

SUPREME COURT OF YUKON

Citation: *R. v. Frisch*, 2012 YKSC 41

Date: 20120517
Docket S.C. No.: 11-01500
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

KEVIN PETER FRISCH

Before: Mr. Justice R. Foisy

Appearances:
Keith Parkkari
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING DELIVERED FROM THE BENCH

[1] FOISY J. (Oral): The accused, after a trial, was found guilty of aggravated assault by maiming contrary to s. 268 of the *Criminal Code*. I do not purport to go over the evidence extensively here as I have done that in my oral judgment, which I rendered after the trial.

[2] Both the Crown and defence have submitted books of authorities and there is always argument and difficulty in trying to find authorities which are exactly on point; it is quite impossible to do so. However, I do note in the authorities that the Crown submitted that either the accused in those cases had a criminal record and/or in most of these cases the beatings were somewhat more severe than what we find here. By saying that

I am not saying that the beating suffered by the victim was not severe. It was. But there were no broken bones, there were cracked ribs, there were numerous bruises and contusions, swelling, and he was knocked unconscious; he was unconscious for some five to six hours. It does not appear that the injuries were of a lasting nature, although the victim, who was a cab driver at the time, has not returned to that type of work but has been able to find work as a truck driver.

[3] The case law that was submitted seems to indicate that in this jurisdiction beatings of this sort will attract a sentence of 16 months and upwards. The defence has submitted cases to the Court which indicate some possibility of having sentences which are less than that. One, I think, goes as little as a suspended sentence with probation. In this case, I must say that a suspended sentence is not proper, that jail time is required. The question is how much time and under which circumstances.

[4] The accused is a first offender and in his early 30s. He comes from a difficult background in the sense that his father abandoned the family, leaving the accused and four siblings and the mother to look after the children. It was difficult, to say the least, and at the age of 17, this accused decided, in order to assist in relieving his mother, and also in trying to develop some kind of a life for himself, left, and has been quite successful over the years in obtaining training. He has become a cook or a chef, and still plies that profession today. There is a Pre-Sentence Report that has been filed which is extremely positive in this case, and numerous letters from former employers, ex co-employees and others who have known this accused well, and these letters are very positive. One letter indicates that he has had a long-standing relationship with a young lady who certainly supports him.

[5] The Crown has quite fairly and properly conceded that were my discretion not had been taken away by amendments to the *Criminal Code* this accused would be a good candidate for a conditional sentence, which means a sentence that can be served in the community, usually under very stringent conditions.

[6] I sympathize and somewhat agree with the position taken by defence here that there has to be another way of dealing with cases such as this one, which, in my view, do not require a lengthy sentence such as 16 months or thereabouts. The cases submitted by the defence, which have dealt with these matters, the latest one being out of the Supreme Court of this Territory, where a three-month sentence was imposed, leaves, I suppose, some hope that because conditional sentences have been taken away, there is room to try some other alternate route to deal with accused such as this accused.

[7] All in all, I have come to the conclusion that a proper sentence here in this case, for this accused, is a 90-day sentence to be served intermittently on Fridays to Mondays, starting tomorrow. Crown and defence can probably help me here in terms of the times, because each jurisdiction has its own times when they like accused to turn themselves in, and when they can be released.

[8] MR. ROOTHMAN: May I just have a moment, Your Honour? Your Honour, since my client goes to the mine for some periods and then out again, what

would have been home for some periods, as compared to the normal weekend thing, would that not then be a way to deal with the intermittent sentence?

[9] THE COURT: I am sorry, run that by me again.

[10] MR. ROTHMAN: I mean the normal intermittent sentence here is going up to WCC over weekends, and serve it that way, but he works in Saskatchewan for, what's it, two or three weeks at a time or how long?

[DISCUSSION BETWEEN MR. ROTHMAN AND THE ACCUSED]

[11] MR. ROTHMAN: Okay. So that's how his schedule work, so he's three weeks at the mine and then he comes back what would have been down in B.C., home, where he can come back to the Yukon then, and do five days and finish it off that way.

[12] MR. PARKKARI: That would be fine. Normally, it's surrendering yourself by six o'clock. So I'm not sure what his flight schedule is and when he would get in, but if he were to surrender himself by 6:00 he gets credit for that day and release as early as six o'clock, more often, seven o'clock on the day of release, and he gets credit for that day as well. And I have no issue with -- he'd of course have to deal with his own transportation back and forth, but no issue with that if he's back and can serve a week at a time, that's fine.

[13] THE COURT: I should be specific in terms of days. I simply cannot say three weeks without specifying, and one week. I would need some specific times.

(PROCEEDINGS ADJOURNED FOR DISCUSSION)

(PROCEEDINGS RECONVENED)

[14] MR. ROTHMAN: Your Honour, I've discussed the matter with my client and with much appreciation for the intermittent sentence, he decided to rather do his 90 days straight, because the intermittent sentence would, if he was from locally, it would not have been a problem, but with his circumstances, it would just, accepting it, the practical cost of it, travelling all the time and the fact that he would not see his partner for a very, very long time, which may create further problems. In the light, thereof, he's asking for the Court to just make the 90 days straight.

[15] THE COURT: I have no problem with that.

[16] MR. PARKKARI: That's fine.

[17] THE COURT: Actually, he has that option under the *Code*. Even if I impose an intermittent sentence, he can opt to serve the days consecutively, so. All right, so I will impose a three-month sentence, and following which, there will be a period of probation of 18 months, and I am going here to the PSR, at page 7, conditions 1 and 2 are mandatory, and 3, as well, so they will go in:

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 notify the Probation Officer of any change of employment or occupation;
4. After his release, he will report to a Probation Officer here in Whitehorse within seven days of his release, and thereafter when and in the manner

- directed by the Probation Officer;
5. Have no contact directly or indirectly with the victim, Robert Bada, except with the prior written permission of the Probation Officer, in consultation with Victim Services and Offender Services;
 6. Abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances, except in accordance with a prescription given to him by a qualified medical practitioner;
 7. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

Here, just for purposes of clarification, if he is working in a kitchen in a restaurant that serves alcohol, that of course is not included in this prohibition. I do not think the curfew is going to be required.

8. Take assessment, counselling and programming as directed by his Probation Officer, particularly with respect to Anger Management;
9. Make reasonable efforts to find and maintain suitable employment, and provide the Probation Officer with all necessary details concerning his efforts;

I do not see that as being a big problem.

10. Provide the Probation Officer with consents to release information with respect to your participation in any programming, counselling, employment or educational activities that he has been directed to do pursuant to this order.

[18] Any other conditions, counsel?

[19] MR. PARKKARI: No.

[20] THE COURT: No. All right. That will be it. So unless there is anything else, we can adjourn.

[21] MR. ROOTHMAN: Nothing from me, Your Honour.

[22] THE CLERK: Victim fine surcharge?

[DISCUSSION]

[23] THE COURT: He will not be working for a while, so he will not have any income, I will waive it.

FOISY J.