
Citation: *R. v. Mackenzie*, 2012 YKTC 109

Date: 20121030
Docket: 11-00412
11-00412A
11-00412B
Registry: Whitehorse

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

REGINA

v.

TROY ALEX MACKENZIE

Appearances:

Christiana Lavidas, Articled Student
Melissa Atkinson

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C (Oral): Troy Mackenzie was convicted after trial of one charge of assault against his former partner, Melanie Jensen, and three breaches of undertakings to peace officers that prohibit him from having contact with her. All of these events took place between August 31st and September 21st of 2011.

[2] I found, with respect to the assault, that Mr. Mackenzie was at Ms. Jensen's residence in the presence of her children at the conclusion of their relationship, and that there was a dispute and Ms. Jensen wanted Mr. Mackenzie to go. At the door he grabbed her and put her in what has been called a chokehold, in that his arm was

around her neck restraining her and holding her, but that there was no evidence that she, in fact, had her breathing cut off. So it was more in the nature of a restraining use of the arm than a choking and cutting off air supply. Her children were present. Ms. Jensen struggled and Mr. Mackenzie let her go and left.

[3] Then on the September 3rd evening into the morning of the 4th, he made a number of phone calls to her house. On September 13th, he pulled up and spoke to her at a parking lot when she was unloading groceries. On September 21st, in Superstore, he again spoke to her. All of these were breaches of the requirement that he have no contact or communication with her.

[4] The positions of counsel are quite apart from one another. Crown counsel seeks a sentence of six months, followed by a period of probation, but is not opposed to it being served conditionally in the community. Defence counsel seeks a conditional discharge.

[5] Mr. Mackenzie is 36 years of age. He has no prior criminal history. A Pre-Sentence Report has been filed that certainly highlights some of the issues Mr. Mackenzie is struggling with, in particular being difficulties with abuse of alcohol, and mental health issues. I note that there is no indication alcohol is directly related to the offences for which he was convicted.

[6] Mr. Mackenzie has completed his GED to obtain the education he failed to complete in school. He has generally been employed, and for the last ten years or so, has worked as a residential worker, a support worker, and most recently, since 2008, as a Correctional Officer at the Whitehorse Correctional Centre, although of note, he has

been on medical leave on two occasions, and is currently on medical leave until January of next year. The report indicates that his job has been held open for him, although there is no indication with any specificity as to what will happen as a result of the outcome of this case.

[7] Mr. Mackenzie struggles with obsessive compulsion disorder which, in combination with alcohol, has caused him to miss work on a number of occasions and he certainly needs to deal with this issue. It appears that he has been able to maintain sobriety for periods of time but started to drink again in March of last year. Nonetheless, he is rated on the LS/CMI as being at the low range for risk of re-offending.

[8] He has a five-year-old daughter he supports. He is currently in a stable and supportive relationship. He has one support letter from friends and the indications in the Pre-Sentence Report are that Mr. Mackenzie generally has a fairly stable base of friends in the community with whom he is involved in pro-social activities.

[9] I note in the Pre-Sentence Report, that Mr. Mackenzie continues to deny having committed the index offence, and I mention that only to point out that that is not an aggravating factor. He is entitled to do that. It simply means that there is no mitigation available in the same sense there would be, had he accepted responsibility early on. It also precludes certain options in a probation order because certain programs require an admission of responsibility. But I want to make it clear that it is not an aggravating factor.

[10] The sentences available for domestic assaults, which, of course, are statutorily

aggravating for the breach of trust, range widely, and, as indicated, the positions of counsel before me today range widely. The aggravating factors certainly are the presence of the children, the breach of trust, and the fact that this took place in her own home. The mitigating factors are that, at 36, Mr. Mackenzie has no prior criminal history. He has been under conditions of recognizance or process since September of last year, and it seems that he understood finally what he was supposed to be doing and has not breached since then.

[11] I note that these events took place within about a three-week period, which differentiates them from something that takes place over a long period of time, a sustained course of conduct, in a life that otherwise, although troubled, has not, other than one occasion, brought Mr. Mackenzie before the courts before. The Crown has filed their internal documentation, which is not disputed by Mr. Mackenzie, showing that in 1995, he received a conditional discharge with respect to an assault charge.

[12] Now, a prior conditional discharge is not relevant for the purposes of sentencing except for one limited purpose, and that is when defence counsel is seeking another discharge. The fact that there was a prior discharge is a relevant factor for consideration by the Court, but as it appears, Mr. Mackenzie successfully completed the terms of his discharge. It is certainly not a prior conviction. So he has no prior criminal convictions.

[13] The test for discharge, as set out, is that it really needs to be in the best interest of Mr. Mackenzie and not contrary to the public interest. When I consider all the principles of sentencing set out in s. 718, including the aggravating principles and the

need for denunciation and deterrence in the context of domestic assaults, and when I consider the life of Mr. Mackenzie and the potential for rehabilitation, I am satisfied that a jail sentence is not necessary in this case. Possible, yes. Necessary, no. When I look at the issue of a discharge, which, more commonly, is dealt with in cases of domestic violence through, or are imposed more commonly in cases of domestic violence when an individual has built up a track record of successful completion of spousal abuse programs, such as the Domestic Violence Treatment Option Court, I nonetheless must remind myself that they are not out of the question if a person does not proceed through that court.

[14] In *R. v. Shortt*, 2002 NWTSC 47, Justice Vertes deals with the considerations relevant to a discharge in the context of domestic relationships. In para. 23 he states that:

All this convinces me that the fundamental aim of the discharge option is the avoidance of a criminal record. As a general proposition, discharges are granted in circumstances where the nature of the offence, and the age, character and circumstances of the offender, are such that the recording of a criminal record would be disproportionate and unjust in relation to the offence.

Now, I note it says "a general proposition." It is not necessary that it be determined to be such in all cases.

[15] The *R. v. Sanchez-Pino* case (1973), 11 C.C.C. (2d) 53 (Ont. C.A.), the *R. v. MacFarlane* case, [1976] A.J. No. 441 (C.A.), and the *R. v. Fallofield* case (1973), 13 C.C.C. (2d) 450 (B.C.C.A.), led Justice Vertes in para. 24 to state that:

[These cases] ... agree that the first condition, that a discharge be in the best interests of the accused, presupposes that the accused is a person of good character without previous convictions, that it is not necessary to deter the accused from further offences or to rehabilitate him, and that the entry of a conviction may have significant adverse repercussions. The second condition, that the grant of a discharge not be contrary to the public interest, addresses the public interest in the deterrence of others. The cases also note that, while a need for a general deterrence is normally inconsistent with the grant of a discharge, it does not preclude the judicious use of the discharge option.

[16] He recognizes "that offences involving violence are generally not amenable to the granting of a discharge," but goes on to say that there is not "an offence-specific presumption that takes a certain type of offence out of consideration for a discharge (...); it is simply a recognition that a greater emphasis on the need for general deterrence will usually mean that a discharge is contrary to the public interest."

[17] With respect to the public interest consideration, Justice Vertes states that:

... the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice. The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice....

[18] Now with respect to the first part of the test, I do not have any problem understanding that a criminal conviction detrimentally impacts on Mr. Mackenzie, and could certainly exceed that of what a criminal conviction would be in the case of every person that is convicted. His job is certainly directly related to the administration of justice, and I do not have any trouble finding that a criminal conviction would perhaps have greater impact on his job potential than it would on any other or the general

population. That is only one consideration. It simply means that I recognize that any person is going to be impacted as a result of a criminal conviction. The impact on him would exceed that.

[19] With respect to the public interest, is a conviction required to maintain public confidence? I keep in mind that Mr. Mackenzie's life, other than the 1995 discharge, which is a factor for consideration, appears, generally speaking, to have brought him to the age of 36 in a generally pro-social lifestyle. Good enough that he got a job with Corrections, went through his probation, and ended up doing it; he has been able to work in environments where he provides support for others. This is a three-week period of time that we are talking about in his life and not a protracted period of time. He has been able to move on with his life; I understand the complainant has moved on with her life, and the last year has been uneventful.

[20] Breaches of no contact orders in domestic relationships quite generally attract custodial dispositions because the risk of escalation and violence is considerable when contact takes place, in what are the emotionally strained and difficult circumstances that take place after an allegation of domestic assault. It is very critical that people do not have contact. In this case, Mr. Mackenzie did have contact. Now, other than the phone calls, which were made three or four days later, the other two contacts were less; there is less indication that they were planned and premeditated, the one at Superstore clearly appears that it could have been coincidental, but nonetheless, the obligation on an individual is to walk away when those circumstances present themselves, and Mr. Mackenzie did not.

[21] Again, it took place in three weeks. There is a context to this that I think allows me to find that a discharge is not contrary to the public interest in this case.

[22] So Mr. Mackenzie will, in respect of all of these offences, be subject to a conditional discharge. The discharge is going to be 15 months. The terms of the discharge will be as follows: You are to:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the Court;
3. 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. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
5. Report to a Probation Officer immediately and thereafter when and in the manner directed by the Probation Officer;
6. Take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
7. Take such psychological assessment, counselling and programming as directed by your Probation Officer;
8. Take such other assessment, counselling and programming as directed by your Probation Officer;
8. Have no contact directly or indirectly or communication in any way with Melanie Jensen;
9. Not attend within 25 metres of the residence or place of employment of

Melanie Jensen;

10. Perform 40 hours of community services directed by your Probation Officer or such other person as your Probation Officer may designate. Any hours spent in mental health counselling may, at the discretion of the Probation Officer, be counted as community work service hours;
11. Provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this Probation Order.

I am not going to put an abstention clause on but you are going to have to deal with the issue of alcohol through your counselling.

[23] This is a secondary designated offence for the purpose of DNA. There will not be a DNA order in this case.

[24] It is also an offence for which there is a discretionary firearms prohibition. I will not impose a firearms prohibition in the circumstances of this case and of Mr. Mackenzie.

[25] I will impose victim fine discharges, however. It is a total of \$200, \$50 on each. How much time will you need to pay that?

[26] MS. ATKINSON: Yes, we're asking six months time to pay, please.

[27] THE COURT: Six months time to pay.

[28] Mr. Mackenzie, this is an opportunity, for a second time, to avoid a criminal conviction. I am confident that you can, as you did before, complete this without problems.

COZENS C.J.T.C.