

Citation: *R. v. Malcolm*, 2012 YKTC 97

Date: 20121012  
Docket: 11-10112  
Registry: Watson Lake  
Heard: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Chief Judge Cozens

REGINA

v.

JAMES GERALD MALCOLM

Appearances:  
Keith Parkkari  
Malcolm Campbell

Counsel for the Crown  
Counsel for the defence

**REASONS FOR SENTENCING**

[1] COZENS C.J.T.C. (Oral): James Malcolm has entered a guilty plea to having committed an offence under s. 268 of the *Criminal Code*. An Agreed Statement of Facts has been filed as follows:

The Accused, James Gerald Malcolm, admits all of the following facts without the necessity of the Crown calling evidence, pursuant to the relevant provisions of the *Criminal Code*:

1. On December 24th, 2011, Cst. Mason Dirnback was on duty, acting in the capacity of back up for Cst. Patrick McRorie. Cst. Dirnback took a complaint of an assault. The complaint indicated that the complainant,

Theresa McGeorge, was attending the Watson Lake Hospital and staff there wished police to attend.

2. Cst. Dirnback attended Watson Lake Hospital where he met ambulance attendants, the complainant, and other witnesses, taking statements from each.
3. Csts. Dirnback and McRorie located the Accused at his residence in the early morning hours of December 25th, 2011. He was sleeping and initially refused to come to the door. However, eventually did come to the door and was arrested.
4. Further investigation revealed the following further details, all of which are admitted by the Accused.
5. EMTs originally responded to the call to the complainant's residence. The [sic] found her unable to get up or put weight on her left leg due to pain. She was also inebriated and complained of pain in the left wrist. She was transported to Watson Lake Hospital and was screaming and swearing on arrival but she was also alert and oriented, with slightly slurred speech and an odour of alcohol.
6. At Watson Lake Hospital, she was treated by Dr. Pinney. He assessed severe left hip pain and was able to determine that the complainant had a prior left wrist fracture along with a left shoulder injury done to repair a fracture in 2008.

7. The complainant's left leg was shortened and externally rotated, with significant swelling of the anterior thigh and extreme tenderness in the hip. Her left wrist was swollen.
8. An x-ray revealed no disease or other pathology in the hip. However, there was an intertrochanteric fracture of the hip with no signs of healing, an indicator that the fracture was very recent. The complainant was medevaced to St. Paul's hospital in British Columbia for surgical repair of the hip and further treatment.
9. She was x-rayed more thoroughly on arrival at St. Paul's. That x-ray showed:
  - a) A comminuted subtrochanteric fracture in the left hip with a fracture extension and distraction of the lesser trochanter; and
  - b) A subtle nondisplaced fracture of the distal radius in the left wrist.
10. A temporary cast was removed from her wrist and replaced with a splint, to limit movement while the small fracture healed. The hip was repaired surgically with a transfemoral dynamic hip screw and intramedullary rod. She will require further surgery to remove and replace the hip screw and rod, as the bone and tissue adjust and she continues to heal.
11. She was transferred back to Watson Lake hospital on December 30th, 2012. She was in wheelchair for several months and now walks with assistance of a cane.
12. A statement was taken from Ms. McGeorge who told RCMP the following:
  - a) The accused beat her up that evening and broke her wrist and hip;

- b) He was jealous over Sydney Pye, who had come over to visit her. She had not seen her friend, Pye, in a while. She cooked for him and they sat [sic] down together to enjoy a movie.
  - c) The accused left the home during the movie and returned a short time later, as Ms. McGeorge and Mr. Pye were preparing to go for a walk.
  - d) The accused threw Ms. McGeorge down on the floor from behind and kicked her in the leg at least twice. Ms. McGeorge says that she could not move or do anything to defend herself. She was punched and kicked several times, before the Accused left the residence.
  - e) Mr. Pye called the ambulance for her and also called the police.
  - f) During the assault, the Accused called Ms. McGeorge “cheater” and “slut.” He had been drinking and before leaving told her to “watch out,” which she took as a threat.
  - g) She is afraid of the Accused and wants to be protected from him.
13. Mr. Pye did not see much of the assault but heard Ms. McGeorge calling for help. When he went to assist her, the Accused ran off.

[2] In brief, Mr. Malcolm was angry at Theresa McGeorge and assaulted her, breaking her wrist and her hip, for which she received medical treatment.

[3] He has been in custody since the time of this offence. There is a joint submission before me for 15 months time served, which is giving him enhanced credit.

There is a letter filed from the Whitehorse Correctional Centre that supports the position of enhanced credit in this case.

[4] Mr. Malcolm is, by my count, 56 years of age. He is a member of the Na-Cho Nyak Dun First Nation. He has a Grade 10 education. He and his sister went to residential school and were exposed to much trauma there. He has been in and out of foster care and group homes since the time he was two.

[5] MR. PARKKARI: I have just been advised there may be a Victim Impact Statement we may need to deal with.

[6] THE COURT: Thank you.

[DISCUSSION RE VICTIM IMPACT STATEMENT]

[7] THE COURT: As I said, Mr. Malcolm was in group homes and foster care from the time he was approximately two years of age, clearly a difficult upbringing. A Pre-Sentence Report had been ordered but was not available for court today. I am satisfied that Crown and defence counsel, being well aware of the issues relating to *Gladue* principles, have considered them and brought them to bear in their joint submission that is before me, and I am satisfied that I do not need any further information in that regard.

[8] There has been a Victim Impact Statement filed. Clearly, this assault has had a significant impact upon Ms. McGeorge, both physically and emotionally, and this cycle of harm that is so often started, and was started, really, at a very young age in Mr. Malcolm's life, has continued to affect others and it is clear that is going to take some

work for Ms. McGeorge to deal with some of the issues that have arisen with respect to both her physical injuries and the emotional harm in this case.

[9] Mr. Malcolm has a fairly lengthy criminal record. There is a prior assault in 2006. Not lengthy by comparison to many that we see, but it has the one prior conviction in 2006 and the most recent conviction in 2010 for failure to comply.

[10] I am satisfied that in the circumstances the sentence should be 15 months time served. There will be a period of probation of three years to follow. The terms of the probation order will be:

1. Keep the peace and be of good behaviour. Appear before the Court where required to do so by the Court;
2. Notify the Court or 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;
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 two working days of your release from custody --

I say that because I am not exactly sure when he will be released today, so it is either going to be today or Monday.

-- and thereafter when and in the manner directed by the Probation Officer;

[11] There was an abstention clause sought, correct?

[12] MR. PARKKARI: Yes.

[13] THE COURT: Was there a reside clause? I did not note that one.

[14] MR. PARKKARI: No, we were not looking for a reside clause.

[15] THE COURT: Okay.

5. 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;
6. Take such assessment, counselling, and programming as directed by your Probation Officer;
7. Have no contact directly or indirectly or communication in any way with Theresa McGeorge except with the prior written permission of your Probation Officer in consultation with Victim Services for the purpose of providing an apology letter to Ms. McGeorge;

I am not going to order that you give her an apology letter. You can choose to do so or not; that is up to you. But that is how it will be provided, if it is provided.

8. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling you have been directed to do pursuant to this probation order;
9. You are to not have in your possession any firearm, ammunition, explosive substance or weapon;

[16] This is a primary designated offence for the purposes of DNA. That order will go. It is also a mandatory firearms prohibition order. For a period of ten years you are prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance.

[17] MR. PARKKARI: Sir, a not attend at her residence clause.

[18] THE COURT:

10. Not attend at or within 50 metres of the residence of Theresa McGeorge.

[19] MR. CAMPBELL: I ask the victim fine surcharge be waived.

[20] THE COURT: It will be waived.

---

COZENS C.J.T.C.