

Citation: *R. v. Luke*, 2009 YKTC 63

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Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

DANIEL LUKE

Appearances:
David McWhinnie
Gordon Coffin

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Daniel Luke has entered guilty pleas to three offences. The first offence is an offence under s. 430(4) of the *Criminal Code*.

[2] The circumstances are that on June 16, 2008, an individual who was an employee of the Yukon Government who happened to be in Pelly Crossing, heard a noise and banging on her door where she was staying at approximately 10:30 in the evening. This woke her up. Mr. Luke was outside, intoxicated. He was banging on the door saying, "Asshole, let me in", and swearing. The complainant was concerned enough that she hid in the washroom. Ultimately, the RCMP attended, located Mr. Luke

outside, quite intoxicated, and spoke to the complainant who was visibly upset. The complainant did not know Mr. Luke and Mr. Luke has no recollection of those events other than counsel submitting that he had thought his aunt was staying in that residence.

[3] The second offence is a s. 145(5.1) charge. Mr. Luke was released on an undertaking to a peace officer as a result of the June 16th incident. One of the terms of the undertaking was that he abstain absolutely from the possession or consumption of alcohol. The RCMP responded to a complaint at approximately 12:30 in the afternoon at a residence and located Mr. Luke inside the residence, intoxicated by alcohol. He was somewhat resistant initially. Again, he has no recollection of those events.

[4] The final incident is that on November 28, 2008, at approximately 12:00 in the afternoon, the RCMP in Pelly Crossing responded to a complaint that Mr. Luke was intoxicated on a snowmobile. As the RCMP were on the scene, Mr. Luke approached them on the snowmobile, almost striking the police vehicle with the snowmobile. He was demonstrating severe signs of intoxication and, in fact, subsequent to his arrest on impaired driving, provided breath samples of 310 and 290 milligram percentile. I note that there was a third charge for breach of his abstain clause, which does not have a guilty plea but clearly this was a breach of the same release conditions that required him to abstain from alcohol as before.

[5] Mr. Luke has a significant criminal record, given the charges that he has before the Court today. Of particular concerns are the driving-related convictions. He has a conviction in 1986 for breath samples over .08. He received a \$500 fine in that

instance. He has a 1987 dangerous driving conviction for which he received three months in custody. In 1993 he has another over .08. He received a \$750 fine. In 1996 he has a third over .08 charge, for which he received 90 days incarceration.

[6] Crown counsel is not filing notice in this case, recognizing the significant gap in the record since the last conviction for an impaired driving offence, and thus not fettering the discretion of the Court with respect to the appropriate disposition that the Court may impose. The Crown is, however, seeking custody on each of these charges, suggesting that an in custody sentence of incarceration at Whitehorse Correctional Centre would be in the area of two to three months on the s. 430 charge, another perhaps, 14 to 30, or 30 days, on the s. 145, and four to six months on the s. 253 charge.

[7] In the event that the Court were to consider the appropriateness of a conditional sentence, the Crown is suggesting that a 12 to 16 month sentence globally may be appropriate.

[8] Mr. Luke has 33 days in custody, approximately 50 days credit; therefore, that can be taken into account when deciding what the appropriate sentence is. Clearly this calls for a custodial disposition. The *Criminal Code* amendments have increased the sentences available for impaired driving offences, raising the fines to \$1,000 and the sentence for a third from 90 days to 120 days. This reflects society's wish to deal with the very significant problem posed to individuals and society as a result of impaired driving offences. There is no doubt that there are significant, tragic and horrific consequences on people that arise when individuals drive motor vehicles when they are

impaired.

[9] I recognize in this case we are dealing with a snowmobile; we are not dealing with driving in the middle of the daytime through a busy area such as a school zone, but the fact that it is a snowmobile, or if it were a quad machine, does not detract from the fact that it is still the same *Criminal Code* offence. These are still places where members of the public are present, and being struck by a snowmobile is of little consolation if in fact it causes the same form of injuries and tragic consequences that a motor vehicle on a highway does. There are differences, however. I want to make it clear that because it is a snowmobile, or in other cases a quad or some form of all-terrain vehicle, the offence is still a very serious offence and the *Criminal Code* does not make a distinction between the vehicles and neither should individuals, in their own minds, consider that there is a significant distinction between automobiles or snowmobiles or all-terrain vehicles.

[10] Defence counsel is suggesting that this matter can be dealt with by way of a disposition that does not involve actual custody at the Whitehorse Correctional Centre, taking into account the time between the last impaired driving conviction and the conviction that we have here, taking into account the time in custody and some of the aspects of the pre-sentence report that are before the Court.

[11] I note, as not mentioned earlier, there is one fail to comply with an undertaking on Mr. Luke's record. That was in 2004, for which he received one day. I mention that because, of course, one of the precursors to receiving a conditional sentence is there needs to be some ability of the Court to rely on the fact that a person is able to comply

with court orders.

[12] I will say, other than one other fail to appear and two other very dated mischief or break and enter -- two mischiefs and a break and enter to commit mischief, there is not much else on Mr. Luke's record other than the driving offences, which were mentioned earlier.

[13] Section 742.1 of the *Criminal Code* indicates that, given the assumption that the appropriate sentence of imprisonment is less than two years, if the Court is satisfied that the service of the sentence in the community would not endanger the safety of the community and that it would be consistent with the fundamental purpose and principles of sentencing set out in s. 718.2, the Court can impose a sentence that can be served conditionally in the community.

[14] The principles of s. 718 and s. 718.2 are:

- (a) to denounce unlawful conduct;

Which is clearly applicable in cases of impaired driving.

- (b) to deter the [individual] offender and other persons from committing [these] offences;
- (c) to separate offenders from society, where necessary;

In particular, in cases where you are dealing with this kind of offence, the unintended victims of impaired driving offences where everyone that happens to be on the road, whether they are walking on the sidewalk or driving a vehicle, is potentially a victim of an impaired driver who happens to be going by, there is a distinct need to separate impaired drivers from society, if they have shown a pattern of disregard for the laws

related to impaired driving, because that is the only way that you can provide some form of safety to the community.

[15] There are differences. One of the differences is curative discharge provisions that will allow for individuals to not receive a period of incarceration in jail based on the fact that they have undergone and have shown a level of ability to comply with non-drinking terms of an order in order to reach that level where the Court is satisfied that their drinking no longer poses that kind of risk to society and the benefits of receiving a curative discharge and the rehabilitation actually protects society in the long run more than the period of custody would.

[16] The sentence has to assist in rehabilitating the offender, to provide reparations for harm done to victims or to the community, and to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[17] Section 718.1 requires that the sentence:

... be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] Then, the sentencing principles of 718.2 deal with aggravating and mitigating circumstances, and I had not mentioned earlier, clearly the readings that were found in this case are statutorily aggravating readings and they are well beyond what is normally seen in statutorily aggravating; they are indicative of a very high level of impairment and a very substantial problem with alcohol consumption.

[19] One of the other factors to be taken into account is that sentences need to be similar as those imposed on other individuals for similar offences, that liberty of the

individual is something that should be respected and that they should not be deprived of if less restrictive sanctions may be appropriate, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of aboriginal offenders.

[20] There is a very comprehensive pre-sentence report filed in this matter. Mr. Luke is of First Nations heritage. He lost both parents as a result of separate incidents by the time that he was six years of age. He was raised in an extended family, and in the primary residence he had there was no drinking or violence. He was raised in a traditional way. He received a Grade 8 education and did not complete Grade 9. He is somewhat literate but has some difficulties and has indicated a wish to improve that. I note that he was 41 years of age at the time of these offences. Some of the difficulties posed for Mr. Luke in the pre-sentence report are his longstanding problem with alcohol, starting to drink in his later teens and struggling with alcohol problems for much of his life since then. He acknowledges his entire criminal record is related to alcohol abuse.

[21] His co-workers and friends have indicated that they believe he drinks too much. He has never received residential treatment for his alcohol. He has attended Alcoholics Anonymous and is currently attending it. The pre-sentence report points out that on the Problems Related to Drinking Test he shows substantial and severe problems. On the Level of Service/Case Management he shows as being a high risk for further offences related to issues of alcohol, criminal companions, basically just hanging out with the wrong people at the wrong time, dealing with family issues, and his lack of education.

[22] On the very positive side is the fact that he seems to have been able to maintain,

throughout all these alcohol problems, a very good record as a worker and very good periods of employment. The two do not often go hand-in-hand, that you can work and that you can have an apparently chronic alcohol problem. The individual he identifies as his current closest friend is a non-drinker and is currently looking after his house. Many of his other friends have died, many from alcohol-related issues. He has close relationships with his siblings; however, it is to be noted that certain of those also have their legal issues and struggles with the law.

[23] His present situation is that he has been residing at the Yukon Adult Resource Centre and complying with what he is supposed to comply with since approximately, I believe it was, the 30th of December; not a long period of time. He was scheduled to go into the White Buffalo program, which has apparently received very strong, positive reviews, but unfortunately, because of the fact that this date was set for the disposition of his matter, he was not considered eligible and, through no fault of his own, was unable to participate in this two to three month program.

[24] We have a memorandum from Mr. Robert VanBibber, trappers coordinator, that indicates that they very much need his skills on their trail-cutting team, that they have a camp about 40 miles from Pelly Crossing where he will continue cutting and that would go to the end of March or April 2009, and that he could be employed starting tomorrow morning.

[25] One of the biggest problems Mr. Luke has is that he does well when he has external controls and structure around him, but not so well when these controls and structures are not around him and he is relegated to a situation of house arrest where

he really does not have much to do. Keeping busy is one of the things that keeps him sober. Not being busy is one of the things that puts him in a situation where he ends up with the wrong people, who are drinking, and invites these people into his home or goes to their home and ends up drinking himself. In fact, the pre-sentence report makes reference to one time when he was in a situation that was, in that report, termed as house arrest, in which he just got so frustrated that he went out. Factors like that do not support that aspect of the conditional sentence regime that requires that the Court be satisfied that he is not a danger to the community. That is the balance that the Court is looking at here, between the positive aspects that Mr. Luke brings, between considering his background, his history, his First Nations heritage, and considering the fact that he has not been able to deal with his alcohol problem that brought him to this Court today, that endangered the community on the date of the impaired driving offence and would endanger the community if he were ever to drink and get behind the wheel of a vehicle again.

[26] Often when we see conditional sentence applications in respect of impaired driving offences there is a more considerable track record of things that the individual has done in order to show that they not only want to deal with the problem, but they have in fact taken positive steps to deal with that. We do not have before the Court today the same degree of that type of information, but every case is unique, every case is different, and every individual is different and has to be looked at accordingly.

[27] After a review of the pre-sentence report, after a review of the options that are available for Mr. Luke, in reviewing his criminal record, taking into account the fail to comply with the undertaking and the two fails to comply, although only one of them

resulted in a criminal conviction for the offences with which we are before the Court today; taking into account what I did here, for Mr. Luke, I am prepared to offer him the opportunity to serve his sentence conditionally in the community. The sentence will be longer to reflect the fact that it is conditional and to reflect the fact that we are not dealing here with the same element of substantial compliance with non-drinking that we sometimes see.

[28] I note that the general range of sentence for an offender in this situation, as far as prior offences go with readings such as this, taking into account that we are dealing with a snowmobile, that traditionally the general range of sentence prior to the amendments may well have been in the four to six month range. I believe that those sentence ranges need to be considered in light of the new legislation and should be increased. A sentence that may have been four to six months before could well be, and I am not putting this as a limit because the math is not exactly the same, but they may well be looking at sentences of anywhere from six to eight months, five to nine months; but the sentences and the sentence precedents before this legislation may, in some cases, need to be reviewed in light of the legislation.

[29] I believe an appropriate range of sentence of incarceration for the impaired driving offence would be six to eight months. I am going to impose a sentence of nine months conditional on the s. 253 offence. I am going to have one month consecutive on the abstain breach, and the 50 days time served will be credited to the s. 430 charge. So taking all of that into account, and, as I said, I note that the sentence is made somewhat longer because of the fact that it will be served conditionally, not a lot longer, just a little, the entirety of the time, which will be the nine months and the one month

consecutive, will be served conditionally on these terms subject, of course, to any input that counsel may have:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. To report to a supervisor immediately, and thereafter when directed by the supervisor and in the manner directed by the supervisor;
4. To remain within the Yukon Territory unless you have written permission from your supervisor;
5. To notify the supervisor in advance of any change of name or address, and promptly notify the supervisor of any change of employment or occupation;
6. To reside at the Yukon Adult Resource Centre or such other place as directed by your supervisor, and to abide by the rules of the residence;
7. To remain within your place of residence at all times 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.

[30] I will elaborate on this condition. It is effectively not a curfew; it is effectively more of a house arrest situation. That said, I have not put strict terms on when permission will and will not be granted, as we sometimes see. Your work situation and the opportunities that Mr. Luke may have for other counselling, assessment, treatment, these are all factors that can be taken into account when permission is given to him,

and this permission should be as much as is necessary to enable him to do what he needs to do to deal with this alcohol issue and not present any risk to the public.

[31] I also note that conditional sentences and the terms of the sentences are subject to review, and this may be, depending on how Mr. Luke does, and any treatment he may take, that it may be a situation where he may be back before the Court with the support of his conditional sentence supervisor, to seek more of a reduction from the house arrest, but clearly, that is how it is starting, and whether it ends that way will, in large extent, likely depend on how Mr. Luke does and the rapport he is able to develop with his supervisor and the steps he is able to take to satisfy the Court that less stringent house arrest situation conditions need to be maintained.

8. 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;
9. To not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. To take such alcohol assessment, counselling or programming as directed by your supervisor, and attend and complete a residential treatment program as directed by your supervisor;
11. To take such other assessment, counselling and programming as directed by your supervisor;
12. To participate in such educational or life skills programming as directed by your supervisor;

13. To make reasonable efforts to find and maintain suitable employment and provide your supervisor with all necessary details concerning your efforts;
14. To provide your supervisor 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 conditional sentence order;
15. To not drive a motor vehicle at any time during this conditional sentence order.

[32] Are there any of the terms in the conditional sentence that would need to be revised? I have not put a term in respecting whether he can or cannot live in Pelly Crossing because his conditional sentence supervisor can figure that out. I am not certain whether there should be a term that he not attend in Pelly Crossing except with the permission of his conditional sentence supervisor, or perhaps a term except for purposes of counselling, treatment or employment, but any thoughts on that, counsel?

[33] MR. MCWHINNIE: Not at this point, Your Honour.

[34] THE COURT: I am satisfied. This will be followed by a period of probation of one year on the statutory terms:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. To 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;

4. To report to a probation officer immediately upon completion of your conditional sentence;
5. To reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;
6. To abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances, except in accordance with a prescription given to you by a qualified medical practitioner;
7. To not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
8. To take such alcohol assessment, counselling or programming as directed by your probation officer;
9. To take such other assessment, counselling and programming as directed by your probation officer.
10. To participate in such educational or life skills programming as directed by your probation officer;
11. To make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;
12. To provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this probation order.

[35] Any of those terms, counsel, that need to be addressed?

[36] MR. MCWHINNIE: Nothing, Your Honour.

[37] MR. COFFIN: I don't think so.

[38] THE COURT: There will be a driving prohibition of two years, and this prohibition --

[39] MR. MCWHINNIE: Is this one of those ones, Your Honour, that has to be during the period of his imprisonment and two years following his release?

[40] THE COURT: Well, when I read s. 259, given that this is a first offence in the absence of filing of notice, the wording of the *Criminal Code* is that Mr. Luke is prohibited from operating a motor vehicle on any street, road, highway or other public place for a period of two years. I will ask, simply on that point for counsel -- I mean strictly the way that it reads is a period of not less than one year plus any period for which they are in imprisonment. The question that arises in this case is if, of course, the conditional sentence is served in the community in full, he is already -- the prohibition would start now, run two years from now, would cover the conditional sentence, would cover the other. If I say plus any period of imprisonment, it would not start to run until the expiration of the conditional sentence. Is that Crown's position?

[41] MR. MCWHINNIE: I think read, strictly speaking, the intention of the section is to avoid a gap.

[42] THE COURT: Correct.

[43] MR. MCWHINNIE: And although you dealt with it, or intended to deal with it, I surmise, by including in the conditional sentence, the intention would be a period of imprisonment, which is nine months, plus the two years, so the prohibition order should say prohibited for a period of two years plus the period to which you were sentenced to imprisonment, being nine months.

[44] THE COURT: And in the event that the conditional sentence were to be collapsed, then would it begin to run from the date of the collapse of the conditional sentence? No, it would then begin to run from the date that the statutory remission kicks in on any time in custody and he is released or --

[45] MR. MCWHINNIE: I think the prohibition starts now and the calculation is done starting now.

[46] THE COURT: The calculation is done afterwards. No, the intent is to have it start now.

[47] MR. MCWHINNIE: And so it would run for two years, nine months, if I understand -- understood your intentions?

[48] MR. COFFIN: Which raises an interesting question. If there is a collapse, what does that mean?

[49] THE COURT: Well, it would mean that it is two years from the date that he is effective -- no, it means --

[50] MR. COFFIN: Well, it wouldn't. If it's two years plus nine months, it's two years plus nine months. But that nine months we hope will be the period of his incarceration. But it may, in fact, be reduced if it's collapsed, so that the two years nine months would then result in something longer than what was intended.

[51] MR. MCWHINNIE: I think perhaps we're confusing the difference between a period of imprisonment served and a period of imprisonment to which he is sentenced. The provision refers to the period to which he is sentenced, as I understand it, to any period of imprisonment for which the offender is sentenced. So even on an actual custodial sentence, if you were sentenced to nine months, that is the sentence. You actually are only required to serve, in an institution, six months and you're released on staff permission, all things being equal, at the end of six months, but the sentence is still nine months and always was.

[52] THE COURT: I believe we are talking ten months, actually, nine months plus 30 days consecutive, right? I had not intended to have him disqualified for three years, but I was thinking -- what I will do is make it 18 months plus any period of custody on that understanding. It will be an 18 month plus any period to which he is sentenced to imprisonment.

[53] MR. MCWHINNIE: It would be 28, in effect.

[54] THE COURT: I will let them work the calculation. I was looking, originally, at something closer to 30 months so I will be satisfied with 28 as being appropriate. The amendments on the Interlock recommendation have not come into effect yet, that make it automatic, virtually. There still needs to be a recommendation

made by the Court. I know there is an amendment out there that shifts it, presumptively made, but I do not believe that is in effect yet. I will make an Interlock recommendation after six months, given that he will not be driving during the term of the conditional sentence. It will not matter.

[55] Now, my understanding of the driving disqualification that he is under, it does not prohibit him from operating a boat on the river. Is that correct? I have not prohibited him from operating a vessel. I think the *Code* gives you an “or”, motor vehicle or vessel.

[56] MR. COFFIN: Yes, that’s how I would read that.

[57] THE COURT: That was my intent, to not preclude him from employment in that area since I believe that the benefits that will come from him being able to work would far outweigh any risks to anyone else on the river.

[58] MR. MCWHINNIE: There’s been a couple of “or’s” added to the section in the last few years that seem to lead more to that. There certainly was some doubt a few years ago as to whether that really worked in that way.

[59] THE COURT: I will go with the plain wording.

[60] I am prepared to waive the victim fine surcharges. Are there any questions anyone has, including yourself, Mr. Luke?

[61] By imposing a conditional sentence, the difference between this and other sentences is that there is no margin for error on a conditional sentence when it comes

to drinking. You received this sentence because you have a lot of positives that come out in the pre-sentence report, and if I was not satisfied that you had the ability to not drink, I would not have given you this opportunity to serve this sentence as a conditional sentence. I believe you have that ability. I do not believe that you have taken advantage of everything you could to stop drinking, but I believe you have the ability to stop drinking. The question now is whether that is what you decide to do and want to do. But you need to know that for an impaired driving charge where there is a conditional sentence imposed, the courts will look more seriously at a breach of a clause for drinking than they would in many other cases where conditional sentences are imposed. So it is important that you just keep that in mind. Even though the terms of the conditional sentence may sometimes seem really kind of restrictive up front, it is less restrictive than being in jail, and it does give you an opportunity, and the terms can be relaxed if you do well on it and take some advantages. There is an ability to make alterations. So is that clear? I hope you do well on it.

[62] MR. MCWHINNIE: Ms. Casselman has raised one matter that you may want to refer to on the record, Your Honour. As I understand the situation, the current operating procedures of the conditional sentence supervisors requires them, for people who are serving conditional sentences, to have them report in three times per week as a minimum part of their process. If you are giving weight to the possibility that the defendant will be allowed to work out of the community in remote places, which seems to be a big part of the plan, where he cannot report, the probation officers would be comforted by some direction from the Court that that was your intention, that you would anticipate, presumably, that if the probation officer or conditional sentence supervisor is

satisfied that it's an appropriate thing to do, that the usual policy might be avoided for that purpose.

[63] THE COURT: I definitely do not want an internal policy that may well have been put in place for very good reasons to frustrate those cases in which the policy just does not quite meet with the job, employment, educational or other prospects that are designed to promote the rehabilitation of the offender and thus protect society. So clearly, if it is not reasonably possible for Mr. Luke to report in accordance with a policy, and, again, without making any negative comment on the policy itself which may well be for good reasons, I would certainly expect that discretion would be utilized to allow him to do his employment or anything else, and that is why the clause, "report as directed." The *Criminal Code* does not put that restriction on reporting and, as such, discretion should be exercised fairly not to defeat the purpose of the conditional sentence in this case.

[64] It brings me back to one point I had not mentioned earlier about the employment, and I will say this because this was raised during court and was addressed during court, and I am thankful for that, is that the job that Mr. Luke is able to commence starting tomorrow, trail cutting, I want it to be clear that the understanding that Mr. Luke has is the RCMP have made it clear on the record that Crown land that has a trap line on it is a public place and that a snowmobile cannot be operated by Mr. Luke on that public place. Now, I am not making a decision in that regard because I do not have the law and I do not have other matters before me, but I am saying that the RCMP have advised that if you are found, Mr. Luke, driving a snowmobile on the trap line, they will consider that a breach of your driving order and there will be both a

breach of the conditional sentence order, an allegation of breach, and possibly a breach of the law that could result in you being in custody. But as a result of that being raised, steps were taken to contact Mr. VanBibber, who did advise that that employment does not require Mr. Luke to drive a snowmobile, that they can work around that, as they have for other individuals. So I wanted that to be clear and to be on the record at this point in time.

[65] Again, I want to make it clear, it is not a finding by the Court that that would be that way. I would really rather have full argument on that issue, but it is clearly the understanding that the Crown has and that the police are operating under.

[66] I believe a stay of proceedings on the remaining charges?

[67] MR. MCWHINNIE: Yes, Your Honour.

[68] THE COURT: Wish you the best, Mr. Luke.

COZENS T.C.J.