

Citation: *R. v. Bruce*, 2009 YKTC 135

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07-00779B  
07-00779C  
09-00178  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Cozens

REGINA

v.

SHAWN LORNE BRUCE

Appearances:  
Kevin Komosky  
David Christie

Counsel for Crown  
Counsel for Defence

**REASONS FOR SENTENCING**

[1] COZENS T.C.J. (Oral): Shawn Bruce was convicted after trial on a charge of having assaulted Jimmy Linklater, causing him bodily harm, contrary to s. 267(b) of the *Criminal Code*. He was also convicted of mischief for breaking the window of Mr. Linklater's residence, contrary to s. 430(4). These offences took place on March 6, 2008. Crown counsel proceeded by indictable election.

[2] Mr. Bruce has also entered guilty pleas to one offence of failing to attend court on March 31, 2009, which was a trial date, contrary to s. 145(5), one breach of the terms of his undertaking to a peace officer on March 28, 2009, for failing to abstain from the

possession and consumption of alcohol, contrary to s. 145(5.1), and one breach of the terms of his recognizance on June 6, 2009, for failing to abstain from the possession and consumption of alcohol, contrary to s. 145(3).

[3] I provided oral reasons for Mr. Bruce's conviction immediately after trial in Old Crow on September 29, 2009, in respect of the s. 267(b) and s. 430(4) charges and sentencing was adjourned until December 1st in Old Crow to allow for the preparation of a pre-sentence report. That sentencing was adjourned from Old Crow back to Whitehorse on today's date for continuation of sentencing.

[4] In brief, at trial, I found that Mr. Bruce went to Mr. Linklater's residence and smashed his window, which cost Mr. Linklater an estimated \$401.85 to repair. Mr. Linklater then went over to Mr. Bruce's residence and knocked on the front door, intending to confront Mr. Bruce over the broken window. Mr. Linklater was carrying a pole with him because he intended to break Mr. Bruce's window. Mr. Bruce came out of his residence and assaulted Mr. Linklater with a stick of some kind.

[5] An independent and credible eyewitness, whose evidence I accepted, saw Mr. Bruce push Mr. Linklater down the stairs to the ground, kneel on him and strike with many aggressive blows, as many as ten to 15 times. She characterized the force as being applied in "extreme anger," full body anger. As a nurse, from what she observed, she was 100 percent sure at the time that injuries would be sustained and in fact notified the person at the health unit to expect to be working shortly. Mr. Linklater sustained a broken hand in three or four places and a bruised shoulder. He continues to suffer from the injury to his hand.

[6] With respect to the s. 145(5.1) charge, circumstances were that Mr. Bruce was located in Whitehorse intoxicated by alcohol, with a blood alcohol level of 332 milligram percentile, contrary to the terms of a release of an undertaking to a peace officer by which he was bound on that day.

[7] With respect to the s. 145(3) charge, the circumstances are that Mr. Bruce was again located intoxicated while in Whitehorse. He was noted to be visibly upset and crying by the police officer at the time of his arrest. This was contrary to the terms of the recognizance he was bound by on that date. As I indicated earlier, the March 31st date on which he failed to appear was a date set for trial in Old Crow.

[8] Crown counsel is seeking a custodial disposition of six to nine months on the s. 267(b) charge, to be followed by one month consecutive on the s. 145(5) charge, one month consecutive on the s. 145(5.1) charge, and one month concurrent on the s. 145(3) charge. Counsel suggests a further two months concurrent be imposed on the s. 430(4) charge.

[9] Counsel agree that the pre-trial custody of Mr. Bruce amounts to five months credit to be applied against the sentence imposed. Crown counsel is also seeking a period of probation of one year to follow.

[10] Defence counsel is seeking a sentence of five months time served on the s. 267(b) and concurrent time on the remaining offences, also followed by a period of probation.

[11] Mr. Bruce is a 41-year-old member of the Vuntut Gwitchin First Nation, to turn 42 this month. He has lived most of his life in Old Crow. He was raised in a traditional lifestyle which was not, according to the pre-sentence report, marked by significant alcohol abuse in the home. There is some indication by Mr. Bruce, when he spoke to the Court today, that there may have been more difficulties associated with alcohol than have necessarily been relayed.

[12] It is to be noted that he was adopted by his aunt and uncle, Robert and Ellen Bruce. He was really not raised by his biological parents at all. He has provided information that Robert Bruce was a residential school attendee and it should be noted that Robert Bruce died in 1995.

[13] Shawn Bruce has a limited, albeit related, criminal record. His first conviction for an offence of violence was in 1989 for an assault causing bodily harm, for which he was sentenced to one day deemed served and nine months probation. He has two convictions for assault in 1995 for which he received 30 days on each, consecutive to each other, and one year probation on each. His only conviction between 1995 and today is one in 2004 for failing to provide a breath sample. He received a conditional discharge on a mischief charge in 1992.

[14] Mr. Bruce has a grade ten education. He has completed some partial upgrading. It is noted that he generally keeps himself busy with a variety of employment and appears to be someone that wants to keep busy and is able to. Mr. Bruce struggles with issues related to grief and loss. In the past year he has lost two aunts and two uncles. He has indicated today that he has another uncle who is seriously ill in hospital,

his remaining uncle. His mother, Ellen Bruce, is 98 years of age. She is quite ill and currently staying in Inuvik as she cannot be properly taken care of in Old Crow.

[15] Mr. Bruce advised the author of the pre-sentence report that he feels like he has suffered from loss all his life. His uninsured home was destroyed earlier this year, with the loss of a number of irreplaceable family items. Mr. Bruce describes himself as a recovering alcoholic. The extent to which alcohol played a role in the assault causing bodily harm, for which he is being sentenced today, was not apparent on the evidence at trial; however, in the pre-sentence report, Mr. Bruce states that he was drinking at the time and not necessarily thinking as clearly as he usually does when sober.

[16] Mr. Bruce has attended for residential treatment on two occasions in the 1990s. His longest period of sobriety has been for two years. He has not consumed alcohol since his arrest on September 2, 2009, on charges for which he is still awaiting trial. I note, of course, he has been in custody since that time.

[17] While in custody, Mr. Bruce has completed the White Bison and Gathering Power programs. Mr. Bruce claims to have found the White Bison program in particular to be very useful, saying he has never had opportunity to go to such a useful program. Mr. Bruce has expressed a willingness to continue with counselling after his release from custody.

[18] The report from Kevin Barr, the final report from the White Bison program which was filed, is very positive; brief but very positive about full participation from Mr. Bruce, who spoke often of what he was learning, sharing his cultural ways with the group and expressing many insights he had come to understand while in the course of the

program that Mr. Bruce had indicated he believed would help him to continue a sober lifestyle in the future. He was noted to be a pleasure to have in the group.

[19] There is a letter from the Vuntut Gwitchin Health, Recreation and Social Services Department indicating some pro-active contact by Mr. Bruce with respect to wanting to continue some grief counselling. Mr. Bruce spoke quite convincingly about what he has learned about grieving while he has been in custody. He noted that he worked eight hours a day in the kitchen and continued, despite being tired, to take these courses because of what he was learning and the benefit that he was getting from them. He said that he felt that he made the best of a bad situation while in custody, and in all the information before me and the pre-sentence report and the documents filed, it is clear that Mr. Bruce has done pretty much everything you could hope and expect someone to do while in custody.

[20] Mr. Bruce's Criminogenic Risk Assessment places him in the medium range with respect to a likelihood of re-offending. The concerns underlying his risks are alcohol consumption, relationship issues and what is considered to be an escalating pattern of criminal behaviour. With respect to the escalating pattern, obviously, it would be the charges for which he is being sentenced today and, I expect, the allegations that he still is awaiting trial for. Clearly, however, Mr. Bruce is, again, at a bit of a watershed point in his life and comes before this Court having, as I said, done everything he could be expected to do in custody, in the meanwhile, to perhaps deal with issues related to his alcohol abuse and issues that might relate to whether there is, in fact, as he has not been convicted of those other offences, any actual escalation of criminal behaviour. To the extent that that may be true or may not be true, certainly what he has done in

custody would be something that could change that direction, if that direction is, in fact, occurring.

[21] The author of the pre-sentence report notes that Mr. Bruce has utilized the time in custody productively and further states that:

If he could bring that ethic into the community when released, Mr. Bruce would do well. He was considered to be a suitable candidate for community supervision. Mr. Bruce has indicated that he needs to move on with his life and he needs to apologize to those people that he has hurt through his abuse of alcohol. He acknowledges that family is the most important thing, and community, and that he needs to accept help from family and the community to move on with his life.

[22] The author of the pre-sentence report notes that Mr. Bruce does not express any remorse for the victim of the assault causing bodily harm, Jimmy Linklater. Mr. Bruce continues to assert that he was only defending himself. I do not consider this lack of remorse to be an aggravating factor; it simply is to be contrasted to the mitigation that can be given an offender when remorse is expressed. Mr. Bruce did indicate, however, that he is prepared to provide \$400 restitution to Mr. Linklater for the broken window that seemed to be the initiating factor in this entire incident around the assault causing bodily harm.

[23] Defence counsel submits that s. 718(2)(e) needs to be considered, as Mr. Bruce is a First Nations individual. I note, however, that the case law is clear that the greater the degree of violence in an offence, the less likely it is that adherence to this principle of sentencing will result in a different sentence than for a non-aboriginal offender. Also, there is not an abundance of evidence before me to establish a link between Mr.

Bruce's First Nations heritage and the offences for which he is being sentenced. I do note that he is a second generation product of residential school in the sense that his adoptive father, Robert Bruce, was an attendee at residential school. Shawn Bruce indicated some concerns that he - and I say he, meaning Robert Bruce - was not, as a result of his experience at residential school, able to communicate grief issues and help Shawn Bruce deal with some of the issues as well as he could have.

[24] Again, there is not before me the kind of evidence that you would see in a *Gladue* report that would draw the lines and make the linkages between his First Nations heritage and the offence for which he finds himself before the Court today. So I must keep that in mind when I am considering the application of s. 718(2)(e). It would be wrong to simply presume that because someone's father attends residential school that that, of necessity, results in an offender finding himself or herself in circumstances where s. 718(2)(e) should virtually automatically result in a differential sentence.

[25] I keep in mind the principle of restraint, however, in considering which sanction best accomplishes a balancing between all the applicable principles of sentencing on the facts of this case. I note that the only time Mr. Bruce has been in custody, according to his criminal record, prior to his recent time on remand, was the 60 days in 1995 for the two assault charges. This was, of course, 30 days consecutive on each.

[26] Mr. Bruce has indicated that this earlier custodial time was spent on the land. I do not have any information on that. The closest thing I have got to corroborate that is the author of the pre-sentence's report indication on page 5 that this is Mr. Bruce's first time in custody at Whitehorse Correctional Centre and he is finding the experience



stressful. I do not consider it necessary to resolve whether in fact it is his first time in custody at Whitehorse Correctional Centre; the reality is that Mr. Bruce has not spent much, if any, time in actual custody in an institutional setting. It would seem, based on what he has done, that he has taken the best advantage of it, but it has clearly been a stressful situation for him as is noted in the pre-sentence report. He has done well with that stress.

[27] He has now been in custody the equivalent of approximately five months at a credit of one and a half to one. He is considered suitable for community supervision.

[28] Balancing all of these factors, keeping sight of the importance of rehabilitation and the principle of restraint, even while denouncing offences of violence like this that involve more than the use of hands but the use of some form of a pole or stick, I consider a global sentence of between seven and eight months to be appropriate.

[29] The sentence will be as follows: on the s. 267(b), it will be five months time served; on the s. 430(4), it will be one month time served, concurrent; on the s. 145(5.1), it will be one month consecutive; on the 145(5), it will be two weeks consecutive; and on the s. 145(3), it will be one month consecutive.

[30] With respect to the additional two and one half months custody remaining, I must consider the appropriateness of the imposition of a conditional sentence. I am satisfied on the information before me that the imposition of conditional sentences for the three process offences would not endanger the safety of the community and is consistent with the fundamental purpose and principles of sentencing set out in s. 718 to 718(2) of the *Code*. These are three separate conditional sentences, consecutive,

and the order that they will go is the s. 145(5.1) is going to be the first. The terms will be as follows:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;
5. Notify the Supervisor or the Court in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
6. Reside as approved as your Supervisor and not change that residence without the prior written permission of your Supervisor;

In these circumstances, in the community of Old Crow, and what needs to be done, I am going to deviate from the norm of house arrest and impose a curfew.

7. Abide by a curfew by remaining within your place of residence between the hours of 10:00 p.m. and 6:00 a.m. daily except with the prior written permission of your supervisor. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

8. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
9. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. Take such alcohol and drug assessment, counselling or programming as directed by your Supervisor;
11. Take such other assessment, counselling or programming as directed by your Supervisor;
12. You are to have no contact, directly or indirectly, or communicate in any way with Jimmy Linklater except with the prior written permission of your Supervisor;
13. You are not to attend at or within 25 metres of the residence of Jimmy Linklater except with the prior written permission of your Supervisor;
14. You are to make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;
15. You are to provide your Supervisor with consents to release information with regard to your participation in any programming, counselling or employment that you have been directed to do pursuant to this conditional sentence order.

[31] These terms will apply to the next conditional sentence consecutive, which is the s. 145(3), which is one month consecutive, and to the two weeks on the s. 145(5), which is consecutive. So it is one, one and two.

[32] Mr. Bruce, if you breach any of the terms of this, and I say this noting that we have another application to be heard yet, but if you breach any of the terms of the conditional sentence order that you are bound on, you need to understand that you can be, and likely will be, arrested and brought before the Court to show cause why basically the remainder of that conditional sentence should not be served in full in custody. So you need to take these conditions very seriously.

[33] With respect to the s. 267(b) and the mischief charge, it will be followed by a period of probation of one year. The terms of the probation order will be, of course, the statutory terms:

1. To 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 the Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;

The remaining terms, other than the curfew, will be in effect:

4. You are to report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;

5. You are to remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
6. You are to reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
7. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;

With respect to both the conditional sentence clause on the abstention and the probation order clause, it is going to be "except with a prescription given to you by a qualified medical practitioner," I am going to add the words, "for a controlled drug or substance." I am going to add those words onto the end. That is to distinguish between alcohol and between the drugs.

8. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
9. You are to take such alcohol assessment, counselling or programming as directed by your Probation Officer;

With respect to the conditional sentence, I believe I said drug assessment. We do not need drug assessment on the conditional sentence. There is no indication drugs are a problem in his life. If it is a necessary part of the alcohol assessment, so be it.

10. You are to take such other assessment, counselling or programming as directed by your Probation Officer;

11. You are to have no contact, directly or indirectly, or communication in any way with Jimmy Linklater except with the prior written permission of your Probation Officer;
12. You are not to attend at or within 25 metres of the residence of Jimmy Linklater except with the prior written permission of your Probation Officer;
13. You are to make restitution by paying into Territorial Court the amount of \$401.85 in trust for Jimmy Linklater;
14. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
15. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling or employment that you have been directed to do pursuant to this probation order.

[34] Are there any terms of the conditional sentence order or the probation order that counsel wish to make submissions on?

[35] MR. CHRISTIE: I just want to be careful and clear with -- his intention is, with permission, to work out a plan to visit his mother in Inuvik and is the one term, remain in the Yukon Territory, can that be except with permission?

[36] THE COURT: Except. It has that on it.

[37] MR. CHRISTIE: Oh, it has? Okay, I'm sorry; I just didn't hear that part.

[38] THE COURT: Let me see. The conditional sentence? Yes.

[39] MR. CHRISTIE: Okay.

[40] THE COURT: There are permission exceptions for that. In other words, the terms of the probation order, rather than the necessary changes from Supervisor to Probation Officer, are - and the statutory differences - are virtually identical except for the curfew.

[41] MR. CHRISTIE: Thank you.

[42] MR. KOMOSKY: Your Honour was very deliberate in saying that there would be three separate conditional sentence orders. I wonder if I could make submissions on having one conditional sentence order?

(Submissions by counsel)

[43] THE COURT: I appreciate counsel's submissions on this. I am going to leave it as it is, in the circumstances, although I concede there is merit, certainly.

[44] There will be a mandatory s. 109 firearms prohibition that prohibits Mr. Bruce from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for a period of ten years.

[45] There will also be a DNA sample provided, as it is a primary designated offence.

[46] In the circumstances, particularly the restitution that is to be paid, Mr. Bruce has been in custody for some time and his loss of residency and downstream difficulties, I am going to waive the victim fine surcharges. That deals with this matter. We have the other matter.

[47] MR. CHRISTIE: I'm sorry, did you say the surcharges are waived?

[48] THE COURT: I am going to waive them in this case.

[49] MR. CHRISTIE: And is there -- is there a stay on the remaining counts?

[50] THE COURT: There is one remaining count, I believe.

[51] MR. CHRISTIE: The CDS -- or is that already stayed? No, okay.

[52] THE COURT: No, I think I dealt with all the counts, did I not?

[53] MR. KOMOSKY: Oh, the s. 4.1, yes.

[54] THE COURT: The s. 4.1, yes, right, thank you.

[55] MR. KOMOSKY: The Crown would seek to withdraw that count.

[56] THE COURT: Withdraw Count 2 on the 178 Information.