

Citation: *R. v. Malcolm*, 2005 YKTC 25

Date: 20050307
Docket: T.C. 04-00340A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

DAVID JOHN MALCOLM

Publication of information that could disclose the identity of the complainant has been prohibited by Court Order pursuant to s. 486(3) of the *Criminal Code*.

Appearances:
Susan Bogle
Gordon Coffin

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Mr. Malcolm is before me having plead guilty to sexual assault with a weapon contrary to s. 272(2) of the *Criminal Code* and forcible confinement contrary to s. 270(2). The facts were entered by way of an agreed statement of fact.

[2] In summary, on the 7th of September, six-year-old T.P. took the family dog for a short walk while riding her bicycle. She stopped at the Mae Bachur Animal Shelter to visit the cats, leaving her dog tied up outside. When she came out, Mr. Malcolm was

outside holding both her dog and her bicycle. She was able to retrieve her bicycle, but Mr. Malcolm kept hold of the dog.

[3] Mr. Malcolm took T.P. across the street to the small shack he shares with his stepfather, Art Jackson. Once inside, Mr. Malcolm pushed T.P. to the ground. He told her to take off her clothing or he would kill her. He then held out a knife and a lighter and told her he would burn the place down with her in it if she did not do as she was told.

[4] T.P. removed her clothing. Mr. Malcolm placed her on a small bed and prevented her from leaving. He kissed and hugged her and touched her vagina with his hand. T.P. struggled with Mr. Malcolm resulting in several scrapes and scratches which are readily visible in the photos taken following the incident.

[5] Fortunately for all concerned, T.P.'s mother had become concerned and gone to look for T.P.. Mrs. P. recognized T.P.'s bicycle outside the shack. She called out and was able to hear T.P. yelling for her to help. She was able to gain entry to the shack and to take T.P. to safety.

[6] When Mr. Malcolm was arrested shortly thereafter, he was initially uncooperative and was noted to be somewhat intoxicated. He provided a breath sample of .095. He became cooperative with the police and provided a statement in which he admitted to touching T.P. and stated that he was sorry for what he had done.

[7] Mr. Malcolm has a related criminal record. Of note, he has three prior convictions for sexual offences, two in 1995 while he was still a youth and one in 2001.

All involved young children, two girls and one boy. He received sentences of two years probation, three months in custody and one year probation, respectively. In addition, he has four offences of violence and ten breaches of court orders. His longest sentence to date has been four months.

[8] Mr. Malcolm is a 24-year-old member of the Kwanlin Dun First Nation. He had a somewhat unstable upbringing, residing at various different times with his mother, his grandparents, his stepfather, Art Jackson, or in the care of Family and Children Services. His mother was killed by a drunk driver in 1994. His main support is his stepfather, Art Jackson. Mr. Jackson is clearly concerned for and supportive of Mr. Malcolm. He has attended each of Mr. Malcolm's court appearances and spoke on his behalf at the sentencing hearing. Unfortunately, Mr. Jackson does not appear to have a full appreciation of the issues facing Mr. Malcolm, attributing Mr. Malcolm's criminal behaviour to his use of alcohol and poor social contacts.

[9] I have had the benefit of reviewing a thorough pre-sentence report and a recent psychological assessment. In them, Mr. Malcolm is described as being profoundly challenged, with an I.Q. of 74. The PSR quotes from an assessment performed by Dr. Norman Brodie in 1995 in which he noted that:

On the administered battery of neuropsychological tests, Johnny displayed clear and overwhelming evidence of significant brain injury with impairments on all the major areas of the neuropsychological profile.

[10] The reports before me appear to suggest that Mr. Malcolm's cognitive impairments are the result of prenatal trauma and that he likely suffers from fetal alcohol spectrum disorder, though a formal medical diagnosis of FASD has not yet been made.

[11] To understand what FASD means in the context of the offences before the court, the PSR included helpful information about the impact of FASD, which bears repeating at this time:

However, research shows that the part of the brain most damaged in people with FAS is the prefrontal cortex which controls executive functions. Executive functions include inhibition, problem solving, sexual urges, planning, time perception, internal ordering, working memory, self-monitoring, verbal self-regulation, regulation of emotion and motivation. The effects of alcohol exposure on behaviours related to executive functions result in socially inappropriate behaviour as if inebriated, inability to figure out solutions spontaneously, inability to control sexual impulses especially in social situations, inability to apply consequences from past actions, storing and/or retrieving information, and moody rollercoaster emotions. People with FAS need external assistance and constant reminders, frequent cues and consistent monitors. Without the external assistance, people with FAS cannot manage safely in the community.

[12] The importance of external controls can be seen in Mr. Malcolm's own history. In 1995, as a result of Mr. Malcolm's earlier sexual offences and while still a youth, he was placed in the Mountain Ridge Group Home for special needs sex offender youths. The Mountain Ridge Group Home provided intensive one-to-one supervision by specially trained staff. It is significant to note that during the almost five years that Mr. Malcolm resided in the Mountain Ridge Group Home, he was able to complete the WELLS Program, an educational program for students with cognitive difficulties. He was able to maintain employment and he participated in several sports events, even attending national competitions. It is also of note that his residency at Mountain Ridge coincides with a five-year gap in his criminal record.

[13] Unfortunately, when Mr. Malcolm turned 19 and transitioned from the youth to the adult system, there was and still is no equivalent supportive living environment to provide him with the external controls he so clearly needs. Without those controls, Mr. Malcolm has not been able to maintain employment, he is no longer involved in sports, he is abusing both drugs and alcohol and he has amassed a much longer criminal record.

[14] Using the Static-99 assessment tool, Mr. Malcolm's score indicates a high risk for future sexually violent recidivism. On the Violent Offender Risk Assessment Scale, his score indicates a high risk for future violent recidivism. Mr. Malcolm's risk manageability was also assessed using the Risk Management Guide for Aboriginal Offenders and determined to be low, meaning that he would be unable to manage well in the community at this time.

[15] In the current psychological assessment, Dr. Boer has even gone so far as to provisionally diagnose him as a heterosexual pedophile, although he notes that further testing would be required for a conclusive diagnosis. Dr. Boer indicates that Mr. Malcolm, while willing to receive treatment, has made little progress in past treatment programs, which I take to be those available to him in the Whitehorse area. Dr. Boer indicates that Mr. Malcolm requires specialized treatment for intellectually disabled or FASD offenders in a highly structured setting.

[16] In terms of determining the appropriate sentence, I am in agreement with the Crown that the primary objectives of any sentence in this particular case must be denunciation of the unlawful conduct, separation of this offender from society to protect

the public, and rehabilitation. Given Mr. Malcolm's severe cognitive difficulties, the other objective set out in s. 718 of the *Criminal Code* must necessarily be of lesser importance.

[17] Section 718.2(a) indicates that a sentence should be increased or reduced to account for any aggravating or mitigating circumstances relating to the offence or the offender and s. 718.2(e) requires me, in considering appropriate sanctions, to pay particular attention to the circumstances of aboriginal offenders.

[18] In terms of aggravating factors, I have considered the following:

- (1) Mr. Malcolm's criminal record and the high risk that he presents.
- (2) The fact he essentially lured T.P. to his home by taking her dog.
- (3) His use of threats of weapons to secure T.P.'s compliance.
- (4) His persistence, despite T.P.'s struggles, resulting in the injuries she suffered.
- (5) The very young age and vulnerability of his victim.

[19] I have said much about Mr. Malcolm and his circumstances today as I am required to consider those circumstances in detail in determining the appropriate sentence, but in doing so, I have not lost sight of the other half of this equation; namely, those who have been impacted by this offence, T.P. and her family. I would note that T.P.'s mother has been present at all of the court appearances as well.

[20] Both T.P. and her mother provided victim impact statements. T.P. wrote of being mad at Mr. Malcolm for taking away her dog and about being scared and frightened

both during the offence and when returning to school after. She also wrote of how happy she was that her mom was there to save her. Mrs. P. wrote quite eloquently of the anger and stress, the fear and depression which have rocked the family. She noted that her emotional state has resulted in her inability to continue at her employment, resulting in financial pressures.

[21] The impacts of these offences are profound and far-reaching and it is my sincere hope that T.P. and her family find the support and the counselling that they need to come to terms with what has happened.

[22] In terms of the mitigating factors, I have considered the following:

- (1) Mr. Malcolm's young age.
- (2) The five year gap in his criminal record which indicates to me that his risk factors can be managed in a supervised, structured environment.
- (3) Mr. Malcolm's severe cognitive disabilities. I note that s. 718.1 requires that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. In my view, Mr. Malcolm's cognitive disabilities and their impact on the executive functions of his brain does affect the degree of his moral culpability and must be considered.
- (4) Lastly, in mitigation, I have considered Mr. Malcolm's guilty plea.

[23] The Crown has expressed concern about minimization and lack of empathy for the victim. However, in this case, we must view such concepts as minimization and empathy through the lens of Mr. Malcolm's disability. His brain does not function as a

normal brain does and we must ask ourselves whether he has the capacity to empathize or even to understand what that concept means. I expect that he doesn't and find that his failure does not detract from his guilty plea.

[24] I would also note that T.P. noted her relief at not having to testify in her victim impact statement. Sparing her that ordeal is significant and I give Mr. Malcolm full credit for his guilty plea.

[25] In terms of sentence, Crown submits that a federal sentence in the range of four to five years after giving credit for remand time is appropriate. Defence argues that a sentence in the Territorial range, that being two years less a day or less, plus probation, is more appropriate in order to keep Mr. Malcolm in the Territory where his supports also reside. Both counsel agreed that I should give Mr. Malcolm two-to-one credit for the six months he has spent in custody in remand for a total of one year credit.

[26] I have reviewed the cases provided by the Crown, which were helpful in providing an overall view of the sentences in this area. Though most of the cases differed significantly in terms of the factual circumstances or in the circumstances of the offenders, I found the *R. v. Dickson* case, [1998] Y.J. No. 168 (QL), at tab 2 of the Book of Authorities, and the *R. v. J.H.* case, [1998] N.W.T.J. No. 163 (QL), at tab 9, to be of particular assistance as both cases involved similar fact patterns with FASD offenders with prior related records.

[27] In reviewing those cases, I find the appropriate range in this case to be one of three to four years. After giving the one year credit for remand, this would allow for an additional two to three years, and this range leaves me with three options:

- (1) A Territorial sentence of two years less a day plus three years probation.
- (2) A straight penitentiary term of up to three years.
- (3) Or what Mr. Coffin described as perhaps the best of both worlds, a two-year penitentiary term plus three years of probation.

[28] Mr. Coffin, before continuing, I do want to say I took from Mr. Malcolm's comments to both the probation officer and to the psychologist that he is prepared to consent to any treatment that might be ordered. Before I continue, I want to confirm that that is a correct understanding.

[29] MR. COFFIN: That's certainly my understanding.

[30] THE COURT: Thank you. Mr. Malcolm, if treatment is ordered, I want to know whether you are prepared to agree to that.

[31] THE ACCUSED: Yes.

[32] THE COURT: Thank you.

[33] The reports provided to me made it clear that Mr. Malcolm has made little progress in the treatment that he has been able to access here in Whitehorse. It is clear to me that he requires a much more intensive treatment program, one especially designed for offenders with cognitive disabilities, such as the North Star program that is described in the pre-sentence report. A Territorial sentence will not allow Mr. Malcolm to access that program.

[34] However, it should also be noted that Mr. Malcolm will eventually return to this community. If the risk that he presents is to be effectively managed, he requires structured supervision within the community. A penitentiary term of greater than two years will not allow me to order a period of probation to ensure that Mr. Malcolm is supervised upon his return to the community.

[35] For these reasons, I have determined that option three is the most appropriate option in all of the circumstances and I hereby sentence you, Mr. Malcolm, to a period of two years in the Federal penitentiary to be followed by three years probation. I also direct that the warrant of committal be endorsed with my strong recommendation that Mr. Malcolm be given priority with respect to the North Star program or an equivalent program within the Federal system.

[36] With respect to the probation order, it is my intention that it be an order which provides for intense supervision of Mr. Malcolm upon his return, akin to that which he found in the Mountain Ridge Group Home. The conditions will be as follows:

The statutory conditions will apply:

1. That he keep the peace and be of good behaviour.
2. That he appear before the Court when required to do so by the Court.
3. That he notify the Court or the probation officer in advance of any change of name or address and promptly notify the Court or the probation officer of any change of employment or occupation.

4. That he report to a probation officer immediately upon his release and thereafter as and when directed and in the manner directed by the probation officer.
5. That he abstain absolutely from the possession, purchase and consumption of alcohol and non-prescription drugs and submit to a breathalyzer or urinalysis upon demand of any peace officer or probation officer who has reason to believe that he has failed to comply with this condition.
6. That he not attend at any licensed premises whose primary business is the sale of alcohol.
7. That he reside in a residence as directed by the probation officer including but not limited to a residential facility such as a halfway house and abide by the rules of said residence.
8. That he abide by a curfew as set out in writing by his probation officer.
9. That he have no contact, direct or indirect, with persons under the age of 18 years.
10. That he not associate with any person named in writing by his probation officer.
11. That he have no contact, directly or indirectly, with T.P. or her family.
12. That he not attend within 100 metres of the P. residence.

13. That he attend and participate in such assessment, counselling, programming and treatment as directed by the probation officer including but not limited to sex offender treatment and alcohol and drug treatment.

[37] Now I have not included the last condition suggested in the pre-sentence report by Mr. Hyde as I intend to make a separate order of prohibition in that regard, pursuant to s. 161.

[38] Mr. Malcolm, you are hereby prohibited from attending a public park or swimming area where persons under the age of 14 years are present or can reasonably be expected to be present, or a daycare center, school ground, playground or community center, for a period of 10 years, such period to commence upon the completion of your custodial term.

[39] In addition, as the offences for which you are being sentenced are mandatory offences in relation to other provisions in the *Criminal Code*, I also make the following mandatory orders: You are prohibited pursuant to s. 109 from the possession of any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for a period of 10 years.

[40] I also make an order in Form 5.03 authorizing the taking of any number of samples of one or more bodily fluids from Mr. Malcolm for the purpose of forensic DNA analysis.

[41] Lastly, I make an order in Form 52 requiring Mr. Malcolm to comply with the *Sex Offender Information Registration Act* for the required 20-year period.

[42] Counsel, is there anything in relation to the disposition which you wish to address at this time, specifically with respect to the conditions of the probation order?

[43] MS. BOGLE: Nothing, Your Honour.

[44] THE COURT: Mr. Coffin?

[45] MR. COFFIN: No, Your Honour.

[46] THE COURT: Mr. Hyde, is there anything that raises any concern for you with respect to the probation order and its conditions?

[47] MR. HYDE: Not at this time, Your Honour.

[48] THE COURT: Thank you. Is there anything further?

[49] MR. COFFIN: Surcharge?

[50] THE COURT: In the circumstances, the victim fine surcharge is waived.

[51] MR. COFFIN: Thank you.

[52] MS. BOGLE: Are the two years running concurrent to each other on the two offences, Your Honour?

[53] THE COURT: Yes.

[54] MS. BOGLE: Could the record be endorsed that six months was given credit in remand?

[55] THE COURT: That is appropriate in all of the circumstances. The record will be endorsed to note the six months of remand that was given one year credit.

[56] MS. BOGLE: And there was a s. 264 threat charge that the Crown will enter a stay of proceedings on, Your Honour.

[57] THE COURT: Thank you. That completes my sentence. Mr. Malcolm, I wish you good luck. Mrs. P., I wish the best to you and your family.

RUDDY T.C.J.