

Citation: *R. v. McLean*, 2008 YKTC 96

Date: 20081127  
Docket: 08-00359A  
08-00415A  
Registry: Whitehorse  
Heard: Mayo

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

**REGINA**

v.

**ALLAN JOHN MCLEAN aka JACK MCLEAN**

Appearances:  
Lee Kirkpatrick  
Emily Hill

Counsel for Crown  
Counsel for Defence

**REASONS FOR SENTENCING**

[1] RUDDY C.J.T.C. (Oral): Allan John McLean is before me in relation to two counts to which he has entered pleas of guilty. The first of those is an uttering threats and the second is a spousal assault.

[2] The uttering threats arises on the 2nd day of June of this year, at which point the complainant, Jo-Ann Aird, had let her dog out into her yard. When she heard the dog barking she went to check. It appears that Mr. McLean was at her fence and was antagonizing the dog and trying to grab the dog. She ordered him off of her property and asked him to leave a number of times. Words were exchanged until ultimately Mr. McLean said that he would break her dog's neck and make mitts out of him. It appears

that he followed up this threat with the extremely disturbing behaviour of dropping his pants and exposing himself to Ms. Aird.

[3] There is a victim impact statement before me from Ms. Aird where she clearly indicates that this incident has had a significant impact on her, causing her to fear significantly for the safety of her dog when Mr. McLean is in the community, and also has led to her changing some of her behaviours as it relates to when she allows the dog to be out of the home.

[4] The second offence is the significantly more serious of the two. It involves a spousal assault on Mr. McLean's then spouse, Laverna Kimiksana. It appears that on the 18th day of September, Ms. Kimiksana -- sorry, was the complaint made on the 20th?

[5] MS. KIRKPATRICK: Yes.

[6] THE COURT: There was a complaint made on the 20th by Ms. Kimiksana in relation to what appears to be three incidents, but there has been a plea to one offence.

[7] The circumstances that relate to the actual charge to which the plea has been entered are as follows. It appears that Ms. Kimiksana was out drinking with Mr. McLean. She ultimately dropped him at a friend's house and went home to watch TV. At that point it appears that Mr. McLean came home. He was in an intoxicated state, essentially demanded food, and there appeared to be an exchange of words between the two where Ms. Kimiksana felt compelled to get up and attempt to prepare him food.

There then appears to be a bizarre exchange where he is first asking for rice, and then appears to be belittling her, saying it is foolish for someone to start making rice at nine o'clock in the evening. He began to smash plates against the pots. He then ordered Ms. Kimiksana into their room and ordered her to take off her clothing. He started to be extremely rough with her, hitting her in the ear and slapping her. It appears there were a number of hits and slaps, and he then proceeded to begin to punch her in the stomach and rib area. She attempted to protect herself. He then punched her in her privates.

[8] It appears a theme throughout all of the incidents involving Mr. McLean that he, both in terms of his actions and his words, took significant steps to belittle Ms. Kimiksana. So during this incident, as well, there was name-calling and he ultimately ordered her to get out. When she went to leave the room, he hit her from behind, at which point she fell. He then grabbed her by the hair and threw her into the living room. He proceeded to threaten to get a stick to beat her.

[9] When he left the room to go into the bedroom she felt that she had no option but to run out of the home without clothing, in an attempt to get help from a neighbour's house. Fortunately, there was a neighbour present, who provided her clothing and also assisted her in contacting the police. At one point the two individuals left to go to another home, as they feared that Mr. McLean would follow.

[10] It is important to note that there are additional facts, with respect to prior behaviour, which have been admitted but to which pleas have not been entered. These

are important to me in demonstrating what appears to be a significant and disturbing pattern of behaviour.

[11] I am advised that a couple of days before this incident, there was an incident in which Mr. McLean struck Ms. Kimiksana in the chest area, causing bruising. Even more bizarrely, Ms. Kimiksana appears to have been awoken from sleep the following day, only to find Mr. McLean urinating on her, which she notes made her feel as if she were nothing more than a dog. There does appear to be a pattern of both words and behaviour in an attempt to, essentially, dehumanize and belittle Ms. Kimiksana, which is of significant concern to me.

[12] I am without a pre-sentence report that would provide any insight into why Mr. McLean has behaved in the way that he has. He has made admissions, he has entered guilty pleas, and he is entitled to credit for those pleas, but he has taken the position that he wishes to proceed to disposition in the absence of a pre-sentence report that might provide some insight into his behaviour.

[13] The information that I do have with respect to his personal circumstances is that he is currently 49 years of age and has been in the Mayo area since 1981. He has family in the area, including two children and three grandchildren, and he has a history of various types of employment, most recently two years working for the First Nation doing labour work.

[14] I should note I have a victim impact statement from Ms. Kimiksana as well. I think her focus, when one considers the circumstances of this offence, appears to be, to some extent, on her own need to reach out for help to stop the circumstances that were

occurring and the situation that she found herself in. The only thing that she speaks directly to, with respect to Mr. McLean, is her desire, not surprisingly in these circumstances, for a no-contact order.

[15] I should also state, in terms of personal circumstances, Mr. McLean comes before the Court with a prior criminal record. There are related offences on that record. I am mindful of the fact that the offences of violence are somewhat dated. He has convictions for violent offences in '89 and '98, both of which resulted in fines. He has additional convictions since then which relate to impaired driving offences and failing to attend court. Indeed, I have information from his counsel confirming what one sees, both in terms of the circumstances of these offences and in the record, that he has issues with respect to alcohol. He acknowledges that he is an alcoholic. Apparently he has taken some steps to deal with AA in custody.

[16] Credit for time that he has spent in remand, I should note, will be at one and a half to one, which would be the normal credit. I see no reason to depart from that. Credit would be 109 days.

[17] Crown is suggesting that I apply 45 days of that to the uttering threats charge.

[18] Defence, apparently, takes no issue with that particular position, suggesting it, too, is appropriate.

[19] Crown is suggesting it be followed by an 18-month probation order with a number of conditions that would include no contact with Ms. Aird, and not attending within 50 metres of her residence.

[20] With respect to the 266 charge, Crown is suggesting that I apply the remaining credit to that charge and add an additional six months. Defence is suggesting I apply the remaining credit and add an additional four months. Crown is also suggesting an 18-month probationary order with a number of terms and conditions. Defence is suggesting that a somewhat shorter period of probation is warranted, solely to address the issue of no-contact, but argues that I ought not to include any counselling provisions, firstly because, defence suggests, my primary focus ought to be on denunciation and deterrence, and secondly, she asks me to consider the availability of resources in this particular community and suggests that I leave it to Mr. McLean to address his underlying issues and risk factors rather than imposing conditions on him in an attempt to do so.

[21] I agree with counsel for Mr. McLean that the primary focus of this disposition on the circumstance of this offence are such that denunciation and deterrence have to be the dominant sentencing principles in this particular case, and as a result I am equally satisfied on the circumstances of these offences that custody is warranted.

[22] In determining the appropriate length, I am mindful of the following considerations. Firstly, I am mindful of the fact that Mr. McLean has entered guilty pleas, thus resulting in both Ms. Aird and Ms. Kimiksana not having to testify before the Court.

[23] I am mindful of the fact that he has a criminal record, but equally mindful of the fact that the violent offences on that record are becoming somewhat dated.

[24] But I am also very mindful of the circumstances, both of the actual assaultive behaviour, but also the surrounding behaviour, the behaviour which surrounds both the uttering and the assault. It is clear to me that the facts that I have been given demonstrate a somewhat disturbing pattern of behaviour, which is indicative, in my view, of Mr. McLean presenting as a significant risk, potentially to the community as a whole, but certainly to anyone that he is in a relationship with.

[25] Unfortunately, as I noted, I do not have a pre-sentence report to provide any insight into his behaviour such that I could be comfortable in viewing Mr. McLean as not presenting a significant a risk as he appears to on the facts of this case. As a result, I am satisfied that the disposition needs to appropriately reflect the behaviour and also needs to address the ongoing risk that Mr. McLean presents.

[26] Accordingly, I am satisfied on all of those factors that the appropriate dispositions are as follows. With respect to the 264.1, there will be a sentence of one day deemed served by his attendance in court today, and I will credit him for 45 days spent in pre-trial custody. With respect to the 266, I am satisfied that the range as presented by the Crown is appropriate on the facts of this case, and necessary to meet the principles, both of denunciation and deterrence, but also protection of the public. Accordingly, there will be a sentence of six months in custody, but I would ask that the record note that he is also being credited for the remaining 64 days spent in pre-trial custody.

[27] I will attach to both offences a probation order. Again, being mindful of the risk suggested on the circumstances of this case, I am satisfied that an 18-month

probationary term is necessary, and I am satisfied that there are a number of terms and conditions that need to be attached to that. My concern in doing so is primarily an attempt to manage the issue of risk, and I am of the view that it is necessary in so doing to include counselling conditions to ensure that there are appropriate assessments done. I have heard what defence counsel has said in terms of what is available in this particular community, but I am mindful of the fact that once the orders are made it then becomes the job of Probation Services to determine what he is going to be directed to do or not do, and they will no doubt have to do that in terms of what is available and what is not, but that is an insufficient basis, in my view, not to make the condition, an insufficient reason not to place the conditions on there that I feel are necessary to address the risk that is presented.

[28] The conditions with respect to the 18-month probation order, Mr. McLean, will be as follows. There will be the statutory terms. Those are terms that I am required to include in each and every order. They are:

1. That you keep the peace and be of good behaviour;
2. That you appear before the court when required to do so by the court;
3. That you 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. That you report to a probation officer immediately upon your release from custody, and thereafter, when and in the manner directed by the probation officer.

5. That you reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;

[29] There was talk about the abstention clause and the concern that inclusion of an abstention clause would set Mr. McLean up, given the fact that he is an alcoholic. I am satisfied that Probation is mindful of the difficulty that individuals who have substantial alcohol problems have with complying with abstention conditions and that they are careful in terms of how and when they rely on that condition. An abstention clause is, in my view, necessary for the protection of the public and to manage the risk that Mr. McLean presents. Accordingly there will be a condition requiring:

6. That you 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;
7. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
8. That you take such alcohol and drug assessment, counselling or programming as directed by your probation officer;
9. That you report to the Family Violence Prevention Unit to be assessed, and attend and complete the Spousal Abuse Program, as directed by your probation officer;
10. That you take such psychological assessment, counselling, and programming as directed by your probation officer;
11. That you 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 order;

12. That you have no contact directly or indirectly or communication in any way with Laverna Kimiksana;
13. That you have no contact directly or indirectly or communication in any way with Jo-Ann Aird;
14. That you not attend at or within 50 metres of the residence of Laverna Kimiksana;
15. That you not attend at or within 20 metres of the residence of Jo-Ann Aird;

[30] Any issues, submissions, as it relates to the conditions?

[31] MS. KIRKPATRICK: Ms. Kottnitz also asks that there be a no-contact condition with her. She is Ms. Kimiksana's friend; Mabel Kottnitz.

[Discussions re spelling of Mabel Kottnitz]

[32] THE COURT: Okay. I am satisfied that there should be a -- do you have any submissions on that point? He does not plan to have any --

[33] MS. HILL: There is no issue with that. I mean I'm not sure that it's caught within the general no-contacts, in which I don't quite know how it all arises, but he's got no issue with it.

[34] THE COURT: Okay.

16. That you have no contact directly or indirectly or communication in any way with Mabel Kottnitz.

[35] You indicated earlier there would be submissions as it relates to DNA and firearms?

[Submissions by counsel on DNA order and firearms order]

[36] The first thing I will do is make the order that Mr. McLean provide such samples of blood as are necessary for DNA testing and banking.

[37] I am also going to add a condition to the probation order. Again, I am in a position where I have very little information, absent a pre-sentence report, which would suggest that I should not view Mr. McLean as presenting a significant risk. So I am satisfied in those circumstances that he ought not have in his possession any firearms or weapons, except in controlled circumstances, so to speak. So I am going to add a condition to the probation order, Mr. McLean.

17. That you not have in your possession any firearm, ammunition, explosive substance or weapon, except with the prior written permission of --

And I am not certain whether it is better to do that with the RCMP, as they are here on the ground, or the probation officer.

[38] MS. KIRKPATRICK: I think the RCMP would be more appropriate.

[39] THE COURT: I think, because that gives him someone that he can access here. Okay.

-- except with the prior written permission of the RCMP.

[40] MS. HILL: Perhaps it could be the RCMP or the probation officer. I'm just thinking if he moves or if there's other circumstances where that makes sense. I'm not sure.

[41] THE COURT: Do you have a problem, Mr. Hyde, with being a fall-back?

[42] ANDREW HYDE: No. I'd actually prefer that it read "in consultation with the probation officer" as well, rather than just leaving it up to one agency or another.

[43] THE COURT: I think that makes sense. So it will be:  
-- except with the prior written permission of the RCMP in consultation with the probation officer.

Thank you.

[44] Now, the firearms are not related to the offences. I take it they were seized as part of the investigation; However, I do not believe I have authority to make orders in relation to them, other than he is obviously not going to get them back if he does not have the appropriate licensing.

[45] MS. KIRKPATRICK: Right. Well, that's -- that's the point, basically, is that he can't get them back from the RCMP. They are not entitled to give them back, but he needs to dispose of those weapons because he's not entitled to have them.

[46] THE COURT: But he cannot get them back to dispose of them.

[47] MS. KIRKPATRICK: No, but he can make arrangements to dispose of them and advise the RCMP as to what efforts he's made with disposition. And if the person to whom he's disposed of them has a firearms licence, then the RCMP can give them to that individual.

[48] THE COURT: So you understand, Mr. McLean, they cannot give these guns back to you because you do not have the appropriate licences? You need to make arrangements for somebody else who does before they are going to be re-released to anyone.

[49] MS. HILL: And that -- sometimes in these, I think, sometimes that exception, that 60-day exception is made in cases where there's also an order for destruction. But I think the Court is correct that there's not any other orders that can be made today. So the RCMP have them until those arrangements are made to be released to someone else.

[50] THE COURT: Yes, and then I think they have certain entitlements to make applications down the road for their destruction should nothing happen.

[51] MS. KIRKPATRICK: Right.

[52] THE COURT: Okay. The remaining counts?

[53] MS. KIRKPATRICK: Stay of proceedings.

[54] THE COURT: Victim fine surcharges are waived, given his custodial status. Anything further?

[55] MS. HILL: Nothing further.

[56] MS. KIRKPATRICK: Nothing further.

[57] THE COURT: Thank you.

---

RUDDY C.J.T.C.