

Citation: *R. v. Clunies-Ross*, 2011 YKTC 80

Date: 20111121

Docket: 10-00549

10-00549A

10-00549B

10-00549C

09-00444B

09-00675

09-00675B

09-00675C

09-00675D

09-00675E

09-00675F

11-00235

Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: Her Honour Judge Ruddy

REGINA

v.

DARYL CLUNIES-ROSS

Appearances:

John Phelps

Kimberley Hawkins

Counsel for the Crown

Counsel for the Defence

**REASONS FOR SENTENCING**

[1] RUDDY T.C.J. (Oral): Daryl Clunies-Ross is before me for sentencing with respect to a number of counts to which he has entered pleas of guilty. There are three common assaults; one count contrary to s. 177, which relates to his attempting to enter a local residence, and then there is a fail to appear and a number of breaches. He has

entered pleas to two breaches, but they encompass a number of individual breaches occurring over an extended period of time.

[2] The s. 177 charge involves a situation on August 7, 2009. In the early morning hours, Mr. Clunies-Ross was noted to be attempting to enter a residence of the sister of his ex-girlfriend through the window. When she yelled at him that she was going to call the police he did leave, ultimately running back into the building, which was the same building that he resided in as well.

[3] On November 19, 2009, there was an incident of assault, again in the early morning hours. Mr. Clunies-Ross and the victim, Linda Stick, were both intoxicated. He began cutting himself and did grab her arm, attempting to cut her as well. There was an argument, at which point he grabbed her around the neck and began to choke her. She shoved him away, falling to the ground, but when she got up he grabbed her and choked her again, and it was sufficient that she was having difficulty breathing.

[4] The second assault occurred October 16, 2010, which involved an argument between Mr. Clunies-Ross and Gloria Jack, observed by the complainant, who contacted the RCMP. When they located Ms. Jack they observed some visible injuries including blood from her nose and the left side of her mouth, and a swollen upper lip. They were able to learn, through investigation, that when Ms. Jack had reached for some beer that was in Mr. Clunies-Ross's pocket, he punched her in the face with his fist. Both individuals were quite intoxicated at the time. Mr. Clunies-Ross provided a breath sample which registered at 237 milligrams percent.

[5] There was an additional incident between he and Ms. Jack on June 24, 2011,

somewhat lesser in terms of the actions, but concerning because, again, it involved another female. Again, it appears all parties had been drinking. Mr. Clunies-Ross was with Crystal Jack and the two of them met up with Gloria Jack. There was some unpleasant discussion, and when the two Ms. Jacks went to leave, Gloria Jack was grabbed from behind around the neck by Mr. Clunies-Ross. He also tore her earring out of her right ear, and threw a rock at them. Fortunately, the rock did not hit either of them.

[6] Across this period of time, because these offences do go from 2009 until 2011, Mr. Clunies-Ross had been involved with Wellness Court. So he has been on conditions for an extended period of time in relation to his involvement in the Wellness Court process. The conditions included a curfew and abstain conditions. I am advised that on five separate occasions he was found by the RCMP to be intoxicated after his curfew, and on two occasions intoxicated before his curfew, in breach of his conditions. He failed to appear on November 17, 2010. I believe that covers the facts of all of the various offences to which he has entered pleas of guilty.

[7] He comes before the Court with a prior criminal record. There are related offences on that record, which include a prior spousal assault, which is concerning to me, from 1997, and a prior sexual assault. Now, that particular offence, the sexual assault, was one for which Mr. Clunies-Ross did successfully complete Wellness Court, not without some struggles, but he did make it to the end and did do very well. Unfortunately, he has not been as successful this time. There are a number of reasons, I imagine, for that.

[8] There is a lot of information before me with respect to Mr. Clunies-Ross's background. I think most notably, of course, is the fetal alcohol diagnosis. I really think his mother said it best, that many of these problems he struggles with were visited upon him at birth, through no fault of his own. There are a number of things that flow from his disability that make it difficult for him to function on a daily basis without the appropriate supports and supervision around him. At times he does well. He has a lot of very positive qualities when he is sober and doing well. He has held a lot of employment positions over the last few years and had positive reports from his employers. He has had support from FASSY, support from his mother. He has also completed a lot of programming and treatment while he has been involved with Wellness Court and while he has been in custody for the last few months. He recognizes he needs help and he recognizes he needs support, but he struggles, and that is not surprising.

[9] The dilemma for me in this particular case is really what I do as an appropriate disposition. The Crown is taking the position that the offences as charged before me, when I consider credit for partial completion of Wellness Court, because he was with us for some period of time, and when I consider the nature of his disability, is one which would amount to effectively time served, which would be effectively a nine month sentence but giving him credit, at one and a half to one, for the time that he has spent in custody, but is suggesting that I follow that up with an 18-month probationary term to ensure that there is appropriate supervision in place for Mr. Clunies-Ross.

[10] Somewhat ironically, I am in the situation where Mr. Clunies-Ross's counsel on his behalf is actually arguing that I keep him in jail longer, noting the concern of possibly setting him up, should I place him on conditions, as it is evident that he does struggle

with conditions. As I mentioned in our discussions earlier, the difficulty is that I really have two options before me, both of which are options he will struggle with. One is to keep him in jail for a slightly longer period of time, but then to release him, basically, on his own. As his mother points out and as is evident to me from the reports, having that degree of freedom over his choices is actually not a good thing for him, because he struggles to make the right choices, particularly once he starts drinking; and if he makes those poor choices and starts drinking, people get hurt. I know that is not something that he would do if he were not drinking, but once he opens that door, then the people around him are at risk.

[11] So, on the one hand, I am being asked to basically give him the freedom to make his own choices, and that is concerning for me for the reasons that we talked about, in terms of whether or not I am setting him up equally for failure by doing that, because he just does not have the structure and supervision and supports that he needs to be successful.

[12] On the other hand, I am being asked to consider placing him on conditions, and we know, from the charges in front of me today, that he struggles with complying with conditions, quite understandably, because of the nature of his disability, which manifests itself in problems with recollection and problems with knowing what the expectations are that he has to meet. So conditions are, not surprisingly, very difficult for him to follow.

[13] I must say I really wish I had a better solution; I do, but at this point, the best option that we have to try and assist people in Mr. Clunies-Ross's situation really is

Wellness Court, and I think everybody gave it their best shot over the last couple of years, but we just did not get to where we wanted to be.

[14] At the end of the day, when I consider all of the factors that are before me, I am comfortable with the sentence as suggested by the Crown in terms of the length of custody. I think the length fairly reflects both the efforts that he has put in, in terms of programming and Wellness Court, and also reflects his disability. I think it is important; I will tell you that if I were dealing with an individual that was not struggling with the same issues, it would be a considerably longer sentence without much hesitation, because of the number of offences of violence against women, particularly ones with whom he is or has been in relationships, so that element of there being a spousal relationship is very concerning to me.

[15] I have come to the conclusion that while neither of them are perfect solutions, and while I know he struggles with and does not care to be on probation, that in all of the circumstances the best option that I have is to follow up the time he spent in custody with a probationary term that is going to allow for someone to step in and put certain controls and limitations on the choices that he makes, recognizing that it will likely be difficult for him. I trust that Probations will be very even-handed in their supervision of the order in terms of recognizing his limitations and will not jump to breach him at every possibility, but will respect the fact that he has struggles and that it will be hard for him.

[16] Here is what the disposition is going to be. I am satisfied with the breakdown as suggested by the Crown. I should state for the record, because it is going to end up as time served, that following the recent decision out of this Court in *R. v. Vittrekwa*, 2011

YKTC 64, I have been provided sufficient evidence with respect to his performance in custody to satisfy me, and indeed it is conceded by the Crown, that in this particular case one and a half to one is appropriate. He has done approximately six months or slightly over in remand, which gets him to, essentially, credit for nine months in pre-trial custody.

[17] The sentence will be as follows: With respect to the s. 177, one day deemed served with credit for 30 days in remand. The first s. 266 offence, one day deemed served by his attendance in court today, and credit for 90 days in pre-trial custody. The second s. 266 charge will be also one day deemed served by his attendance in court today, with credit for 90 days in pre-trial custody. The third s. 266, one day deemed served by his attendance in court today with credit for 60 days in pre-trial custody. On each of the three s. 145 charges, there will be a sentence on each of one day deemed served by his attendance in court today, and he will be given concurrent credit for 30 days in pre-trial custody on all three of those.

[18] For the reasons that I have stated, while I am satisfied that it is not a perfect solution, at this point I think it is the best and only solution that I do have, that there be a probationary term. Furthermore, the reality is that Mr. Clunies-Ross requires supports on a long-term basis, so I am satisfied that 18 months is an appropriate term to place him on at this point in time.

[19] One of the struggles that I do have, though, is the language of the conditions that we use. I do not think we have time right now to try and craft them into plain language conditions. I am wondering whether it makes most sense for me to simply put him on

our standard form conditions, and perhaps Mr. Phelps could be prevailed upon to speak to Probations, but put on the record a request or a suggestion that they work with Mr. Clunies-Ross to develop some plain language terms to assist him in understanding what his obligations are. I think it would take us too much time to do that today, and I do not want to put it over for us to do that, so I am going to see if maybe Probations could assist us with that.

[20] The terms and conditions of the probation order will be:

1. Keep the peace and be of good behaviour; appear before the Court when required to do so by the Court;
2. Notify the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;
3. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
4. Report to a Probation Officer within one working day and thereafter when and in the manner directed by the Probation Officer;

I am going to say:

5. Reside as directed by the Probation Officer --

-- instead of "Reside as approved" because housing in Mr. Clunies-Ross's situation is absolutely critical, and I think the Probation Officer should be determining what is in his



best interests, or rather, what the best option is that we have for him in light of his disability. He is also to:

Abide by the rules of the residence and not change that residence without the prior written permission of the Probation Officer.

We do not normally include curfews on probation orders. In his circumstances, it may well be a control that assists him, but I am not prepared to put it on for the whole time. The suggestion of the first six months is appropriate.

6. For the first six months, you are to abide by a curfew by remaining within your place of residence between the hours of 10:00 p.m. and 7:00 a.m. daily except with the prior written permission of your Probation Officer. 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.

The abstain clause is always a tough one, but I think in this case it is critical because that is when he becomes dangerous.

7. You will be required to abstain absolutely from the possession or consumption of alcohol;
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;

10. You are to take such other assessment, counselling and programming as directed by your Probation Officer;
11. You are to have no contact directly or indirectly, or communication in any way with Linda Stick or Gloria Jack, except with the prior written permission of your Probation Officer in consultation with Victim Services;
12. You are to participate in such educational or life skills programming as directed by your Probation Officer;
13. You are to make reasonable efforts to find and maintain suitable employment, and provide your Probation Officer with all necessary details concerning your efforts;
14. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this probation order.

[21] I just want to reiterate, I appreciate that those conditions in our normal wording will be very difficult for him to understand, hence the request for Mr. Phelps to call Probations to work on some plain wording to assist him in understanding what he needs to do.

[22] That would leave us with issues like the victim fine surcharge, which I would waive, given his recent custodial status. The remaining counts?

[23] MR. PHELPS: Stay of proceedings, Your Honour. And just for clarification, the 18-month probation order attaches to which counts?

[24] THE COURT: I would attach it to all three of the assaults and the s. 177, all of the substantive offences, basically.

[25] MR. PHELPS: Thank you.

[26] THE COURT: I do not think it needs to be attached to the breaches, nor should it be, but will attach it to all of the substantive offences.

[27] I believe a s. 109 firearms prohibition would be discretionary.

[28] MR. PHELPS: Yes, and I don't have a -- I'm not seeking that, Your Honour, under the circumstances.

[29] THE COURT: In the circumstances, I would not think it is appropriate, but I should probably reference it in any event to say in this particular case I do not believe that is necessary. So I would exercise my discretion not to impose it. I do not believe there are any other ancillary orders that come up, are there?

[30] MR. PHELPS: I don't believe so, Your Honour. Thanks.

---

RUDDY T.C.J.