Citation: *R.* v. *Surge*, 2010 YKTC 123

Date: 20101101
Docket: 09-00931
09-00931A
Registry: Whitehorse

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

REGINA

v.

SHAWN ROBERT RICHARD SURGE

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Shawn Surge has entered guilty pleas to the following offences under the *Criminal Code*:

> That he did break and enter a dwelling house and commit therein the indictable offence of assault with a weapon, contrary to s. 348(1)(b);
>
> That he did without lawful authority confine Sarah Hutchinson, contrary to s. 279(2);
>
> That he did have in his possession a weapon, an axe, for the purpose of committing an offence, contrary to s. 88;
>
> That he did escape from lawful custody at Whitehorse Correctional Centre, contrary to s. 145(1)(a).

[2] An Agreed Statement of Facts was filed at the sentencing hearing. Due to an issue that has arisen within the hearing, I will repeat the facts in their entirety:

> THE EVENTS OF 16 MARCH, 2010
>
> 1. The Accused and the Complainant were involved in an intimate relationship that ended in January, 2010.
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> 2. The Accused and the Complainant had an encounter two days prior to the events of 16 March, 2010, which resulted in an exchange of words between the Parties.
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> 3. At approximately 4:00 am on the day preceding the events of 16 March, 2010, the Accused had attended at the residence of the Complainant purporting to hang himself from a nearby tree, and was removed from the premises by the police. The Accused attended again at 6:00 p.m. that same day, and was asked to leave by the landlord. The Accused later came knocking on the door, and had left when the police attended at the request of the Complainant.
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> 4. On 16 March, 2010, at 2:10 a.m., the RCMP responded to a complaint at 69-96 Lewes Boulevard, Whitehorse, the home of the Complainant.
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> 5. At 2:13 a.m. the police arrived on the scene and were advised that the Accused had tied a rope from the doorknob of the apartment to a vehicle in front of the apartment, such that the apartment door could not open.
>
> 6. The Accused then went around to the back door of the apartment and entered.
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> 7. A neighbour observed all of this. He went out and cut the rope so that the front door could be opened and called to the Complainant that she could now exit through the front door, if she were able.
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> 8. The neighbour had then called the police.
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> 9. Shortly after the police arrived on the scene, the Accused presented himself at an upstairs window and began talking to the police.

10. At 2:15 a.m. the Accused indicated that he had two firearms in the residence. He subsequently advised the police that he did not, in fact, have any firearms.

11. The Complainant, who had telephone contact with the police, advised the police that the Accused was trying to gain access to the bedroom in which she and her three children had locked themselves.

12. The Accused continued to speak to the police and stated that he was not going to hurt anyone, but needed to speak to the Complainant as well as a negotiator.

13. Throughout the time that the police were outside the house they could hear yelling and screaming going on inside the house.

14. At one point the Complainant told the police that the Accused had briefly gained entry into the room where she and her children were, but had been pushed back outside the room.

15. Two police officers entered the apartment through the back door which was unlocked, but had a china cabinet pushed up against it.

16. The police had their service pistols drawn when they entered the apartment.

17. When the police confronted the Accused, he had an axe in his hand. The police told him to put the axe down. The Accused complied and the officers holstered their pistols. At some time shortly before 2:27 a.m., the police handcuffed and detained the Accused.

18. There was slight damage to the back door of the apartment.

19. The Complainant gave a statement in which she told the police that the Accused was holding the axe in a threatening manner, but told her that he was not going to hurt her or the children, but that he simply wanted to talk.

20. The Complainant and her children were not physically injured during the course of this event.

21. As the Accused was arrested he advised the police that he simply wanted to get his bicycle back from the Complainant.

22. The Accused has been in custody since the date of the offence, 16 March, 2010.

23. On June 16, 2010, the Accused was taken from WCC to the hospital for medical treatment.

24. While the Accused was being taken out of the prisoner van, he fled, while handcuffed. He ran past the Thompson Centre, down the hill, over a fence and towards the river.

25. The Accused was apprehended as he was crossing the Long Lake Road.

[3] Crown counsel suggests that a sentence of four to six years globally be imposed, less credit for time spent in pre-trial custody since March 16, 2010, at one to one credit. Counsel points to certain factors as aggravating. Firstly, these offences occurred within the context of a spousal relationship. Secondly, Mr. Surge has a prior history of spousal violence. His criminal record includes a prior spousal assault in 1998 for which he received a 90-day custodial sentence, a spousal assault in 2001 for which he received an 80-day custodial sentence in addition to 29 days time served, and a break and enter and utter threats in 2001 for which he received a two-year custodial sentence consecutive to two months for criminal harassment and two months for possession of a weapon. The latter offences occurred within the context of a spousal relationship as well. The facts of the previous break and enter, as I understand it, are that Mr. Surge broke into his girlfriend's parent's house at a time it was unoccupied in an attempt to obtain firearms, which he intended to use to try and persuade her not to have an abortion. A 14-hour armed stand-off with the Calgary police ensued.

[4] Mr. Surge was convicted in 2007 of uttering threats and mischief involving the complainant in the present case for which he received a three-month custodial sentence. Mr. Surge's criminal record also includes convictions for uttering threats in 1994 and 1996, being unlawfully at large in 1996, and assault in 1996. As stated before, Crown counsel points to his prior history as an aggravating factor.

[5] Counsel further submits that s. 348.1 applies and characterizes these offences as involving what is often called a home invasion, and I recognize that this is a term that has no specific definition, but is simply one way in which, according to Crown counsel, events such as this can be characterized. The relevant portions of s. 348.1 read as follows:

> If a person is convicted of an offence under...subsection 279(2) or section...348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,
>
> (a) knew that or was reckless as to whether the dwelling-house was occupied, and
> (b) used violence or threats of violence to a person or property...

Crown counsel submits that the facts of this case fall squarely within the requirements of s. 348.1.

[6] Defence counsel submits that the appropriate sentencing range should be one to two years. He states that Mr. Surge is remorseful for his actions and is taking responsibility for them. Counsel further submits that this was not a home invasion within the context of s. 348.1 as Mr. Surge did not either use violence or threaten to use

violence against any person or property. When the facts are viewed in context and sum, counsel submits that the circumstances of these offences are not significantly aggravated, and that the circumstances of Mr. Surge are more favourable than that attributed to him by Crown counsel and by the author of the Pre-Sentence Report.

The application of s. 348.1

[7] Mr. Surge clearly broke into and entered the residence of Ms. Hutchinson knowing that it was occupied. The question is whether he used or threatened to use violence. Mr. Surge has admitted to committing an assault within the complainant's home, however, he claims that the assault was not an act of violence or a threat to use violence. Counsel for Mr. Surge asserts that the assault in this case was more than that contemplated by s. 265(1)(c), which defines an assault as also including circumstances where an individual "while openly wearing or carrying a weapon or imitation thereof accosts or impedes another person." Defence counsel submits that there was no violence in Mr. Surge's actions that would put him within the ambit of s. 348.1. In particular, counsel notes the complainant's statement to the police in which she said that Mr. Surge told her he was not going to hurt her or the children, but that he only wanted to talk. While Mr. Surge admits to impeding the complainant and her children, counsel submits that his actions were never violent or accompanied by any threat of violence and, in fact, Mr. Surge specifically made comments to the contrary.

[8] Section 265(1)(c) has been considered in *R.* v. *Whitehorn* [2004] N.J. No. 304. In that case, Gorman J. stated as follows:

> Begging, accosting or impeding when a weapon is being openly carried can constitute a threat of force in and by itself. Therefore I conclude that the purpose of s. 265(1)(c) of the Code is to prevent all impeding, accosting or begging when the person doing so is openly in possession of a weapon or imitation thereof. Such activity, when a weapon or an imitation of one is openly worn or carried is inherently intimidating. (para. 65)

I agree with these comments of Gorman J. Assuming for the moment that I were to accept Mr. Surge's position that he was only impeding the complainant and her children, thus committing a s. 265(1)(c) assault, did his actions constitute either an act or a threat of violence? Violence is not defined specifically in the *Code.*

[9] After a review of case law, I find that the determination of whether an act is violent has to be construed from a consideration of the context in which the act occurred. In *R.* v. *Lebar*, 2010 ONCA 220 at para. 33, the court considered whether the respondent's commission of a robbery involved the use of violence. Section 343(d) reads as follows:

> Everyone commits robbery who
>
> (d) steals from any person while armed with an offensive weapon or imitation thereof.

The court found that this does not necessarily require that violence be an essential element of the offence. Whether the robbery involved the use of violence is dependent on the circumstances in which the robbery was committed. At paragraph 38, the court explicitly found that concepts in the *Code*, such as violence, should be determined contextually. Context sometimes requires a consideration of the scheme of the *Code*, its object and the intention of Parliament. In considering the context, the facts of the

offence admitted to by the offender, or as found by the trial judge, are of particular importance. It is not inconceivable that there may be a factual situation where an offender's actions, while constituting an assault as per s. 265(1)(c), are nonetheless not violent within the application of s. 348.1.

[10] The Agreed Statement of Facts filed in this case is somewhat problematic. An Agreed Statement of Facts for sentencing purposes should clearly set out the acts to which the offender is admitting. In this case, the failure to do so has created ambiguity. The critical paragraph is number 19 which reads:

> The Complainant gave a statement in which she told the police that the Accused was holding the axe in a threatening manner, but told her that he was not going to hurt her or the children, but that he simply wanted to talk.

When plainly read, all that Mr. Surge has admitted to in signing the Agreed Statement of Facts is that this is what the complainant told the police. There is no admission that he actually did what she told the police he did. Within the context of a sentencing hearing, a judge is concerned with what happened, not with what someone says happened.

[11] Paragraphs 11 and 14 are similarly ambiguous. When pressed on this point, counsel for Mr. Surge acknowledged that his client was not disputing that the complainant felt threatened, but he denied that his client ever actually threatened her or the children with violence, emphasizing what the complainant said Mr. Surge told her about not intending to hurt her or the children.

[12] Both counsel made further submissions and Crown counsel sought to call evidence from the complainant to elaborate upon the events of that day. I refused

Crown counsel's application as the evidence was not necessary for me to find that s. 348.1 applies in this case.

[13] There can be no doubt that everything Mr. Surge did that night was intended to create an intimidating atmosphere where he was in control. The fact that he may have said he would not hurt the complainant or her children needs to be put into context. This was an approximate 2:15 a.m. entry into the complainant's residence. Mr. Surge tied the front door closed to prevent her from leaving. There was a china cabinet pushed up against the back door which, although not specifically admitted to by Mr. Surge in the Agreed Statement of Facts as having been done by him, can be inferred as such, based upon the RCMP noting it placed there when they entered the residence. It is unlikely that anyone other than Mr. Surge placed it there. There was damage to the back door which, again, is not attributed to anyone in the Agreed Statement of Facts, although in the Pre-Sentence Report Mr. Surge indicates he kicked in the back door. Mr. Surge was carrying an axe through much of the events inside the residence. There was yelling.

[14] I can only imagine the atmosphere of terror that the children, ages approximately ten, eight, and six, would have been in, as well as the complainant. The entire atmosphere was imbued with the threat of violence and this atmosphere was entirely created by the actions of Mr. Surge.

[15] Even if I consider the facts in the best possible light for Mr. Surge and resolve the ambiguities in his favour, this nonetheless remains a home invasion within the application of s. 348.1. I find that the circumstances of these offences as committed by

Mr. Surge are serious and quite aggravated. I will further say that I am not satisfied that there was no intent on the part of Mr. Surge at the time to commit harm to the complainant, although I clearly also cannot find in these facts that he intended to do so.

[16] On a further note, even were I to accept that Mr. Surge's intent was to commit suicide or to attempt to do so inside the complainant's residence, as stated in the Pre-Sentence Report and to some extent in the submissions of counsel, this itself may constitute a threat of violence to a person within the meaning of s. 348.1. Even though the actual immediate physical harm of the violent act being threatened was to be borne by Mr. Surge, he may fall within the definition of a person. Also, there can be no doubt that the complainant and the children would be victims as well of such a violent act or threat and the psychological impact may also cause them to be victims of such violence.

[17] Finally, the kicking in of the back door causing damage falls within the purview of s. 348.1 as being violence to property although, certainly, at the lowest end of the spectrum.

[18] The application of s. 348.1 does not invoke a sentencing regime with a minimum sentence. Like all aggravating factors, whether statutory or otherwise, the extent to which the factor impacts upon the ultimate sentence to be imposed must be considered with all the other aggravating and mitigating factors.

Circumstances of Mr. Surge

[19] A Pre-Sentence Report was prepared and filed. In association with the Pre-Sentence Report, a psychological report was also prepared and provided to the Court.

The psychological report dated July 7, 2010, is in addition to an earlier report prepared by the same psychologist dated September 9, 2008, when Mr. Surge was under probation conditions.

[20] Mr. Surge was 38 at the time of these offences. He appears to come from a somewhat mildly dysfunctional background and reports having experienced some non-familial sexual molestation as a child. He suffers from arthritis and Crohn's disease and has a permanent disability in his right arm as a result of an accident for which he continues to be somewhat angry and resentful towards his mother. He is on medications for his illnesses as well as anti-depressant medication. When he is employed, it is as a floor installer.

[21] Mr. Surge reports a lifetime of drinking with associated problems which began shortly after his arm was severed and reattached in 1986. He states that his longest period of sobriety has been three months. The Problems Related to Drinking Scale indicates that he has a severe level of problems related to alcohol use. The LS/CMI risk/needs instrument assessed Mr. Surge as being a very high risk to reoffend.

[22] When describing the current charges as well as the circumstances of past offences and actions, it appears from the reports that he minimizes his own culpability and extends responsibility to the actions of others as well. In regard to the present case, he states that his real concern and reason for entering the residence of the complainant was to regain possession of his specially designed bike, which the complainant was refusing to return to him.

[23] Mr. Surge reports a number of suicide attempts he has made in the year before the July 7, 2010 Pre-Sentence Report as well as his suffering from significant mental health issues. Mr. Surge takes issue with the July 2010 psychological report where it states in the summary and recommendations section that:

> He does not appear to have a major mental illness such as serious mood disorder or psychosis.

Counsel for Mr. Surge submits that the psychological report fails to adequately diagnose his mental health problems, claiming them to be more significant than considered to be by the psychologist. I note at page 2 of the July 7 report that Mr. Kropp, the psychologist, quotes from the earlier assessment as follows:

> It does appear that Mr. Surge has significant antisocial features including chronic and diverse antisocial behaviour, behavioural instability, impulsivity, unreliability, and a history of violating supervision conditions. Moreover, he appeared to harbour considerable anger toward women, and made statements that minimized his responsibility for his violent behaviour. He also appears to have a manipulative, explosive style of dealing with conflicts in his relationships. Overall, he represents a high risk for further violence in relationships, especially when confronted with real or imagined separation.

[24] Mr. Kropp indicates in the July 7, 2010 report in his summary and recommendations that overall his impressions of Mr. Surge had not changed in the two years since the earlier report. He maintains his opinion that:

> ...Mr. Surge continues to pose a significant risk for violence toward the victim due to his long history of domestic violence, his obsession with the victim, his suicidality, his disregard for previous release conditions (including an escape attempt) and his general antisocial nature. It is also possible that any new intimate partner of the victim is at risk.

Appropriate sentence

[25] The principles of sentencing are set out in s. 718 to 718.2 as follows:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to The community; and
> (f) to promote a sense of responsibility in offenders, and Acknowledgement of the harm done to victims and to the community.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
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> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law
> partner,
> (ii.1) evidence that the offender, in committing the offence,
> abused a person under the age of eighteen years,
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed

> on similar offenders for similar offences committed in similar circumstances;
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[26] Just for clarity, I did not include every portion of those sections of the *Code*. I did include 2.1 because, as I read the Information, the indictable offence of assault with a weapon is not specifying any one individual present in the home, and my understanding from the facts are that all of the individuals present in the home were the victims of that assault. I know that Count 2 does specify only Sarah Hutchinson and not the children, and I can further indicate that this does not impact in any way the sentence that I am imposing, but it is a consideration, that even though there could be an argument made that it is implicit that sub-section 1 only refers to Sarah Hutchinson, as the confinement would appear to be the same as the assault with a weapon, they are all present for both. I, nonetheless, considered it a factor that the children were present and were subjected to the same actions of Mr. Surge in this case.

[27] I consider that the circumstances of these offences and of Mr. Surge as set out in the Pre-Sentence Report, psychological reports, and his criminal record require me to impose a sentence which emphasizes the principles of denunciation and deterrence. This is a case which requires that Mr. Surge be separated from society and from the complainant and her children.

[28] This case is aggravated by the existence of the prior spousal relationship and by Mr. Surge's prior criminal history of domestic violence, including violence against the complainant, Ms. Hutchinson, in this case. Prior custodial dispositions have not deterred Mr. Surge from committing further acts of domestic violence. There is at least some degree of premeditation involved, although not a significant amount. The presence of the children is a further aggravating factor. The circumstances of the break and enter invoke the statutorily aggravating factor of s. 348.1. I have concerns about the extent to which Mr. Surge has insight into and accepts responsibility for his actions, as well as concerns about his ability or willingness to alter his behaviours in future, given, in part, the lack of lasting impact that prior treatment and programming that he has been the recipient of appears to have had. I consider Mr. Surge to constitute a high risk for reoffending in a serious way in future in the context of an intimate relationship.

[29] In mitigation, I recognize his guilty pleas have saved the complainant and perhaps even any of her children from having to testify. Notwithstanding my concerns about Mr. Surge fully accepting responsibility for his actions, I accept that he has remorse for his actions in committing these offences against the complainant and her children.

[30] At this point in time, I will address the victim impact statement. At the time that sentencing submissions were made, there was no victim impact statement before the Court and when asked, Ms. Hutchinson indicated that she did not wish to speak to the Court. This matter was adjourned subsequently, primarily to deal with the s. 348.1 issue, and the availability of counsel and myself, and in the interim, Ms. Hutchinson filed a victim impact statement. This was provided to counsel prior to today's date. At the

outset of proceedings today, counsel for Mr. Surge objected to the victim impact statement being before the Court on the basis that it did not comply with the requirements of s. 722.1 in that it was not provided to the Clerk of the Court as soon after the finding of guilt as it should have been. I ruled that the victim impact statement was admissible and read it after providing opportunity for counsel to make submissions. There is no question from a review of the victim impact statement that these events have had a significant impact on the complainant and on her children, one that appears to be ongoing and may well have impact for some period of time. Certainly, the Court is aware, and now specifically aware, in relation to this offence, of why such actions in a domestic relationship can be as harmful as they often are.

[31] The sentence to be imposed today is not altered by the victim impact statement, and I am making that very clear, but certainly it is an opportunity for individuals to say to the Court and to the offender what their actions have caused them to suffer, and I accept that there have been significant consequences and I believe it is important for offenders to know the consequences of their actions for the people that they offend against.

[32] I have considered the cases filed by counsel. Each case varies in the circumstances of the offences and the offenders, and none can be said to be on all fours with the present case. Some of the cases had little relevance at all to the present case. In *R.* v. *Busch*, 2009 ABCA 160, the court held that the appropriate range of sentence for domestic assaults involving weapons, injuries, prolonged confinement and the presence of children was four to seven years. *Busch* involved guilty pleas to aggravated assault, unlawful confinement and assault with a weapon by a husband

against his wife within their residence and in the presence of their two young children. Mr. Busch had previously assaulted his wife. The sentence imposed upon appeal was five years. The factual circumstances of the offence were worse in the *Busch* case than in the present case. Certainly, the circumstances of the *Busch* case are such that had that case occurred in the Yukon, the sentence imposed could well have been the same.

[33] It is difficult to establish a general range of sentence for types of offences and the circumstances of their commission that will apply without exception. Every case has its own unique circumstances and while general ranges are helpful, the sentence of each case must take into account the particular circumstances of the offence and the offender in order for the sentence to be just and in accordance with the principles of sentencing.

[34] I find that the appropriate sentence in the present case is as follows: For the s. 348.1(b) offence, there will be 44 months custody. For the s. 279(2), there will be a concurrent sentence of 44 months custody. For the s. 88 offence, there will be a concurrent sentence of 12 months custody. For the s. 145(1)(a) there will be a consecutive sentence of two months. Mr. Surge will receive credit of seven and one half months for his time in remand since March 16, 2010. His credit is to be applied against the sentences imposed for the s. 348.1(b) and s. 279(2) offences. Mr. Surge will, therefore, have a further 38 and one half months in custody to be served.

[35] There will be an order under s. 109 prohibiting Mr. Surge from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for life.

[36] THE ACCUSED: I already have one, Your Honour.

[37] THE COURT: Well, it is mandatory, I believe, in this case, so there will be another one.

[38] MR. GOUAILLIER: Yes, it is.

[39] THE COURT: The victim fine surcharge is going to be waived in this case.

[40] There will be a non-communication order while in custody and that will be with the complainant and her children. Does counsel have the section for the non-communication order?

[41] MR. MARCOUX: Yes, I was looking at it. It's seven, seven something, 730. 743.21, Your Honour.

[42] THE COURT: Pardon?

[43] MR. MARCOUX: Section 743.21

[44] THE COURT: So the non-communication order, then, is under s. 743.21 prohibiting Mr. Surge from communicating directly or indirectly with Ms. Hutchinson and her children, Tyler, and is it Hutchinson?

[45] THE CLERK: Tyler Hutchinson, Alyssa Gehmair, Christopher Gehmair.

[46] THE COURT: And the second name is Alyssa --

[47] THE CLERK: Gehmair.

[48] THE COURT: How do I spell Gehmair?

[49] THE CLERK: G-e-h-m-a-i-r.

[50] THE COURT: Gehmair, and?

[51] THE CLERK: Christopher.

[52] THE COURT: Christopher?

[53] THE CLERK: Gehmair.

[54] THE COURT: Gehmair. As a final comment prior to this sentence being imposed, Mr. Surge made submissions that he considered that the principles in *R.* v. *Askov*, [1990] 2 S.C.R. 1199, applied in this case and that he wished to bring an application to have, basically, these charges stayed as a result of delay. He filed before the Court some documentation, which at that time I had not indicated should be marked as an exhibit, which I am going to say now should be filed as Exhibit -- do we have any exhibits on sentencing yet?

[55] THE CLERK: It will be Exhibit 3.

[56] THE COURT: It will be Exhibit 3 on sentencing, so we will get those materials back just so they are before the Court.

[57] MR. MARCOUX: Okay.

[58] THE COURT: I denied Mr. Surge's application, but advised him that should he wish to appeal the sentence this is an issue that he could bring up in the context of that appeal.

[59] The remaining counts?

[60] MR. GOUALLIER: There will be a stay of proceedings, Your Honour.

[61] THE COURT: All right.

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COZENS T.C.J.