Citation: *R.* v. *Ngeruka,* 2015 YKTC 22

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Docket: 12-00260A
12-00295
Registry: Whitehorse

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

REGINA

v.

NAPOLEAN NGERUKA

Restriction on publication: Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 or 486.5 of the *Criminal Code*. Check with the court registry for details.

Appearances:
Joanna Phillips — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCING

[1] Napolean Ngeruka has entered a guilty plea to having committed the offence of aggravated sexual assault contrary to s. 273(1) of the *Criminal Code*. Mr. Ngeruka had sexual intercourse with L.S. on several occasions within two separate periods of time, one being for two or three months in 2005, involving perhaps five occasions of vaginal and/or anal intercourse, and the other within a two-week period in 2009, involving perhaps three or four acts of sexual intercourse. He had this sexual contact while knowing that he had contracted the Human Immunodeficiency Virus ("HIV"), but without

communicating this fact to L.S. and without taking adequate steps to protect her from contracting HIV.

[2] L.S. was subsequently diagnosed as having contracted HIV. Mr. Ngeruka, while accepting responsibility for having committed the offence of aggravated sexual assault, was not prepared to admit that L.S. contracted HIV as a result of her sexual relationship with him. The matter proceeded to a ***Gardiner*** hearing and, in my judgment in ***R.*** v. ***Ngeruka,*** 2015 YKTC 10, I held that L.S. had in fact contracted HIV from Mr. Ngeruka during and as a result of their sexual relationship.

Positions of counsel

[3] Crown counsel's initial submission, made prior to my decision in ***Ngeruka***, was that an appropriate sentence, based upon a finding that Mr. Ngeruka infected L.S. with HIV, is one of three years imprisonment. Had I not made this finding, Crown's submission was for a period of imprisonment of two years. Given that I did find Mr. Ngeruka infected L.S., Crown counsel, who is not the same counsel, maintains that a three-year sentence is appropriate.

[4] Mr. Ngeruka's original counsel at the ***Gardiner*** hearing submitted that an appropriate sentence is one of two years less one day, to be served conditionally in the community. Although this submission was premised on the Court finding that the Crown had not proven beyond a reasonable doubt that L.S. contracted HIV from Mr. Ngeruka, there was no subsequent submission that a different sentence should be imposed. Present counsel for Mr. Ngeruka, (who I note is not the same counsel) says that, in the circumstances, a sentence of two years less a day is still an appropriate disposition.

Such a sentence would leave open the option of Mr. Ngeruka serving the sentence conditionally in the community.

Victim Impact

[5] A Victim Impact Statement has been filed. L.S. was brief in her comments but it was clear that she has suffered both physically and emotionally as a result of Mr. Ngeruka's actions. The evidence at the ***Gardiner*** hearing was that, from a health perspective, L.S. was doing extremely well. It was also, however, evident from the testimony of L.S. that the offence committed by Mr. Ngeruka has had a significant impact upon her life. This said, I saw nothing in L.S.' testimony that betrayed anger, hostility or ill intentions towards Mr. Ngeruka. I was impressed with L.S.' demeanour while testifying and her rather stoic and realistic approach to the situation she is in. I am not, of course, saying that I know, or believe I know, what L.S. may have felt since learning she was HIV-positive and what she may be feeling now. I am certain she has gone through, and is likely still experiencing, a myriad of emotions. It appeared to me from the little that I saw, however, that L.S. has chosen to move on as positively as she can given the very significant burden she now has to carry as a result of Mr. Ngeruka's actions.

[6] Some of the impacts upon victims in similar circumstances have been made very clear in the cases referred to herein and I am certainly aware that many of the negative impacts upon victims noted by these sentencing judges are of almost universal general application.

Circumstances of Mr. Ngeruka

[7] Mr. Ngeruka comes before the Court with a criminal history that consists of impaired driving-related convictions in 1992, 1994 (x2), 2006 and 2009 as well as associated convictions under s. 335 in 1992 and s. 252 in 2009. He was also convicted of assault in 1998 and 2012 and he has two convictions for obstruction of justice in 1994. He was incarcerated for periods of 15, 14 and seven days in relation to some of these offences.

[8] A Pre-Sentence Report ("PSR") was filed in anticipation of sentencing in June 2014. There has been no written update to this PSR. Counsel for Mr. Ngeruka was, however, able to provide me with some additional information at the continuation of the sentencing hearing on June 29.

[9] Mr. Ngeruka is 57 years old. He was born in Rwanda and resided there until he left in 1987 after being threatened with death. He lived as a refugee until he entered Canada in 1989, becoming a citizen in 1993.

[10] Both of Mr. Ngeruka's parents were killed in the Rwandan genocide, as well as one sister and one brother. Both his grandparents were burned alive in their home along with a number of his other relatives. This genocide has been described by the author of the PSR as being:

> …the most efficient killing spree of the twentieth century in which "… killers, armed mostly with machetes and clubs… did their work five times as fast as the mechanized gas chambers used by the Nazis" hunting people "… down as they fled… through farmland and woods as if they were animals… and when they were found… the old… women and children alike, they were killed…". They were killed because "… they were

> Tutsi… they had a Tutsi parent… or… they looked like a Tutsi" (p. 90) or, because they were moderate Hutu who protected the Tutsis. People who had been neighbours for years before turned on one another in the killing frenzy. [Fisanick,C. (Eds.) (2004). The *Rwanda* Genocide. Farmington Hills, MI: The Gale Group Inc.]

[11] Mr. Ngeruka has irregular contact with his older sister who lives in France. He is aware that one of his younger sisters is alive and lives somewhere in Europe. He has no information regarding his other three younger siblings.

[12] Mr. Ngeruka attended residential school in Rwanda, as was the custom. He would see his parents at Easter and during summer holidays. There was ethnic tension within the school system, which intensified with the commencement of the pogroms in 1973. Starting in 1973/74, "they" started killing people in his tribe. Some people would be taken from their homes by the government and would die in jail or disappear. A couple of his close friends were taken in this way. On one occasion a student struck Mr. Ngeruka in the head with a hoe, knocking him unconscious and sending him to hospital. When asked what happened to this student, he stated that the teachers did not care because he was a Tutsi. He acquired his college diploma (Grade 12) and was qualified in Rwanda as a school teacher in History and Geography.

[13] Mr. Ngeruka advised the author of the PSR that, besides himself, only two of the students from his class are still alive. Most of the people that he grew up with are dead or have disappeared. He stated that during the height of the genocide both Hutu-s and Tutsi-s participated in the massacres….in the end it was all about killing and the *Interhamwe* "people who attack together".

[14] Mr. Ngeruka's former spouse of approximately ten years, "L" stated to the author of the PSR that Mr. Ngeruka keeps his time in Rwanda suppressed. She described him as a "good person" who has been "damaged". She believed that a piece was missing from his time in Rwanda and that he was being secretive. She was unsure whether Mr. Ngeruka either was witness to or did something that he was not proud of in Rwanda.

[15] The author of the PSR states that Mr. Ngeruka was not able to discuss family matters and his time in Rwanda, noting what the author observed as Mr. Ngeruka having:

> …dissociative behaviour when the subject of his past came up; he would appear to mentally withdraw, emotionally freeze as tears welled, and he seemed to struggle with his thoughts unable to speak, while at other times he would speak with an "edged" tone.

[16] It was evident to the author that "…discussion with Napolean that touches on past issues provokes almost immediate reactions associated with deep sadness".

[17] Mr. Ngeruka's counsellor at Alcohol and Drug Services ("ADS") informed that the "…'trauma' …is sitting there on the surface and that Napolean becomes very emotional when his past or his children are brought into the conversation".

[18] Mr. Ngeruka worked at various jobs while in Canada including, after his arrival in Whitehorse in 1992. In 1998 he secured employment in the custodial department of Yukon College and has been there ever since. He is considered to be a pleasant person and a good employee who works well with others. His supervisor of 14 years states that he has nothing negative to say about Mr. Ngeruka. A fellow employee, "Wallace", describes Mr. Ngeruka as an "…honest man who has always been

supportive, helpful and upfront with him. Wallace states that he and Mr. Ngeruka are working hard at not drinking and they are a source of mutual sobriety for one another. He states that Mr. Ngeruka "…is a 'different' man today than what he was four (4) to five (5) years ago, he approaches problems differently, he is not as upset and angry anymore, he 'solves them'."

[19] Mr. Ngeruka advised the author of the PSR that he struggled with alcohol between 1994 – 2009, at times drinking alcohol to the point that he would black out. Mr. Ngeruka completed the Substance Abuse Management Program at Offender Supervision Services in November and December 2012. He was connected with ADS in early 2013. Mr. Ngeruka remains connected with ADS Counselling Services and has completed the Information and Motivation for Positive Action and Choices Today Program. His ADS counsellor advises that he remains connected and makes his appointments or otherwise reschedules them. He states that Mr. Ngeruka works hard to understand and he is a "good guy" who has dealt with an incredible amount of trauma in his life.

[20] Mr. Ngeruka has had two significant relationships in his life. When he left Rwanda in 1988 he was unaware that his partner of five years, C. was pregnant. He states that he applied to get C. out of Rwanda but there was a delay in the paperwork and she was killed. Their daughter, N., was able to leave the country after the war and lived with a relative in Denmark until Mr. Ngeruka was able to bring her to Whitehorse in 2000. N. has a learning disability that, according to a teacher and physician in Whitehorse, is likely the result of watching her mother be killed in the 1994 genocide.

[21] Mr. Ngeruka states that he helps his daughter with her disability as she has difficulty with comprehension. While she graduated from Grade 12, Mr. Ngeruka states that N. is likely at a grade 7 level in terms of actual achievement. As of the date of the PSR, N. was in an "extended" five year program to become a nursing assistant. This is a working program and I understand her to receive some income from this program currently.

[22] Mr. Ngeruka was married to L from 1994 until they separated in 2003. They have two children, born in 1997 and 2000. L. and the children no longer reside in Whitehorse. Mr. Ngeruka maintains a relationship with his children. L. states that Mr. Ngeruka loves his daughters and tries to be the best that he can for them. She states that he pays child support and is otherwise generous. Mr. Ngeruka states that he was depressed and drinking heavily at the time that he and L.'s relationship dissolved.

[23] It appears that Mr. Ngeruka suffers from some significant medical conditions. He states that he has been diagnosed with depression, is diabetic, has high blood pressure and suffers from insomnia. According to the author of the PSR, Mr. Ngeruka has advised him that he is suffering from another life-altering disease that the author of the PSR states he "is prevented as a matter of policy from disclosing". I was unable to obtain any further information regarding this disease at the continuation of the sentencing hearing. Mr. Ngeruka states that he takes medication to treat all his health issues and suffers numerous side effects as a result. He intimated to the author of the PSR that "…he was cognizant of the fact that he did not have much longer to live and he hopes to live until he is sixty (60) years old so he can see his youngest daughter graduate and complete his twenty (20) years of service with the College".

[24] Dr. Elwell of Alcohol and Drug Services consulted with Mr. Ngeruka and he provided a letter dated March 6, 2015. Mr. Ngeruka advised him that he is getting only two or three hours of sleep a night at present. He wakes up in the middle of the night and has nightmares at least two to three times a week. He is scared of going to sleep and talks to his parents in his dreams. If he talks about the past it makes his nightmares worse. It causes him to become quite emotionally upset. Dr. Elwell notes that Mr. Ngeruka is currently on several prescription medications. Mr. Ngeruka is suffering from extreme fatigue and extreme depressive symptomology, which may be related to one of the medications he is taking. As a result this has affected his ability to work, for which he feels considerable shame. Mr. Ngeruka was also noted to be tearful when discussing some past events, with a very anxious mood coupled with sadness.

[25] Dr. Elwell offered a diagnosis of Post-Traumatic Stress Disorder and expressed concern about "…a depressive syndrome secondary to efavirenz or, in that case, a depressive disorder secondary to complication of treatment". Dr. Elwell expressed concerns about the interaction of the different medications Mr. Ngeruka is taking and has instituted changes in order to minimize some of the negative impacts upon Mr. Ngeruka that he believes may be resulting. He hopes this will have the effect of turning around Mr. Ngeruka's mood syndrome. He considers Mr. Ngeruka's present circumstances to present somewhat of a psychiatric challenge.

[26] Mr. Ngeruka has been assessed as having no current level of problems related to alcohol or drug abuse. He has been noted, in the criminogenic risk assessment, as requiring a medium level of supervision, primarily due to his longstanding trauma and cultural adjustment-related issues.

[27] Mr. Ngeruka advised the author of the PSR that his current situation is a result of his own "…carelessness, my drinking and it is my fault, she (the complainant) is not to blame. If she says I did not tell her then I did not tell her, I was drinking heavily back then, I just don't know".

Authorities

[28] In ***R.*** v. ***Nduwayo,*** 2010 BCSC 1467, the offender was sentenced to eighteen years custody after being convicted at trial on five counts of having committed aggravated sexual assault against five separate victims. Three of these victims contracted HIV as a result of their sexual relationship with Mr. Nduwayo. The Court described Mr. Nduwayo's actions as follows in para. 54:

> In the present case, I am particularly struck by what can only be described as an outrageous degree of inexplicably selfish conduct by Mr. Nduwayo. Even though he had been advised of his condition, and even though he had been fully advised of the concerns as to passing it on to other persons, he elected, for reasons which are beyond my ability to fathom, to embark upon a series of intimate relationships with a number of women. In each instance, he chose not to disclose his condition and he chose not to use condoms in sexual relations. In fact, in a number of instances, he actively dissuaded his partner from the use of condoms, implicitly or explicitly misrepresenting the state of his sexual health.

[29] After reviewing a number of authorities, Williams J. stated in para. 40 that:

> On the basis of the applicable authorities, it is clear to me that the dominant objectives to be served in imposing sentence in matters such as this are the denunciation of the conduct, the deterrence of the both this offender and others, and, where necessary, the separation of the offender from society in order to protect the public. Other objectives, such as rehabilitation, the provision of reparations, and promoting a sense of responsibility in the offender are of lesser weight.

[30] After noting that the Court in ***R.*** v. ***Smith***, 2004 BCCA 657 held that a sentence of 56 months was in the mid-range for an aggravated sexual assault conviction (in that case the victim did not contract HIV), Williams J. stated in paras. 42, 47 and 48 that:

> 42. Where the conduct results in the victim being infected by the HIV virus, that represents a meaningful aggravation and, in my view, will warrant the imposition of a greater sentence in recognition of that factor.
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> ….
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> 47. While I do not have specific or precise evidence of the treatment and prognosis affecting those with the condition today, I accept from the evidence at trial that an HIV infection no longer constitutes a virtual death sentence, and with careful medical care and good fortune, an infected person should be able to expect to live a somewhat ordinary life and that life span will not be enormously diminished by the condition. Nevertheless, I am satisfied as well that the condition is incurable and it represents a very serious and permanent condition of harm. Of the victims in this case who were infected, each of them will carry that condition for the remainder of her life. Each must have to expect to be on a strict course of medication for the rest of her life. Taking that medication may well bring about complications. Infection results in a permanent and significant compromise of the victim's health. It impacts on such decisions as the ability to become pregnant and to have a family. It most certainly impacts upon romantic relationships, which the victim may choose to pursue. Whenever each of them becomes involved in a relationship with someone else, they must declare their condition. In short, there can be no doubt that they are justified in feeling that they now live in a permanent shadow of fragile health, shame and diminished value.
>
> 48. Sight cannot be lost of those facts.

[31] I concur with the comments of Williams J. and find them applicable in this case. In saying this, I am aware, as Williams J. was, that the medical advances in the treatment of those infected with HIV have been significant. A diagnosis of HIV is no longer the virtual death sentence it once was and those infected can often be expected to live a relatively 'normal' life. Certainly, to the extent that the determination of an appropriate sentence is in part determined by the harm caused to the victim, the harm

can be said to be somewhat diminished from what it once was. Thus there is the basis for an argument that sentencing ranges based in part upon the extent of the harm caused, when the harm was more serious than it presently is, due to medical advances, can be reconsidered and sentencing ranges adjusted. This said, the harm caused is still very serious.

[32] In ***R.*** v. ***Tippeneskum***, 2011 ONCJ 219, an aboriginal female offender was sentenced to 42 months imprisonment for failing to disclose that she was HIV-positive to the male partner she had a sexual relationship with over the course of their approximate one-year relationship. The victim became HIV-positive as a result of his sexual relationship with the offender.

[33] After considering the application of the purposes and principles of sentencing and being mindful of the relevance of the application of the ***Gladue*** principles as set out in s. 718.2(e) to Ms. Tippeneskum, Di Giuseppe J. stated in paras. 22-24 as follows:

> 22 Counsel have provided a number of cases to assist the court in arriving at a fit sentence. While the sentences imposed in these cases vary, and in some circumstances widely, the overarching theme is clear: deterrence and denunciation are the primary sentencing objectives to be achieved in cases of aggravated assault of this nature. This was expressed by Cory J. in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 142:
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> "…the criminal law …provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centered recklessness and the callous insensitivity of the actions of … those who have acted in [such] manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever present reality. Indeed, the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the Criminal Code. The risks of infections are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. <u>If ever there was a</u>

> place for the deterrence provided by criminal sanctions it is present in these circumstances." [Emphasis added.]

[34] Judge Green in ***R.*** v. ***Williams***, [2006] O.J. No. 5037, a decision of this Court, summarized how sentencing courts have approached cases of this nature. At paragraph 20:

> The range of sentences in these cases involving HIV unprotected intercourse run from one to eleven years of incarceration. As is to be expected, this broad range reflects a variety of aggravating and mitigating factors, including the number of partners involved, the frequency of exposure, the criminal antecedents and contrition, if any, of the defendant, and the impact on the complainants, particularly whether or not there was HIV transmission. There is no settled view as to the appropriate tariff, other than that a period of true imprisonment is consistently imposed.

[35] The aggravating factors were considered to be the fact that the offender and the victim were in a domestic relationship, that she repeatedly deceived him over a lengthy period of time, increasing his exposure to the virus with each sexual encounter, the victim became infected with HIV and the offender was bound by a probation order at the time she committed the offences.

[36] In mitigation was her youth (23 years old), her plea of guilty which spared the victim from testifying at a trial, her level of insight into the underlying issues that contributed to her offending and willingness to address these issues, as well as the systemic factors that also contributed to her offending.

[37] In ***R.*** v. ***Walkem***, [2007] O.J. No. 186 (S.C.), the approximately 31-year-old offender (as of the date of sentencing) was sentenced to consecutive sentences of 36 and 22 months for having had unprotected sex with two women, one of whom was only

18 years old, all the while knowing that he was HIV-positive and without advising these women of his condition. The sexual relationship with the 18 year-old victim occurred over a period of several months and she contracted HIV as a result. The sexual relationship with the other victim was "marginally more than a one-night stand" and ended when the victim heard that Mr. Walkem was HIV-positive. The victim that instance did not contract HIV.

[38] While Mr. Walkem pled guilty to two counts of sexual assault, the complainants in this case were required to testify as Mr. Walkem made certain conversations he had with the victims an issue in the sentencing process. Gans J. made the following observation:

> What I found of greater moment was the fact that Mr. Walkem made these conversations an issue in the sentencing process, which fact, in and of itself, undercut his expression or evidence of contrition.

[39] Gans. J goes on to state in para. 21 as follows:

> It is acknowledged by the defence, albeit after an open discussion with the Court, that in cases of this nature where an aggravated assault is perpetrated by knowing HIV-carriers that the sentencing objectives of deterrence and denunciation are of paramountcy, requiring as it does the imposition of a sentence of imprisonment rather than a conditional sentence.

[40] In ***R.*** v. ***Lamirande***, 2006 MBCA 71, the majority of the Court of Appeal imposed a sentence of two years less one day, to be served conditionally in the community, plus three years of probation after the sentencing judge had rejected the joint submission of counsel for such a sentence and instead imposed a sentence of two and one-half years.

The 42-year-old offender (as of the time of the offence), engaged in one act of sexual intercourse with the cognitively impaired victim. The offender had been previously diagnosed with HIV as well as Hepatitis A and B. The victim did not contract HIV.

[41] At the time of the decision in ***Lamirande***, a conditional sentence of imprisonment was still available for an aggravated sexual assault, an option that became unavailable with the amendments to the *Criminal Code* in 2007. I note that Mr. Ngeruka's offence occurred in a time period that includes both before and after this amendment was proclaimed in force. Counsel have agreed that a conditional sentence is available for Mr. Ngeruka, if I impose a sentence of less than two years, on the basis of the time of the offence spanning the availability of a conditional sentence and Mr. Ngeruka being given the benefit of the least restrictive sentencing options available.

[42] The Court of Appeal, in para. 24, distinguished the circumstances of the offender from other cases, noting that "In the present case, the accused committed one isolated, unplanned, spontaneous act with none of the elements of willful intent or deceit present in some of the cases described above".

[43] In ***R.*** v. ***McGregor***, 2008 ONCA 831, the 34 year-old accused (as of the time of trial) was convicted after trial on a charge of aggravated sexual assault. He was convicted on the basis of two instances of having unprotected sexual intercourse with his girlfriend during their approximately 18-month relationship. At no time did the offender disclose to the victim that he was HIV-positive. While he and the victim had frequent sexual intercourse, on almost every occasion the offender used a condom. He

failed, however, to use any protection in the two instances of which he was convicted. The victim did not contract HIV from the offender.

[44] On a Crown appeal, the sentence of one year imprisonment, to be served conditionally, plus three years probation, was overturned and a sentence of 18 months incarceration was imposed, also to be followed by three years of probation.

[45] The Court stated as follows:

> [25] As the sentencing judge correctly noted, denunciation and deterrence are the primary sentencing sentencing objectives in this case…
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> [26] In some cases, an appropriately crafted conditional sentence may satisfy the principles of denunciation and deterrence: R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, at paras. 102 and 107. However, in Proulx, at para. 106, Lamer C.J.C. pointed out that "there may be certain circumstances in which the need for denunciation [or deterrence] is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct". In other words, the nature of the offence or the circumstances of the offender may require a term of actual incarceration to adequately express society's condemnation of the conduct at issue or to achieve the required deterrent effect. In my opinion, this is such a case.
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> [27] Section 718.1 of the Code provides that "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." This direction requires that, in fashioning an appropriate sentence, a sentencing judge…have regard to both the seriousness of the offence and the offender's degree of responsibility.
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> [28] The respondent's crime was very serious. On the sentencing judge's findings, the respondent deliberately refrained from disclosing his HIV-positive status to M.M. for approximately a year and a half, notwithstanding that he knew he was obliged to do so before engaging in sexual intercourse with her and despite prior explicit warnings to him of his disclosure obligation by public health authorities. …
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> …
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> [30] Section 718.2(a)(iii) of the Code provides that the abuse of a position of trust in the commission of an offence is an aggravating circumstance on sentencing. The respondent did not occupy a traditional position of trust in

> relation to M.M. However, any intimate relationship of the type entered into by the respondent with M.M. is based on a certain amount of trust and confidence, at least to the extent that each participant may reasonably expect that he or she will not knowingly be exposed by the other to a dangerous contagious disease: …
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> …
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> [42] The respondent has been unable to point to any case where, absent a joint submission on sentence and/or a guilty plea, a conditional sentence was imposed on an accused convicted of aggravated sexual assault for engaging in unprotected sexual intercourse without first disclosing his or her HIV-positive status. The dearth of authority in support of the approach to sentencing taken by the sentencing judge in this case confirms that aggravated sexual assault of the type at issue here will generally compel a custodial term of imprisonment.

[46] In ***R.*** v. ***Mercier***, 2011 QCCQ 198, the 48-year-old offender (at the time of sentencing) and the victim had sexual relations over an approximate two-month period, some of which involved protected sex and some of which was unprotected. The offender was convicted on a guilty plea to having nine unprotected incidents of sex with the victim. The offender never advised the victim that he was infected with HIV. The victim did not contract HIV.

[47] After reviewing a number of cases, the Court imposed a sentence of two years less one day to be followed by three years of probation.

[48] In ***R.*** v. ***A.T.R.***, 2011 BCPC 283, the offender admitted to having unprotected sex with two women, over a period of approximately 15 months, while knowing that he was HIV-positive and without disclosing this fact to the victims. Neither victim became infected with HIV. In accepting a joint submission that took into account some difficulties the Crown faced in presenting its case, the offender was sentenced to two years imprisonment to be followed by three years probation.

[49] Baird J. noted in para. 9, referring to ***Nduwayo***, that cases where the victim does not contract HIV will result in a lower sentence than where the victim has been infected. In determining where a sentence falls within the range of sentence, consideration is given to factors such as "…the number of incidents [and hence the degree of risk], the degree of culpability and intent, whether there has been a guilty plea, whether there is remorse and insight, and the risk of continued offending".

[50] Baird J. noted as mitigating the early guilty plea and assessed the offender, giving consideration to his background, as having moderate culpability.

Application to Mr. Ngeruka

[51] Mr. Ngeruka is entitled to some credit for having entered a guilty plea. This said, the guilty plea was entered on February 28, 2014, just prior to the March 3 trial date, thus limiting the mitigation it provides to some extent, when compared to an early guilty plea. The mitigation that Mr. Ngeruka's guilty plea offers is further reduced as the complainant was required to testify in detail with respect to her sexual history at the ***Gardiner*** hearing. This is not, of course, an aggravating factor, as requiring the Crown to prove aggravating facts at a sentencing hearing was certainly within Mr. Ngeruka's right to make full answer and defence; it does, however, nonetheless have the effect of lessening the mitigating impact of the guilty plea. Greater mitigation is generally afforded when a complainant is not required to testify, particularly in sexual offences. Had L.S. not been required to testify I could have given greater emphasis to the mitigating impact of the guilty plea.

[52] Prior counsel for Mr. Ngeruka, in his written submissions, points out that the circumstances of Mr. Ngeruka as an African-Canadian, for the purpose of imposing an appropriate sentence, while not on an equal footing with that of Aboriginal Canadians, nevertheless is a factor that merits consideration.

[53] I agree with this submission. The particular circumstances of every offender are to be taken into account in determining a just and fair sentence. Mr. Ngeruka's background is very tragic and there can be no doubt that the circumstances of his childhood and adulthood are significant contributing factors to his abuse of alcohol, depression and other analogous issues. It would be an error were I not to take these factors into account in determining an appropriate sentence for Mr. Ngeruka. As the Court of Appeal stated in ***R.*** v. ***Borde***, (2003) 623 O.R. (3d) 417 at para. 27 in regard to a defense counsel submission that:

> …the background of the [African-Canadian] appellant exhibits many of the same factors found in the background of Aboriginal offenders including poverty, family dislocation, chaotic child rearing and alcoholism. I accept that there are some similarities and that the background and systemic factors facing African Canadians, where they are shown to have played a part in the offence, might be taken into account…

[54] I find that Mr. Ngeruka's personal circumstances are such that they are a mitigating factor in sentencing. While not the same as those all too often seen in cases of Aboriginal offenders in Canada, as is specifically captured in s. 718.2(e), and not the same as in ***Borde***, the simple reality is that the trauma Mr. Ngeruka has been a part of and a witness to has clearly negatively impacted him. Section 718.2(e) requires me to take into account the circumstances of every offender that is before me for sentencing, whether the offender is Aboriginal or not. It is the fundamental principle of sentencing

that a sentence must be proportional to the gravity of the offence and the moral blameworthiness of the offender. In considering this principle of proportionality, the background and personal circumstances of an offender must be considered, not that this background and the personal circumstances afford an excuse, but they certainly provide a context in which the commission of the offence occurred.

[55] I also find that the steps that Mr. Ngeruka has taken to address his alcohol abuse issues, including his lengthy and ongoing participation in counselling to be a significant mitigating factor.

[56] Mr. Ngeruka has been on a Recognizance since June 7, 2012 with some amendments made on June 19, 2012, and subject to a total of approximately 20 terms throughout. Until September 2014, he was on a curfew from 9:00 p.m. until 6 a.m. daily. The curfew was suspended by his bail supervisor in September due, I would expect at least in part, to Mr. Ngeruka's positive performance while on bail. Other than breaching the abstain condition of his Recognizance on June 8, 2012, I am not aware that Mr. Ngeruka has done anything other than comply with the terms of his Recognizance.

[57] Compliance by an offender with strict terms of release is a factor that can be considered in determining an appropriate sentence. (See ***R.*** v. ***Dragos,*** 2012 ONCA 538 at para 77). There is no mathematical approach to such a consideration and there is not a requirement that the Court consider this factor in any given case. In the present case, some of the delay in sentencing is attributable to factors other than Mr. Ngeruka. In the circumstances, I consider it appropriate to impose a sentence that gives Mr.

Ngeruka some recognition for his lengthy period of time spent on bail on somewhat strict conditions.

[58] I am cognizant of the many positive factors in Mr. Ngeruka's life. I note his actions that demonstrate commitment to his responsibility as a father. I note his steady employment and praise from his employer and fellow employee. I note his involvement in counselling, and I accept that Mr. Ngeruka is a different man in many ways today than the man he was when he committed these offences. I note his poor medical condition. I note, to the limited extent I can consider it mitigating, his guilty plea. I find, from reading the PSR, and from Mr. Ngeruka's comments when he addressed the Court at his sentencing hearing, that Mr. Ngeruka has expressed, in his own way, remorse for his actions. There is certainly no indication that he in any way blames L.S. for his being here.

[59] I note that there is one victim in this case and not several. I also note that on neither occasion was there a particularly prolonged sexual relationship. I also note that, all told, there were likely 10 or less incidents of sexual contact between Mr. Ngeruka and L.S.

[60] This said, there was certainly a reasonable expectation on the part of L.S. that she would not be exposed to a life-threatening virus through her contact with Mr. Ngeruka and I find that the relationship between the two was sufficiently intimate to involve, to some degree, a breach of trust on the part of Mr. Ngeruka. The actions of Mr. Ngeruka showed a reckless disregard for the health, safety and well-being of L.S.

Her life has been endangered and she must live with the consequences of Mr. Ngeruka's offence for the rest of her life.

[61] This is a difficult case. The circumstances of Mr. Ngeruka, notwithstanding the significant gravity of the offence, are such that a sentence to be served in the community would not pose a significant risk to the community and would allow Mr. Ngeruka to continue the positive steps he has made in the last few years towards a more positive life and to continue to be a positive factor in his children's lives.

[62] However, given my finding that L.S. contracted HIV as a result of her relationship with Mr. Ngeruka, the jurisprudence does not support a sentence of less than two years but rather supports a sentence in a range closer to that suggested by Crown counsel, notwithstanding the various mitigating factors I have noted.

[63] I find that in order to comply with purposes, objectives and principles of sentencing, with particular emphasis on the objectives of denunciation and deterrence, and in considering the jurisprudence in this area, a sentence of incarceration in excess of two years is required. I do not have sufficient information before me, in these circumstances, to allow me to impose a sentence below the applicable range established within the jurisprudence as being appropriate. I say this being mindful that, as the Yukon Court of Appeal recently stated in ***R.*** v. ***Charlie***, 2015 YKCA 3, a range is simply that, a range and unless the legislation mandates a minimum sentence, then

sentences below the general range can be imposed, when the circumstances of the offence and the offender warrant it. I do not find that to be the case here.

[64] Taking into account all the aggravating and mitigating circumstances, including his three years on relatively strict bail conditions, and assigning credit for 23 days in pre-trial custody, I sentence Mr. Ngeruka to serve a further sentence of 30 months.

[65] In addition, at the conclusion of the sentencing hearing, Mr. Ngeruka entered a guilty plea to having breached the abstain condition of his Recognizance. The breach occurred on June 8, 2012, the day after he had been released on the Recognizance. A friend attended at the RCMP to turn in Mr. Ngeruka's passport as he was required to do by the terms of the Recognizance. The friend advised that Mr. Ngeruka was ill. The RCMP officer conducted a curfew check later that day and found Mr. Ngeruka slumped over his table, under the influence of alcohol. Crown counsel submits that the appropriate sentence is 30 – 45 days custody consecutive to the sentence for the s. 273(1) offence.

[66] Considering the timing and circumstances of the breach, Mr. Ngeruka's compliance with the terms of his Recognizance since the breach occurred, and the principle of totality, the sentence will be 15 days concurrent.

[67] I am prepared to take the unusual step of strongly recommending to the federal and territorial authorities that Mr. Ngeruka be allowed to serve his sentence at the Whitehorse Correctional Center rather than being transferred to a Federal Institution, and that this recommendation be endorsed on the warrant of committal. There is appellate authority for me to make such a recommendation (***R.*** v. ***F.D.M.***, [1995] A.J.

No. 1120 (C.A.) and ***R.*** v. ***Peepetch***, [1995] M.J. No. 508 (C.A.)). Mr. Ngeruka has indicated through his counsel that it his wish that this recommendation be made.

[68] It is my understanding that there are in place regulations which can provide for the transfer of prisoners between Federal penitentiaries and Territorial correctional institutions and vice versa.

[69] I make this recommendation for several reasons:

- Mr. Ngeruka's current involvement in counselling would be best maintained by serving his sentence in the Yukon. He has made significant steps since the commission of these offences and remaining within the Yukon would allow for his continued rehabilitation in an already established and somewhat progressively successful regime. This would, in fact, accord with the public interests as they pertain to sentencing of offenders and not be contrary to this interest;

- His medical issues, both physical and psychological, are significant and remaining in the Yukon would facilitate the progress he is in the early stages of making towards his rehabilitation and health;

- He would be able to be a better support for his daughter N., who has some developmental limitations and who, it appears, is in some respects dependent upon Mr. Ngeruka. While the extent to which she is dependent upon him has not been clearly established, I nonetheless have a concern in this regard. There are ripple effects in this case, given the sentence that I find I am required to impose, and while ripple effects are not uncommon when offenders are sentenced, to the extent possible I would like to diminish the negative impact upon those, such as N., who have done nothing wrong.

[70] This is a primary designated offence under s. 487.04 and, as such, I order that Mr. Ngeruka provide a sample of his DNA.

[71] There will be the mandatory prohibition order under s. 109. This will be for a period of 10 years.

[72] As this is a designated offence there will be an order pursuant to s. 490.012 that Mr. Ngeruka comply with the *Sex Offender Registration Act* 2007, c. 5 s. 12. Pursuant to s. 490.013 this order shall be for a period of 20 years.

[73] With respect to the s. 273(1) offence there will be a $100.00 Victim Fine Surcharge. I order this to be payable forthwith. I note Mr. Ngeruka to be in default and order that a warrant of committal be issued and that he serve his default time concurrent to the time to be served on the s. 273(1) offence.

[74] The Victim Fine Surcharge is waived on the s. 145(3) offence.

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COZENS T.C.J.