

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Chief Judge Lilles)

REGINA

v.

ARTHUR JULIUS KENDI

Michael Cozens

Appearing for Crown

Samantha Wellman

Appearing for Defence

REASONS FOR SENTENCING

[1] LILLES C.J.T.C. (Oral): What I would like to do then is deal with the matter of Arthur Julius Kendi. He is a 19-year-old First Nations young man from Old Crow, which is where these matters arose.

[2] On my last circuit in Old Crow, Arthur was convicted after trial of break and enter and commit theft and assault causing bodily harm. As I have mentioned, these matters occurred on January 22. The home that was broken into was the home of Victoria Blake, a 60-year-old elder in the Old Crow community. I understood that she lives alone in her own home and as a result is more vulnerable, due to those circumstances.

[3] I would like to begin by summarizing, very quickly, the facts that I have found as a result of the trial. This break and enter that we are dealing with I would characterize as a senseless break and enter committed by a young man in an extremely intoxicated state. He broke into the home of an elderly woman who was living alone in Old Crow. At the time she was in bed, but was awoken by hearing a noise. She stayed in bed until she heard a loud crash. At which point, she got out of bed, walked into the kitchen, where she encountered the accused. He grabbed her by the arms and either wrestled or threw her down to the kitchen floor. On her way down, she appeared to hit the microwave oven that was on a free-standing stand. I am satisfied that the major bruising that lasted for two weeks was a result of contacting that microwave. Eventually she got up and ran to the neighbors to call for help.

[4] The police attended the area and encountered Arthur Kendi nearby, walking down the street carrying a stereo - I assume it was one of those portable stereos as opposed to the more traditional multi-component stereo - taken from Victoria Blake's home.

[5] He also had in his possession some tools, which could have been used to pry open Victoria Blake's door. There was an indication on the door that the door had been pried open.

[6] I thank Ms. Rushant for the very complete pre-sentence report. It is very clear that we are dealing with an individual with a severe alcohol and drug problem. He is an individual, who, once he starts drinking, loses control. Drinking can lead to anything, including serious criminal offences. I am satisfied that once he starts drinking, he has difficulty stopping. He drinks to the point where he cannot remember

what he is doing, and he drinks to the point where he does things that he would never do if he were sober. I am also satisfied that his personality changes when he is under the influence of alcohol or drugs. The report indicates that he is susceptible to peer pressure from other young adults with whom he associates.

[7] His previous record is a limited one, yet it does include two assaults and one offence of being unlawfully in a dwelling house. With respect to the last assault, he received four months incarceration. The history shows some difficulty in abiding by court orders but at the same time, while a young offender, he did well in the closed structure of the Young Offenders facility. While there, he completed a lot of programming and was able to upgrade his education.

[8] He has previously, and I understood prior to this incarceration, participated in two treatment programs. So it is clear this individual is open to treatment. While at Whitehorse Correctional Centre, he started one program that he dropped out of, but he has also completed the SAM program, an introductory substance abuse program, which is a two week program. Depending on his environment and the supports that he has, this young man is able to address his issues through programming and counseling and learning.

[9] I agree with the comments made by both counsel and the comments from Old Crow. This is a very serious offence, and in some respects, happening in a small community like Old Crow, it is even more serious. It is even more serious because of the impact on that small community and the fear it engenders. As we have discussed earlier and he fully understands this, the offence has alienated him from his community. He wants to go back there but I think he understands he has a lot of work to do before the community will accept him. Perhaps the most important thing

he can do is demonstrate to the community that he is prepared to change his ways.

[10] He needs to convince himself that he really cannot drink alcohol again. I am satisfied that if he drinks he is going to be a danger to the community, if not to himself. This is one of these cases where, while not a drinking and driving case, one can now analogize to drinking and driving. For him, the culpable act is starting to drink, because as in drinking and driving, the Supreme Court of Canada has stated, it is not what he intends to do when he is behind the wheel, but it is having that first drink and getting behind the wheel, which is the culpable act. Mr. Kendi starts to drink, he knows he is going to lose control, that he is probably going to black out, and he has a history of hurting people or breaking the law when drinking. In those circumstances, clearly the culpable act, the morally culpable act, is starting to drink. If he wants control of his problem, he can do so by not having that first drink.

[11] I think counsel will agree that the range of sentence available to me is fairly broad. I know counsel have made several of cases available to me. I am aware of a broad range where, for these kinds of cases, the sentence could be anywhere from six months to three years incarceration. These two offences before the court are not at the low end of the scale for the reasons I have indicated.

[12] While I consider this to be a very serious matter, at the same time I am cognizant of the purposes of principles of sentencing as set out in the *Criminal Code*, in particular referring to s. 718.2 of the *Criminal Code*. In addition to the other portions, I have particularly paid attention to:

- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

I think "unduly" has to be read in relation to the person's age as well; I think age is a factor. As is the fact that his lengthiest period of incarceration previously was six months, consisting of four months for an assault and two months consecutive for failing to comply with an undertaking. I have to be careful not to jump his sentence up too quickly.

[13] The *Code* also tells me that:

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

I think the same principle applies to not make the jail term longer than it has to be.

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, [particularly having regard] to circumstances of aboriginal offenders.

I think what the sections say, is be careful when you use jail, do not impose it unnecessarily and when you do impose it, try to make sure there is a clear purpose for using it, either protection of the public or some other rehabilitative purpose.

[14] I mentioned earlier that Mr. Kendi is a First Nations person; and I did not mention, that he has had a very difficult background and Janet Constable-Rushant's report makes that very clear. Much of his behaviour is learned behaviour. I am also persuaded that this learned behaviour can be unlearned, but it is not going to be easy for him.

[15] I am advised that Mr. Kendi has spent five months in pre-trial custody. I agree

he should get credit two for one, for a total of ten months. In my view, taking into account all of the circumstances and all of the offences before the court, including both mitigating and aggravating factors, my view is that a total sentence, a global sentence of 20 months incarceration is appropriate.

[16] I am prepared to give him credit for ten months for the break and enter and theft, based on the two for one formula. With respect to that particular charge, I impose a further period of incarceration of six months.

[17] With respect to Count 2, assault causing bodily harm, I am imposing a period of incarceration of four months consecutive, but for the reasons discussed and agreed to by counsel, I am prepared to have this sentence served conditionally in the community, on terms that I will prescribe. I am going to attach to the assault charge a period of probation of 12 months.

[18] Before I get to addressing the terms of the community orders, I think the best way to deal with the Old Crow alcohol charges is to impose seven days incarceration on each, consecutive to each other but concurrent to the disposition I have made today.

[19] Ms. Rushant has been good enough to suggest some of the terms that should be included in any community disposition. Let me start first of all then with the four month conditional sentence of imprisonment. The statutory terms apply, but I think it should include: reside at such place as directed by the conditional sentence supervisor and abide by the terms of said residence. Ms. Rushant, at this point in time, I am strongly recommending a residence in Whitehorse and at least for part of that time I believe the YARC would be suitable, if they are prepared to take him.

Attend for alcohol and drug assessment treatment and counseling as directed.
Attend for other assessment treatment and counseling as directed. Related to those, I would strongly recommend a psychological assessment. I recommend that the assessor contact individuals in Old Crow, including Roger Kaye and Joe Tetlichy for background information. You are to abstain from the possession, purchase and consumption of alcohol and non-prescription drugs. Throughout the conditional sentence order, you will be subject to random testing, including the taking of bodily fluids to ensure your compliance with this order.

[20] You are to seek and maintain employment or further your education as directed by a conditional sentence supervisor. You are to abide by a curfew by remaining within your residence between the hours of 8:00 p.m. and 6:30 a.m., unless you have the prior permission of your conditional sentence supervisor.

[21] For the twelve month probationary period, I think all of those terms can continue, with the exception of the curfew. Madam Clerk, the random drug testing will not apply to the probation order, rather the term, "Should a peace officer have a reasonable suspicion to believe that you are in breach of this order, the peace officer may make a demand for a breath sample or a sample of bodily fluids and you shall comply with such order".

[22] If we can jump back to the conditional sentence. Madam Clerk, I am sorry for doing this to you. There should be the normal knock and talk term with respect to the curfew. I do not need to set that out, do I? That is fine?

[23] THE CLERK: Yes.

[24] THE COURT: Now let us go back then to the four month conditional sentence and speak directly to the people in Old Crow. Let me just say, again, that Mr. Kendi will be allowed to serve four months of his ten month sentence in the community, under very strict conditions. They include a curfew and random drug checks.

[25] What happens under a conditional sentence is that if there is even a minor breach, he will be immediately arrested, brought before the Court and he could end up spending the balance of his conditional sentence in the Whitehorse Correctional Centre. The conditional sentence of imprisonment is followed by a 12 month probation period. That includes terms for alcohol and drug assessment, treatment and counseling and other assessment, treatment and counselling, and I have recommended a psychological assessment and a no-contact with certain individuals in Old Crow.

[26] Now Roger, Corporal Brown, Kim, anything else that you think should be in that order? Should there be a no-contact order with Victoria?

[27] CPL. BROWN: Yes, it is of the opinion -- I see some head shaking, Your Honour.

[28] THE COURT: Are nod --

[29] CPL. BROWN: Yes, to the no-contact order.

[30] THE COURT: There will be a no in-person contact with Victoria Blake, and it will be part of the conditional sentence. With respect to the

probation order, there will be a no in person contact with Victoria Blake unless he has the written permission of his probation officer. What I am assuming is that if he comes back to the community and he is on probation, some form of integration or community conference might be held. I would be happy to chair that conference if it were part of my circuit. Members of the community and Mr. Kendi could meet and Mr. Kendi could address the community and Victoria Blake and start the process of making amends. I think something like that should probably take place before the no-contact term is changed.

[31] Anything further from either Old Crow or from counsel?

[32] CPL. BROWN: Nothing from Old Crow, Your Honour.

[33] MR. COZENS: On the no-contact, on the conditional sentence order, was that no in-person contact on that?

[34] THE COURT: Yes.

[35] MR. COZENS: That will be he would be allowed indirect contact?

[36] THE COURT: I would not worry about it. I am concerned about the in-person contact.

[37] MR. COZENS: The only thought that I have had is if there is going to be any indirect contact that -- I mean, generally speaking, I thought that that would be more appropriate, if there is going to be any, that it would be through the

conditional sentence. I mean he may be in the position then. I am just reluctant. I do not know this offender well enough to suggest that maybe if there is any reason to contact her at all, even in-directly, I think it may be better --

[38] THE COURT: I am persuaded. With respect to the conditional sentence, there will be no direct or indirect contact. Why do we not say without the permission of the Court. The matter could be brought back to Court for a change.

[39] MR. COZENS: I mean I would be content to have it through the conditional sentence supervisor, with the expressed permission to allow her that discretion. I do not know if it needs to come before the Court.

[40] THE COURT: That would be fine with me as well. There needs to be a release valve. It could be the permission of the conditional sentence supervisor. That would be fine as well.

[41] I have spoken to the DNA order, I have signed it off. I have spoken to the firearms order, it will be a ten year order. And any other loose ends? Ms. Rushant?

[42] THE CLERK: Victim fine surcharge?

[43] THE COURT: It will be waived.

[44] THE CLERK: The knock and talk, is that part of the probation order?

[45] THE COURT: No, that is part of the curfew term and it is a conditional sentence. There is no curfew on the probation order. But there is a reside term on the probation order.

[46] MR. COZENS: Nothing I can think of further, Your Honour.

[47] THE COURT: Roger, Corporal Brown, Kim Blake, thanks very much for participating. We are very grateful that you took the time to do this, and you will be in a position to report back to other interested parties as to what transpired.

(Sentencing concluded)

LILLES C.J.T.C.