

Citation: *R. v. Johnson*, 2011 YKTC 70

Date: 20111031
Docket: 10-00574
Registry: Whitehorse

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

REGINA

v.

JASON DENNIS JOHNSON

Appearances:
Joanna Phillips
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] GOWER T.C.J. (Oral): Jason Johnson has entered a plea of guilty to the charge of assault causing bodily harm upon one Justin Fromme on September 24, 2010. Mr. Johnson was originally charged with aggravated assault under s. 268 of the *Criminal Code*, but the Crown consented to a guilty plea to the lesser included offence under s. 267. The Crown has also elected to proceed summarily on this matter, and I am sitting in my capacity as Territorial Court Judge for this sentencing.

[2] The circumstances of the offence are that Mr. Johnson and Mr. Fromme were in the Foxy's Cabaret in Whitehorse on the evening of the offence. Mr. Fromme had recently broken up with a girlfriend, who was known to Mr. Johnson. The two were

drinking, I gather, and there was some form of misunderstanding about what happened in the breakup between Mr. Fromme and his girlfriend. There were some loud verbal exchanges between the two and eventually they were both escorted out of the cabaret. Mr. Fromme was taken to the back door and Mr. Johnson was taken to the front. One of the comments made by one of the bouncers of the behaviour of the two gentlemen inside the tavern was to describe them as having “a puffing out of chests.”

[3] Moments later, Mr. Fromme appeared at the front of Foxy's Cabaret and the two got into a fight. Mr. Johnson says that it was Mr. Fromme who was the initial aggressor by starting to punch. In any event, blows were exchanged. The two bouncers came out of the cabaret and witnessed a portion of the fight after it had started. At one point, they were rolling around on the ground. At another point, Mr. Fromme said twice that he was “done,” and held his hands up. However, Mr. Johnson continued to kick him. Some bystanders intervened and, as Mr. Fromme started to get up, Mr. Johnson kicked him again in the head, knocking him unconscious. He attempted to kick Mr. Fromme one more time, but was restrained by the bystanders.

[4] Mr. Johnson himself was injured in the fight with a cut to the top part of his forehead, which did require some sutures. Mr. Fromme similarly had a cut to the side of his scalp which required six sutures to close, and he also reported some difficulty with his breathing. When questioned at the hospital, Mr. Fromme had very little or no memory of the incident. The Crown says that there is no information as to any lasting injuries on the part of Mr. Fromme.

[5] The circumstances of the offender are that he is 27 years old and is a member of

the Kluane First Nation. I am informed that he has been in a long-term and stable common law relationship for approximately five years. He has no dependents. He was employed with the Sun Dog Carving Retreat in Whitehorse for about three years in a teaching capacity, and was employed in that capacity at the time of this offence. He since took brief employment as a driller's assistant in the spring and early summer of 2011. Subsequent to that, he was unemployed for about one month, but then gained employment as an apprentice carpenter for Ketza Construction. He was employed by Ketza from September 1 of this year until about ten days ago, but I am informed by his counsel this morning that he has work to return to for Ketza in Haines Junction starting tomorrow.

[6] His counsel also informs me that as a youth Mr. Johnson volunteered for the Blue Feather Youth Centre in Whitehorse and has done some community service work at that institution.

[7] Mr. Johnson has a criminal record. In 2003, Mr. Johnson was convicted of a driving over 80, unauthorized use of a credit card, and failing to attend court, as well as possession of counterfeit money and failing to comply with a recognizance. There appears to be no criminal activity until 2008, when he was convicted of an offence under s. 5(2) of the *Controlled Drugs and Substances Act*. He has no prior record for violence.

[8] Mr. Johnson was released on an undertaking following his arrest for the offence on September 24, 2010, with a number of conditions, including abstaining from alcohol and drugs, not to attend any bar, tavern, or off-sales, or other commercial premises

where the primary purpose is the sale of alcohol, and not to have any contact with Mr. Fromme.

[9] Defence counsel informs me that he has spoken with Mr. Johnson's bail supervisor who described Mr. Johnson as a model client and indicated that there have been no breaches on that undertaking. Defence counsel also informs me that following the 2008 drug conviction, which resulted in a four-month conditional sentence, there were no subsequent breaches.

[10] Turning to the case law provided by the Crown, *R. v. Derkson*, [2009] Y.J. No. 128 (S.C.) is distinguishable for a number of reasons. Firstly, that was a matter involving a charge of aggravated assault under s. 268 of the *Criminal Code*. It involved a victim who was a stranger to the offender with more serious injuries including a fractured jaw and a skull fracture. The victim in that case had to receive his nourishment through a straw for a period of eight weeks. There was a conviction following a trial, and the offender had a prior assault on his criminal record.

[11] The *R. v. Malcolm*, 2008 YKTC 45 (CanLII) decision is also distinguishable in that it was also an unprovoked and gratuitous attack. The offender there apparently had two prior assaults, or at least more than a single assault on his criminal record, as well as a robbery conviction. There was some issue with the offender having been detained, then released, and then being found to be absent without leave from the Yukon Adult Residential Centre where he was supposed to be residing.

[12] The decision of *R. v. Germaine and Moses*, 2007 YKTC 90 (CanLII) was tendered by the Crown primarily with respect to the sentence imposed on Mr.

Germaine, which was 15 months imprisonment in addition to time served. However, that matter similarly involved a gratuitous and unprovoked attack which was commenced by Mr. Moses, but willingly joined into by Mr. Germaine. Mr. Germaine also had a criminal record which was described as “only slightly less breathtaking” than that of Mr. Moses, who was described by the sentencing judge in that case as having an absolutely horrendous criminal record. The victim in that case also received numerous cuts and bruises.

[13] The *R. v. Glover*, 2003 YKTC 61 (CanLII) decision is distinguishable because it involved an unprovoked attack involving the use of a knife to cut the victim’s throat, which was described by the sentencing judge as an unprovoked, gratuitous and deadly act.

[14] The aggravating circumstances in the case at bar are that Mr. Johnson administered one kick too many to the victim, and would have kicked him yet again but for the fact that he was restrained by a bystander.

[15] The mitigating circumstances are that it appears the victim was the aggressor, as Mr. Johnson maintains, because of the fact that he quickly came around to the front of the cabaret after being escorted out the back, in what would seem to be a provocative circumstance, all things being considered. It is also mitigating that Mr. Johnson has no prior record for violence and that he performed as well as he has done on his undertaking, as well as having no prior difficulties with the conditional sentence which was imposed in 2008. It is mitigating that Mr. Johnson has been steadily employed for approximately the last four years, and has been in a stable common law relationship for

about five years. It therefore appears that this incident was out of character for him.

[16] It is a neutral factor that both the victim and the offender in this case received cuts to the scalp, which required stitches.

[17] The Crown's position on sentence is that a conditional sentence would be inappropriate because the last time that Mr. Johnson received one in 2008 it did not have a deterrent effect upon him, and that in this case, specific deterrence and denunciation are the primary sentencing principles to be addressed. That those are the primary principles involved is not disputed by the defence. However, the defence focuses on the fact that this was an unprovoked attack, which is out of character for Mr. Johnson, and that he would otherwise appear to be a suitable candidate for a conditional sentence.

[18] It must be noted that a conditional sentence is a sentence of imprisonment which is allowed to be served conditionally in the community under strict conditions which are intended to have a punitive effect and, in many respects, can be as difficult for the offender as a jail sentence. In these circumstances, I am satisfied that a conditional sentence can meet the objectives of specifically deterring Mr. Johnson from future like-minded behaviour, as well as denouncing the vicious attack with the last kicks to Mr. Fromme.

[19] The length of the conditional sentence will be 15 months, and will involve the statutory terms as well as the following conditions:

1. That Mr. Johnson will reside as approved by the sentence supervisor at 161 Dalton Drive in Haines Junction, and not change that residence

- without the prior written permission of the supervisor;
2. Mr. Johnson will be under house arrest for the duration of the conditional sentence, which means that at all times he is to remain within his place of residence except with the prior written permission of his supervisor, except for purposes of employment, including travel directly to and directly from his employment. He must also present himself at the door and answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;
 3. He is to abstain absolutely from the possession or consumption of alcohol, controlled drugs or substances, except in accordance with a prescription given to him by a qualified medical practitioner;
 4. He is to provide a sample of his breath for the purposes of analysis upon demand by a peace officer who has reason to believe that he may have failed to comply with this condition;
 5. He is not to attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;
 6. He is to have no contact directly or indirectly, or communication in any way with Mr. Fromme, and he is not to attend at or within 50 metres of the residence of Mr. Fromme;
 7. He is to make reasonable efforts to find and maintain suitable employment and provide his supervisor with all necessary details concerning those efforts;

[20] Given the fact that this does appear to be an out-of-character act for Mr. Johnson, which was executed in the heat of the moment in the midst of an argument with someone that he knew over a friend, it appears that there is not a sufficiently compelling reason for Mr. Johnson to undertake any form of counselling, and I decline to make that a condition of this order. However, I will impose a period of community service work because Mr. Johnson has some abilities in the carving and artistic traditions of his First Nation, and has some capacity to provide benefit in that regard to his community. I do so, not in an attempt to impose a rehabilitative component to the sentence, but to add a denunciatory component to the sentence. So, I will require that:

8. Mr. Johnson is to perform 50 hours of community service as directed by his supervisor or such other person as his supervisor may designate, and that community service is to be completed within the first six months of the conditional sentence.

[21] Now, nobody addressed it, but I understand that a s. 109 firearms order is mandatory, is it?

[22] MS. PHILLIPS: Yes. I believe it's also -- no.

[23] THE COURT: That is for a ten-year period, is it?

[24] MR. CAMPBELL: It's a discretionary firearms order because we proceeded summarily, I believe.

[25] THE COURT: Where are we?

[26] MR. CAMPBELL: Under a summary conviction. I believe it's a s. 110 discretionary firearms order. I'm just looking at the grid in *Martin's*, and I would note that he's already in the midst of a firearms order, in any event. Not that that doesn't mean that another --

[27] THE COURT: Sorry, where do you read in s. 110 that it is discretionary? I see the title, but in terms of it being a summary matter.

[28] MR. CAMPBELL: I was getting that from the grid in -- at the back of *Martin's*.

[29] MS. PHILLIPS: Section 109 has the word "indictable" actually in that section, whereas s. 110 does not.

[30] THE COURT: So s. 109 is not applicable, but s. 110 is?

[31] MS. PHILLIPS: Section 110 is, yes.

[32] THE COURT: All right. In the circumstances, I have declined to make a firearms prohibition order. Are there any other collateral orders that the Crown is seeking that have not yet been addressed?

[33] MS. PHILLIPS: No.

[34] THE COURT: I will order that the victim fine surcharge be imposed, and I think that is a standard amount, is it not?

[35] MR. CAMPBELL: Fifty dollars.

[36] THE COURT: Fifty dollars, and two weeks to pay.

[37] MR. CAMPBELL: Two weeks time to pay, yes.

[38] THE COURT: Anything else that I have omitted?

[39] MS. PHILLIPS: No, Your Honour.

[40] THE CLERK: Sorry, Your Honour, I'd just like to verify that the Supreme Court charges are withdrawn?

[41] MS. PHILLIPS: Yes, the Crown will withdraw those.

[42] THE COURT: All right, so the indictment has been stayed, then, or withdrawn?

[43] MS. PHILLIPS: Yes.

GOWER T.C.J.