to be made today by me? And the reason I say that is I would think, if I were in Mr. Buyck's position, I would like to establish a little bit of a track record before I made an application like that.

[79] MS. CUNNINGHAM: I think that's -- that's one thing that I did think about. And I know that before he ever does be able to hunt for subsistence purposes he's going to have to work through FAC issues, which his criminal record takes into it. It's just that we're before you today asking for it, and you've heard the evidence.

[80] THE COURT: Right.

[81] MS. CUNNINGHAM: And I think even if your prohibition order, you put it into place for ten years, then he would still, even if he didn't have that, he's still working on it. It just means that we wouldn't have to come back before another judge and call this evidence.

[82] THE COURT: I think you are going to have to come back before another judge because I am not prepared to grant it at this stage.

[83] MS. CUNNINGHAM: I understand.

[84] THE COURT: Is that it?

[85] MR. SINCLAIR: That's all from the Crown.

[86] THE COURT: Thank you very much. Thank you, members of the community for coming down. Your input was helpful.

BROOKER J.