Citation: *R. v. Moses*, 2015 YKTC 40

Date: 20151023
Docket: 15-00126A
14-00247
14-00247A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

JEREMIAH SOLOMON MOSES

Appearances:

Keith D. Parkkari — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR SENTENCE

[1] LUTHER T.C.J. (Oral): Jeremiah Moses has pleaded guilty to one charge from 27 July 2014, for which he has been in the Domestic Violence Treatment Option Court ("DVTO") for some time. He has also pleaded guilty to s. 145(3) of the *Criminal Code* on 9 May 2015. We also have this raft of charges, six from 4 June 2015.

> (During the course of my oral decision, I did not set out the facts as they were fresh in our minds and not in dispute. Sentencing took place within the hour. I have added paragraphs 2 - 7 for the purposes of this published decision.)

[2] On 27 July 2014, the offender punched the victim, Ms. Sembsmoen, in the face. She was in distress. When the police arrived, she had put a towel to her face to stop the bleeding.

[3] On 9 May 2015, the offender contacted the victim at the Airport Chalet contrary to his judicial interim release conditions. She was afraid and fled from him.

[4] The six charges from 4 June 2015 occurred over a short, but terrifying period of time. The offender had punched her. She ran to the highway to hitchhike and was picked up by Rose Wilson and her daughter, Chantel Frost, whose infant child was in the Frost vehicle.

[5] The offender, in his white Hummer, pursued them and rammed the vehicle twice and tried to force it off the road. The women were terrified. The victim was let out and ended up in the white Hummer. Ms. Frost and Ms. Wilson phoned the police right away.

[6] The offender, who was driving towards Carcross, became aware of police pursuit and took off down a couple of side roads. With the help of the police dog and two more officers, the offender was eventually arrested but not before kicking the victim and punching her several times in the head. She thought she was going to be killed.

[7] The offender would not exit the police vehicle until the police dog had bitten him to assist the officers in removing him.

[8] The Court is well aware of the principles of sentencing as set out in that part of the *Criminal Code* around s. 718 and following thereafter.

[9] In this particular instance, we want to make sure that this type of conduct, both the assaultive conduct and the driving conduct, is definitely denounced. Despite the fact that the offender participated in the DVTO, he is going to need to be separated from

society because these offences are egregious, both the 267(b) from 4 June 2015, and also the two driving charges from that date as well. He has to be deterred; he is going to be separated from society; the probation order will serve to assist him in his rehabilitation.

[10] The Court notes that his record is somewhat limited. That goes in his favour. We are looking at a charge from 2009 which attracted a jail sentence, and a fairly serious charge at that, forcible entry, and also uttering threats. Following there were two breaches of s. 145 and a breach of probation, the last one from 2011.

[11] Mitigating would be the pleas of guilty. Aggravating is the fact that he assaulted the victim with whom he had shared a common-law relationship and with whom he had had a four-year-old daughter, notwithstanding the fact that he had been through the DVTO. The worst assault took place on 4 June 2015.

[12] The offender said he was not able to restrain himself. He was still out of control, and not only out of control to the main victim here, but to the two women who happened to find themselves caught up in an act of kindness and paying the price for that. They are Ms. Frost and Ms. Wilson.

[13] The Court notes that he is a member of the Carmacks First Nation, but to that I would say that there is no evidence that he has had a particularly disadvantaged life. He has come through the program with Fred's Plumbing and Heating quite well. He has completed all his hours. He would soon, that is, once he completes his exams, qualify as a journeyman in the field of plumbing and heating, which will mean that he will have a lucrative income.

[14] As to the principle set out in s. 718.2(e), the Court notes his background, with no apparently significant *Gladue* factors, but also would note that it would appear to me that Ms. Sembsmoen would be a First Nations person as well. Certainly First Nations women deserve to be protected from violent men, be they First Nations or otherwise.

[15] We do not have a joint submission on sentence. I am going to have to craft the sentence in a careful way. But given the extent of the assaultive behaviour towards the victim and given the nature of the driving, very dangerous, as it impacted Ms. Frost, her baby, Ms. Wilson and Ms. Sembsmoen and then fleeing from the police and so on, the Court is not satisfied with the length of sentence as submitted by the Crown. I do not have to accept the Crown's recommendation and, indeed, I can go beyond it; *R. v. Anderson*, 2014 SCC 41 para. 25; *R. v. Wheeler*, [2015] N.J. No. 376 (P.C.) paras. 29 to 35. This is different from the position that I would be in if there were a joint submission. Then we have to go through a certain procedure before I can depart from the joint submission. Here, the Crown seeks nine months. The Court will be imposing 10 months, merely a slight increase.

[16] With regard to the s. 266 charge from 27 July 2014, the Court will suspend the passing of sentence and place him on probation for one year with just the statutory conditions. The main probation order I am going to attach to the s. 267(b) from 4 June 2015.

[17] As to the victim surcharge for the s. 266 charge, the Crown proceeded summarily. The victim surcharge will be fixed at $100. I am going to give him 18 months to pay that.

[18] With regard to the breach of undertaking from 9 May 2015, considering the manner in which this breach occurred and considering that he has a record for these types of offences, the Court will impose the sentence at 30 days.

[19] For the assault causing bodily harm and the other charges, the Court is not going to run them all concurrently. They did occur within the same time frame, but they are different in nature.

[20] It is similar, in some senses, to the old case from Ontario, *R. v. Chisholm*, [1965] 2 O.R. 612 (C.A.) where a person committed some bank robberies, and two of them on the same day. Proximity in time is not sufficient. The dangerous driving and fleeing from the police are quite separate from the assault. The assault causing bodily harm, in my view, is the worst charge. The Court is going to impose a sentence of six months on that, taking into account the nature of the assault and also the fact that he was on an undertaking at the time.

[21] I will run the two breaches of undertaking concurrent with that, and each of those will be fixed at three months.

[22] As to the driving charge under s. 249, the Court is going to fix the sentence at two months, consecutive. Fleeing from the police will be one month, consecutive. That will be a total, then, of 10 months.

[23] The s. 129 will also be one month, and it will run concurrently to the s. 249.1. That will be a total of 10 months. It will be less 140 days.

[24] The probation order will be in effect for three years, and I will go through those conditions as well in a moment.

[25] As to the victim surcharges, for the s. 145(3) from May 9, 2015, the Crown proceeded summarily, so the victim surcharge will be fixed there at $100, and it will be paid within a period of 18 months.

[26] With regard to the victim surcharges on Counts 1, 3, 4, 5, 6 and 7, this was an information in which the Crown indicated they were proceeding by indictment, so those victim surcharges will be fixed at $200 each. Again, I will give him a period of 18 months to pay those.

[27] As to the probation order, it will be for three years and it will attach to the s. 267(b) charge. The conditions will be largely, not entirely, but largely as outlined by the Crown.

[28] Statutory conditions:

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, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with Dawnann Marie Sembsmoen, Chantel Frost, and Rose Wilson except with

the prior written permission of your Probation Officer in consultation with Victim Services and Family and Children Services;

5. Remain within the Yukon unless you obtain the written permission from your Probation Officer or the court;

6. Report to your Probation Officer within two working days of your release from custody, and thereafter when and in the manner directed by the Probation Officer;

7. Reside as approved by your Probation Officer;

8. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;

9. Not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

10. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues:

    i) substance abuse;
    ii) alcohol abuse;
    iii) spousal violence;
    iv) anger management;
    v) any other issues identified by your Probation Officer.

and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this Order.

11. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

[29] I will not impose a weapons condition on probation. We will leave that to s. 109 of the *Criminal Code*.

[30] Now, as to the driving, it is important that this man pursue his employment prospects, which appear to be substantial, so I will impose a condition as follows, and this will be an additional probation condition:

12. Not operate any motor vehicle in Canada unless and until you have a valid licence, registration, and insurance and there are no outstanding fines or victim surcharges; and only for work purposes between the hours of 6:00 p.m. and 6:00 a.m. and you must present documentary evidence that you are on a job.

[31] I will say two things about that. If you are out working on, let us say, a school somewhere and you are helping them with their plumbing and you drive to or from the school, you must have a document, a contract or something of that nature that you are working at the school. Secondly, people in this business often get called out after

hours. In no way does this give you the right to go out after hours. If you are out after hours, you are taking a taxi or getting someone to drive you in his or her truck.

[32] There will be a DNA order which attaches to Section 267(b).

[33] As to the restitution, I have to say, I really want to impose a restitution order here, but I do not have the detailed information that I really need. Quite clearly there was significant damage to the Frost vehicle but the amount is not known to me, although the Crown sought a reduced amount of a possible $6000 which was never documented.

[34] In *R. v. Heathcliff*, 2015 YKCA 15, I had an abundance of very accurate information about what the restitution amount should be. The Court of Appeal took a different view despite the specifics of the information I had. Based on that case, I would be reluctant and, in fact, will not impose a restitution order here. Rather, that would be left to the civil courts. The general amount sought could readily be pursued in the Small Claims Division of this Court with relatively small fees to the complainant.

[35] THE COURT: So are there any questions for the Crown?

[36] MR. PARKKARI: Section 109 order?

[37] THE COURT: Yes, that is attached to the s. 267(b).

[38] MR. PARKKARI: And the length?

[39] THE COURT: Ten years.

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LUTHER T.C.J.