Citation: *R.* v. *Kendi*, 2011 YKTC 37

Date: 20110613
Docket: 11-00029
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

ARTHUR JULIUS KENDI

Appearances:
Susan Bogle — Appearing for the Crown
David Christie — Appearing for the Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J.. (Oral): Arthur Kendi is before me for sentencing on a single count of spousal assault.

[2] There is an agreed statement of facts which has been filed as an exhibit in these proceedings today. It is not my intention to read the whole of that into my decision. Suffice it to say the assault involved a single punch to the mouth and nose area of Mr. Kendi's spouse, Cecelia Taylor. I have been provided with photographs which indicate to me that the blow was a significant one. There was a large amount of blood, which can be seen throughout the home on walls, on carpets, on some of the furniture, and in the bathroom area. So there was extensive bleeding. Medical intervention was required. Fortunately for Ms. Taylor, her nose was not actually broken, although there

was some injury that would have taken, in terms of the swelling, some time to resolve.

[3] There is a significant amount of information that has been filed before the Court, and I would like to commend both counsel for their efforts in bringing all of that information forward. I am not proceeding with a current pre-sentence report in this case, as I might normally in circumstances like this, but counsel have provided an extensive joint book of authorities, which includes a number of cases which highlight the principles which are at play in this case, but also which include a great deal of information with respect to Mr. Kendi and his background. These include a pre-sentence report from 2009, an FAS diagnostic report completed in 2006. There is also a dated psychological assessment completed in October of 2003, and additional information on how it is that we ought to deal with FASD individuals on a day-to-day basis, but in particular, within the justice system, which types of things work, which types of things do not. So there has been a great deal of information filed in an effort to assist me in determining what an appropriate disposition is in this particular case.

[4] I will say at the outset that the real dispute as between counsel is the appropriate sentence in terms of the custodial portion of the sentence. There is a joint agreement that two years probation is appropriate, with modified terms which are appropriate to Mr. Kendi's disability.

[5] The real dispute, however, is length of time in custody. Crown takes the position that eight months would be an appropriate disposition. Defence is suggesting that a sentence of three months would be appropriate in all of the circumstances. In weighing those two positions there are a number of issues which I have to have regard to, the first being the seriousness of the offence. It is a serious offence. It is serious because it

is spousal in nature. It is serious because the blow itself was obviously a significant one when one looks at the amount of blood and the injuries suffered. It is also serious when I look at Mr. Kendi's criminal history.

[6] He does have an extensive criminal record. That is not surprising when one considers both his background circumstances and his disability, but he does have a history of violence; he does have a history of violence against women. Of particular note, in 2003, there was a break-enter and commit assault causing bodily harm on a female elder in Mr. Kendi's home community of Old Crow. In 2006, there was a common assault which was committed against his mother. Then, of particular note to me, in 2009, there was an assault with a weapon against Ms. Taylor, who is the same victim in the offence before me today, as well as an uttering threats against Ms. Taylor in 2010. I should say he received a significant sentence for those offences, 15 months for the assault with a weapon, and four months for the uttering threats. In 2010, he was again sentenced to a period of five months for uttering threats against Ms. Taylor, and later, in the same year, there was another common assault against Ms. Taylor and a second uttering threats against Ms. Taylor as well. I understand the assault involved him spitting in her face on two occasions. He received a total global sentence of six months with respect to those two counts. So there is concern as it relates to his history and criminal record and, in particular, his recent history and his history as it relates to Ms. Taylor.

[7] I have also been, as I said, provided information with respect to his background and circumstances. It is evident to me that his background was a troubled one, with early exposure to abuse of substances and to violence, and, of course, the most important factor, in my view, in determining appropriate sentence today, is the positive

diagnosis of his suffering from a disorder, which is specifically phrased as Static Encephalopathy, which falls within the Fetal Alcohol Spectrum. There is a great deal of information in the report that has been provided with respect to his particular dysfunctions. He does have some skills, some positive skills. He has written a very articulate letter for me today in which he is able to verbalize his remorse for his actions and his plans for change and for the future, but the report is very clear in cautioning me to make sure that I do not allow the verbal strength that Mr. Kendi does exhibit to mask the nature of his disability in terms of framing an appropriate sentence with respect to his disability.

[8] I would simply like to quote one area of the report which, in my view, summarizes to some extent the disability as it presents for Mr. Kendi. It is from page 4 of the report, which indicates that:

> Arthur's most significant deficits are in the areas of executive functioning or higher order thinking skills. Deficits in these areas of higher order thinking skills interfere with Arthur's ability to take responsibility for his actions; to show remorse or empathy towards others; to quantitate risks/benefits, to evaluate options, to problem solve; to respond to feedback and alter strategies based on the feedback; and in the formation of friendships, appropriate reciprocal social interactions, and managing societal expectations. These deficits result in Arthur's social difficulties and ongoing problems meeting society's expectations. Understanding his deficits in executive functioning can lead to more consistent and structured supervision and management strategies.

So the report is clear and evident in terms of outlining what his struggles are, and the challenge today is to come up with a sentence which responds not just to the offence itself but to his personal circumstances.

[9] We have had much discussion here in the courtroom today about the various

different principles that I am required to consider, and how it is that they play out in this particular case. We have discussed both specific and general deterrence, rehabilitation, denunciation, protection of the public, and also, of course s. 718.2(e) in recognition of his aboriginal status as a member of the Vuntut Gwitchin First Nation. In weighing these principles, there are a number of, I think, appropriate comments to be made, specifically with respect to the issue of general deterrence.

[10] I referenced, in my discussion with Ms. Bogle, comments made in *R.* v. *Harper*, 2009 YKTC 18, a decision of His Honour Judge Lilles, now a deputy judge of this court, which relate to how the various different sentencing principles play out when we are dealing with an FASD offender. In that decision, he speaks specifically to the issue of general deterrence and makes the following comment:

> Should denunciation and general deterrence be a major factor in sentencing an individual with the cognitive disabilities exhibited by Mr. Harper? In this case should we use Mr. Harper as a whipping boy by imposing a gaol sentence of greater length on him in order to deter others who should and are capable of knowing better? I think not. Mr. Harper is an innocent victim of the FASD visited on him by maternal alcohol consumption during pregnancy. As stated in *R.* v. *Abou*, [1995] B.C.J. No. 1096 (Prov. Ct.), "It is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person." To do so would invite a Charter remedy pursuant to s. 12 of the *Canadian Charter of Rights and Freedoms* that forbids cruel and unusual punishment.

I would adopt those comments as it relates to the issue of general deterrence in this particular case.

[11] With respect to the issue of specific deterrence, it is clear from the report that specific deterrence, as we generally consider it in the courts, is not going to work with

Mr. Kendi. He simply does not, and is not, capable of making the same cause and effect assessment that someone without the disability is capable of doing. So I do have some questions about the degree to which the sentence that I pass today will in any way specifically deter him in the future. As I noted earlier, in my view, what this case is about, really, is about balancing the issues of rehabilitation and protection of the public. By rehabilitation, I want to make it clear that I am talking about rehabilitation in the context of Mr. Kendi's disability. So this is not a situation where he is ever going to be cured; this is not a situation where we can send him off to a particular program that is going to change his behaviour. Rehabilitation in the context of a situation with an FASD offender is really about adjusting our expectations to their abilities, but also about setting up a situation which maximizes his chances of being successful within the community, and that is really all about structure, support, and supervision. A situation in which there are others around him to provide, in the absence of his ability to do so, that executive brain functioning to help him to make appropriate decisions. So rehabilitation, in this case, I am viewing within that context.

[12] On the other hand, the significant concern and other principle which I see at play in this particular case is about protection of the public. Mr. Kendi does have a history of violent behaviour. The report is clear in noting that he is not capable of avoiding a fight, so to speak; that he will interpret certain actions in a particular way that will lead him to become involved in violent altercations. He is simply incapable of knowing how to avoid them, when to avoid them, how to stop them once started, and he is therefore not just at risk of hurting others significantly, but of being hurt himself. Those are significant concerns in this particular case.

[13] In addition to that description in the report, his record speaks for itself as it relates to Ms. Taylor. We have, now, our fifth offence of violence against Ms. Taylor in the very short period of just over two years. So I do have a serious concern as it relates to her personal safety.

[14] My biggest struggle in this particular case, when I am weighing protection of the public against rehabilitation for Mr. Kendi, is really about knowing what the options are for release in this particular case. It is evident to me that jail is not going to be capable of changing Mr. Kendi's behaviour in any way, shape or form. It does, however, provide a situation whereby the public is protected so long as he is in custody. My preference, given his disability, obviously, would be to have an appropriate structured and supervised placement for him within the community that would provide that same protection of the public but would not require him to be warehoused in a jail situation. In this particular case, I do not have that.

[15] I do have some information that suggests that it may be possible. Ms. Papequash and Mr. Kelly are here. They have been working with him and supporting him. I am also advised that he has been identified as a candidate for the Prolific Offender Management Program, which is a new program here in the Yukon, which is designed to use a multidisciplinary approach to coordinating supports and services for individuals who are known to come into conflict with the law on a frequent basis, and Mr. Kendi's record demonstrates that he certainly is someone who falls within that category. So there is some potential that a placement will grow out of that work, but we do not have that right now.

[16] Counsel for Mr. Kendi is suggesting a shorter sentence, in the range of three months, recognizing his disability, referencing, again, the *Harper* case, which is one of the many cases in the Yukon which speak to the need to view the level of moral culpability in a different way with offenders who suffer from FASD, and note the importance of reducing sentences to reflect a lesser moral culpability.

[17] I am also advised, in support of a shorter sentence, that Mr. Kendi's children are currently in care, and there are upcoming proceedings that relate to them, in particular a case conference that Mr. Kendi would very much like to participate in on the 24th of June. He would like to do so in person. Although I am also advised that there is some potential and some precedent for him to be able to do so on a TA from a correctional facility. So it is not definitive that he would be precluded from participating in the circumstances of a custodial situation.

[18] What I have then, at the end of the day, is a situation where we have an individual who is perhaps not best kept in a jail facility, but who does present a danger to the public, and for whom I do not, today, have a placement which would satisfy me that he is going to have the requisite support and supervision within the community to protect the public, but some potential that this new program will come up with that in the near future. I certainly hope that it does, because, as I have said earlier, Mr. Kendi is going to be returning to the community. Whether that is tomorrow or six months from now, he is going to be returning to the community, and, in the absence of a structured and supervised placement, he is not going to do well in the community, and he is going to present a risk to himself and others.

[19] In terms of looking at appropriate length, the Crown has provided me with a number of cases that fall within the 10 to 12 month range. Some of those have some similarities from a factual perspective, but also some differences. Most of them are somewhat more serious in terms of the nature of the offence, but Crown is suggesting a sentence of eight months, which is somewhat lower than is being suggested by those cases. I accept that, in doing so, the Crown has also taken into account Mr. Kendi's disability. I keep coming back to this: What this case really needs is an appropriate placement for Mr. Kendi, which we do not have at present. I am satisfied that some additional time is going to be required to do some planning to transition him back into the community, if it is going to be done successfully with this new program. I am not of the view that a lengthy period is necessarily warranted nor would it be of benefit to Mr. Kendi, but I am satisfied that a certain amount of time is going to be necessary for this group to do some planning for an appropriate placement for him.

[20] When I weigh all of the factors, taking into account his disability; his diminished moral culpability; taking into account cases for similar behaviour; taking into account his history of offending against Ms. Taylor and the need to protect the public, I am satisfied that a sentence of six months is appropriate, taking into account the time that he has spent in remand. I am advised counsel are jointly agreed that he should receive credit for 80 days in remand. A six month sentence would be 180 days, less the 80 days credit for remand, leaves an additional 100 days to be served by Mr. Kendi, slightly over three months, which in my view, is an appropriate and reasonable period for those people who support him and the Prolific Offender Management group to do some transition planning to find him an appropriate placement within the community, in the

hopes that he will be successful on the conditions as suggested by Ms. Geddes.

[21] It will be followed by a two-year probationary term on those terms and conditions which I understand counsel are jointly agreed to. I have one question, and that relates to the testing condition that is attached to condition number six.

[22] MR. CHRISTIE: I don't have those instructions to consent to that. I mean Arthur, quite frankly, is willing to be compliant, agree to anything, but I tried to explain to him the law and the voluntariness that I --

[23] THE COURT: Okay.

[24] MR. CHRISTIE: I don't feel quite comfortable, yeah.

[25] THE COURT: So, I think in those circumstances, I cannot include it, with the current state of the law. The conditions will therefore be as set out with the exception of that provision. So Mr. Kendi, once you are released from custody, you will be on probation for two years where you will report to Ms. Geddes. The conditions you have to follow are:

1. You have to keep the peace and be of good behaviour;
2. You have to come to court when you are told to by the Court or by Colleen Geddes, your Probation Officer;
3. Stay in the Yukon Territory and not leave unless you have talked with Colleen Geddes, your Probation Officer, or have been given permission from the Court;
4. Report to a Probation Officer two working days --

I am going to say immediately upon release. Counsel?

[26] MR. CHRISTIE: Sorry Your Honour, I --

[27] THE COURT: My experience is Probation will actually be up there doing some planning with him for the reporting, I think, before he is released. So I think it is more appropriate that he report to a Probation Officer as soon as he gets out of jail. Yes?

[28] MR. CHRISTIE: Yes.

[29] COLLEEN GEDDES: They get out sometimes, mostly Saturday.

[30] THE COURT: Oh, really?

[31] COLLEEN GEDDES: That's what happens.

[32] THE COURT: So we will leave it within two working days then.

[33] MR. CHRISTIE: Your Honour, the only other thing with that one term with the testing, to be fair, we did talk about this, and I did review with him, Ms. Geddes did, too, and I know that is in there, the sample. I just -- I'm always a bit hesitant just because of, well, just explain to him that that has to be voluntary, the law, and I just wanted to point out that he is willing to agree to those things, but Your Honour, and appreciates with the study about his, you know, his voluntariness, but the Crown and Probation and I have all reviewed it with Arthur, and he has seen that term. So, in a sense, it is voluntary. I just wanted to put that caveat, I guess, in it, but --

[34] THE COURT: I certainly think he can participate on a voluntary

basis with them if they want to test him. For me to add it right now, absent the appending amendments to the legislation --

[35] MR. CHRISTIE: Okay.

[36] THE COURT: -- I have to be satisfied, in my view, that there is a clear waiver of --

[37] MR. CHRISTIE: I just wanted to be fair, because we did talk about it. My friend did ask me and I said he was in agreement. So I -- yeah.

[38] THE COURT: In this case, I am not satisfied --

[39] MR. CHRISTIE: Okay. Thank you.

[40] THE COURT: -- that it is a clear waiver. Okay. So:

4. Report to a Probation Officer within two working days of getting out of jail, and after that report when the Probation Officer tells you to;
5. Live in a house that your Probation Officer says is okay to live in. You cannot move to another place unless you talk with and get permission from your Probation Officer;
6. You have to stay in your house between 10:00 p.m. at night and 7:00 a.m. in the morning every day, unless your Probation Officer gives you permission and a letter that says you can be out past that time;
7. The police will be coming to check on you and you have to answer the door when they knock on the door. If you do not answer the door, you will be charged with a breach of your probation;

8. You are not allowed to drink any alcohol or take any drugs unless a doctor gives you a prescription;
9. You cannot go into any bars or taverns or any place that just sells liquor. You can go into a restaurant, though, even if it sells alcohol, too, but you cannot drink;
10. You have to take an alcohol treatment program. This is the most important condition, so when your Probation Officer tells you to do that, you have to go;
11. You have to take other treatment or counselling if the Probation Officer tells you to do that;
12. You cannot have any contact with Cecelia Taylor, unless your Probation Officer tells you you can, and, then, if it is only on certain days or times, you have to listen to that, too;
13. You cannot go to the Kwanlin Dun Village unless you are with someone that your Probation Officer says can go with you, and you have to have permission from your Probation Officer first;
14. You have to meet with a FASSY worker, and any other people on your support team that your Probation Officer tells you to meet;
15. You cannot hang out with other people that drink, do drugs or get into trouble, and you cannot hang out with family members who have been drinking.

So those are the conditions.

[41] We had some discussion with respect to other orders, first, the firearms

prohibition. It is my understanding that it is discretionary in this case, but that he is subject to a lifetime ban at present, in any event. I would decline to make a further prohibition as it would be redundant.

[42] I believe, however, the indication was that DNA is primarily designated in the circumstances with the indictable election. There will be an order that he provide such samples of his blood as are necessary for DNA testing and banking.

[43] I would waive the victim fine surcharge in his current circumstances.

[44] Does that leave us anything outstanding? No? Okay. My thanks again to everyone for taking the time to be here today, for working with him, and supporting him. It is certainly my hope for you, Mr. Kendi, that once you are finished your time in custody, that while that is happening is that they are going to be working on finding a good place for you to go so that you will not get into trouble and have to come back and see me. So good luck.

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RUDDY T.C.J.