Citation: *R.* v. *Quash*, 2018 YKTC 43

Date: 20181206
Docket: 16-00493
Registry: Whitehorse

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

REGINA

v.

WESLEY QUASH

Appearances:
Paul Battin — Counsel for the Crown
Mark Chandler — Counsel for the Defence

## REASONS FOR SENTENCE

[1] Wesley Quash has been convicted after trial of having committed the offence of aggravated assault contrary to s. 268(2) of the *Criminal Code*.

[2] In my trial judgment 2018, YKTC 5, I stated the following in paras. 3-7:

> [3] On October 14, 2016, Steven Smith got out of a cab in the McIntyre Subdivision of Whitehorse. This was at approximately 8:00 p.m., or shortly thereafter. He was somewhat intoxicated. He was walking down the middle of the road towards the residence of his partner, Bobbie Bishop, in order to play radio bingo with her. While walking, Mr. Smith was saying things loudly to no-one in particular and for no particular reason, other than the intoxicated and boisterous mood that he was in.
>
> [4] Mr. Quash was sitting inside his father's vehicle outside a house in the subdivision, where he and his father had been playing radio bingo. Mr. Smith's walk to Ms. Bishop's residence took him past where Mr. Quash was sitting in the

> vehicle. Mr. Quash was not intoxicated. As Mr. Smith was walking by, Mr. Quash stepped out of the vehicle where he was listening to music and yelled out words to Mr. Smith to the effect of "Why are you being so loud"?
>
> [5] Mr. Smith, after this was said to him, turned towards Mr. Quash, said words to the effect of: "I am not being loud", and "I can be loud if I want", and went up to him quickly, in an aggressive manner, getting quite close to Mr. Quash.
>
> [6] Mr. Quash, using a pocket knife that he had just purchased that day, and with the blade in the open position, swung it once at Mr. Smith, cutting his face open from just below the ear to his chin.
>
> [7] Mr. Smith required surgery to repair the injury. He was hospitalized for three days. There was considerable nerve damage that will require Mr. Smith to take medication for life. I have seen the photographs of the wound that resulted. It was a significant injury that has left Mr. Smith with a large scar, besides the pain, discomfort and other effects of the nerve damage that he has incurred.

[3] The knife cut ran from just above Mr. Smith's left earlobe to the base of his lower chin, a distance in excess of 15 cm. It was described by the treating physician as "a large traumatic facial laceration" that was quite deep. From my perspective, in layman's terms, I would describe it as a horrific, gaping and gruesome wound.

[4] In rejecting the defence of self-defence, I found as follows in paras. 51-54:

> [51] Firstly, I am satisfied that the action of Mr. Smith in running towards Mr. Quash as quickly and aggressively as he did, would give rise to a subjective belief on the part of Mr. Quash that there was the threat of force being used against him.
>
> [52] Further, I find that this subjective belief was objectively reasonable. Notwithstanding that Mr. Quash precipitated the encounter by calling out to Mr. Smith, I can accept that he did not intend or anticipate that Mr. Smith would react in the aggressive manner that he did.

> [53] Secondly, given that it was reasonable for Mr. Quash to have a belief that the threat of force was being used against him, it was also reasonable for him to react in a defensive and self-protective manner in order to counter this threat of force.
>
> [54] Thirdly, however, I find that Mr. Quash's response to the situation in his use of the knife to strike Mr. Smith in the face was excessive, and this use of force was unreasonable in the circumstances. The Crown has met its burden in proving beyond a reasonable doubt that the third element of self-defence was not met.

**Submissions of Counsel**

[5] Crown counsel submits that a sentence of four to five years' imprisonment would be appropriate.

[6] Defence counsel submits a custodial disposition of four months would be appropriate, to be followed by a period of probation.

**Victim Impact**

[7] As outlined in the Victim Impact Statement that was filed, the impact upon Mr. Smith has been considerable. Besides the immediate physical and emotional trauma, he suffers from permanent and debilitating physical damage, far beyond the visible scarring, including nerve damage. It appears that Mr. Smith will be required to be on medication for the rest of his life as a result of this injury. He also continues to suffer the emotional and psychological impacts caused by this assault against him.

**Circumstances of Mr. Quash**

[8] Documentary information regarding Mr. Quash's personal circumstances was initially provided through the filing of a ***Gladue*** Report, (see ***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688), prepared in November 2012 for a sentencing hearing being conducted at that time (the "***Gladue*** Report"). Accompanying this was an updated ***Gladue*** Report that was prepared in May 2018 (the "***Gladue*** Update").

[9] The sentencing hearing and submissions of counsel took place on May 17, 2018. After further consideration on my part, I re-convened the matter and advised counsel that I wished for additional information about Mr. Quash. In particular I required a pre-sentence report ("PSR") with a risk-assessment component, and a psychological report. I ordered that these reports be prepared and provided to counsel and the Court.

[10] The information below is largely compiled from all the above sources, in addition to submissions of counsel and other documentation filed at the sentencing hearing.

[11] Mr. Quash has a criminal record starting in 2009. His criminal record includes a conviction for a spousal assault in 2013, for which he received a nine month suspended sentence. His remaining offences include two impaired driving convictions in 2012 and 2017 and several process-related offences. His only custodial dispositions were 45 days' pre-sentence custody on the 2017 s. 253(1)(b) offence, a total of 39 days' pre-sentence custody on four process offences and one day deemed served on another.

[12] Mr. Quash is a 28-year-old member of the Liard First Nation, through his mother, Theresa Johnny. His father, Robin Quash, is a member of the Tahltan First Nation situated in the Telegraph Creek, British Columbia area.

[13] Robin Quash was raised in difficult circumstances. His father and mother had a dysfunctional and abusive relationship that ended when his father murdered his mother. This resulted in Robin Quash and his siblings being placed into the care of social services, where they were ultimately separated. Robin Quash states that he was part of the "Sixties Scoop" where Aboriginal children were taken from their birth families and placed into foster care.

[14] Ms. Johnny attended the Indian Residential School in Lower Post. This school is noted to have been particularly oppressive amongst residential schools. After the Lower Post residential school was closed, she attended Yukon Hall in Whitehorse.

[15] As so often seen in the lives of couples where one or both are residential school survivors, Mr. Quash's parents' relationship was violent and abusive. Both struggled with alcohol addiction that impacted their ability to care for Mr. Quash.

[16] When Mr. Quash was between three to five years of age his father was jailed as a result of having committed a criminal offence.

[17] Ms. Johnny entered into a new relationship around the time that Robin Quash went to jail. In the brief time that Mr. Quash was with his mother in her new relationship, Mr. Quash was exposed to and suffered from violence. Shortly thereafter, Ms. Johnny

abandoned Mr. Quash and he was taken in and cared for by his aunt. He never saw or heard from his mother after she left.

[18] There has been information provided to Robin Quash from the FBI in Alaska, apparently subsequent to the ***Gladue*** Report, that Ms. Johnny was murdered by her partner, who then committed suicide. Robin Quash says he was told that DNA comparisons confirmed her identity. Mr. Quash, however, for some time believed that the results of the DNA testing were inconclusive, and he appears to have had some difficulty in the past accepting that his mother is in fact deceased. It appears that as of lately he is prepared to accept that his mother is dead.

[19] Robin Quash quit drinking after he was released from custody, and has maintained his sobriety for over 25 years. With the help of his sisters, he raised Mr. Quash. From this point on, Mr. Quash was raised in a generally positive environment for a number of years.

[20] In his early and middle teenage years, however, Mr. Quash began to engage in less-positive activities with his peer associations. He began to drink regularly when he was 15 and/or 16 years old. Mr. Quash told the author of the ***Gladue*** Report that he believes he was drinking because he was depressed, a factor he attributed to the void created by his mother's absence.

[21] From the information provided, it is apparent that this is an issue that continues to trouble Mr. Quash. He has expressed that the abandonment by and loss of his mother has at times contributed to his heavy drinking, as a mechanism to cope with feelings of loneliness, sadness and abandonment.

[22] Notwithstanding his struggles, Mr. Quash was able to receive a School Leaving Certificate as a result of completing the FH Collins High School Work Life Experience Skills program ("WELS").

[23] While at various times since he has attempted to upgrade his education through courses at Yukon College, Mr. Quash has generally focused on enhancing his employment skills through his participation in and completion of work-related courses.

[24] He was first employed part-time when he was 16 years old. This employment appears to have overlapped somewhat with his education in the WELS program. He began to work in the mining sector at the age of 18. He has been employed in the mining sector since then, working on and off with different companies. Although he has at times lost his employment due to drinking and related issues, Mr. Quash is generally considered to be a conscientious and hard-working employee. A former employer advised the author of the ***Gladue*** Update prepared for this sentencing hearing that:

> Wesley's a very hard-working guy who we would hire back anytime…I actually tried to contact him this spring for employment. From what I understand he has a substance abuse problem which derails him from time to time. While sober at camp, he showed up every day ready to work, worked very hard (probably the hardest working labourer we ever had), and never had a bad attitude. We did end up letting Wesley go after he had a relapse with substance abuse (as per our company safety manual procedures). Again, we would be willing to hire Wesley back again, in a dry camp situation, due to his hard work and pleasant attitude.

[25] Since 2017, Mr. Quash has been working for a mining company in northern British Columbia on a two-week in, two-week out schedule. He has received several promotions while working there. His current employers are very impressed with Mr. Quash's work ethic and attitude. He is noted to take a lot of pride in his work.

[26] There are conflicting opinions as to whether Mr. Quash suffers from Fetal Alcohol Spectrum Disorder ("FASD"). Robin Quash says that Mr. Quash's mother did not drink alcohol while she was pregnant. Mr. Quash does not believe that he suffers from FASD. There is some indication that Mr. Quash may have been screened for FASD and cognitive impairment while attending school, although there is no reliable information as to the results of any such screening.

[27] Mr. Quash maintains that, except for a slip in September 2017 that has resulted in new charges that are scheduled to proceed to trial on January 10, 2019, he has maintained sobriety since the date of the incident. He states that he realizes he cannot drink alcohol any more because it "changes him" and leads to his criminal behaviour.

[28] Mr. Quash and his girlfriend are expecting a child in early 2019. He has been providing financial support for his girlfriend.

[29] Mr. Quash is noted to be very generous in helping others financially, to the extent that he has, at times, been taken advantage of and found himself short of resources for his own needs.

[30] Mr. Quash says that he is sorry for having assaulted and injured Mr. Smith as he did. Mr. Quash states that he took the matter to trial because he believed he had been acting in self-defence. However, he now says that he wishes he had walked away from the encounter. He states that when he sees Mr. Smith in public he stays away in order to provide Mr. Smith with plenty of space, and he does not engage in intimidation or any action that could be perceived by Mr. Smith as threatening. In his written apology, he stated that he cannot forgive himself for what happened.

*The Historical Clinical Risk Management-20, Version 3 ("HCR-20 V3")*

[31] The HCR-20 V3 guidelines for the assessment and management of violent risk were used to assess Mr. Quash's risk factors for future acts of violence.

[32] On the Historical Scale, areas of risk that were identified included Mr. Quash's history of violence (which appears to include within History the current offence), relationships, substance use and traumatic experiences.

[33] Noted with respect to increased risk factors on the Clinical Scale were Mr. Quash's difficulties with adaptive behaviour, deficits in intellectual and executive functioning, non-visual memory and non-visual reasoning.

[34] With respect to the Risk Management Scale, noted as problematic are the lack of well-formed plans regarding Professional Services, his chaotic living situation and the inadequate emotional and problem-solving support available, coupled with a negative social network.

[35] It is noted in the Conclusory Opinion that Mr. Quash

> …would require a high level of effort or intervention in order to address the risk factors and prevent further violence. Mr. Quash has demonstrated that he is capable of serious physical harm and steps should be taken to continue to minimize the risk of future violence. While the risk of imminent violence is low, this could drastically increase by a change in circumstances such as alcohol use.

*Criminogenic Risk Assessment*

[36] Mr. Quash's criminal-history related risk and criminogenic needs indicate that a high level of supervision would be appropriate for Mr. Quash. His dynamic risk needs

factors indicate a high level of criminogenic need in numerous areas of Mr. Quash's day-to-day life.

[37] These areas of concern are consistent with the comments of Mark Stevens, the author of both the ***Gladue*** Report and ***Gladue*** Update, who, while noting that Mr. Quash was doing quite well at the time, stated his opinion that:

> While his [Mr. Quash's] present highly-regulated existence (a dry camp job and an alcohol-free residence) provides him with the external motivation he needs to maintain sobriety, drinking is still a significant risk factor. If he were to lose his job or move to another residence, then the external controls that seem to be preventing the possibility of a relapse would no longer be in place and the risk he potentially exposes to the community could increase exponentially.

*Psychological Assessment*

[38] The author of the Psychological Assessment (the "Assessment"), Charlene Bradford, stated in the summary of the Assessment that Mr. Quash has extremely low cognitive abilities. She explains, in detail, that these difficulties are spread across a broad spectrum.

[39] For the purposes of this written decision, I do not consider it necessary to set out the analytical details within the various Assessment subheadings of Intelligence, Attention, Executive Functioning, Memory and Learning, Academic Achievement, Mental Health, and Adaptive Behaviour. It is clear that Mr. Quash generally functions within the low or extremely low range in most of these areas.

[40] Of note, however, Mr. Quash scores as having a good ability to maintain his focus on a task while avoiding distractions. He has no difficulties with Inattentiveness,

Impulsiveness, Sustained Attention and Vigilance. He scores relatively well in his visual-spatial reasoning and virtual memory. He is best able to apply these strengths to hands-on tasks after being shown, as compared to being told, what to do. These strengths are consistent with his various employers' comments that Mr. Quash is noted to be a productive and hard-working employee.

[41] Also, Mr. Quash does not appear to suffer from any significant mental health issues. This said, there was one finding of particular interest in the area of Mental Health. Mr. Quash reported having high levels of phobic anxiety. He reported feeling like he needs to avoid certain places and is at times nervous when he is left alone. This, to some extent, is consistent with the evidence at trial that, due to prior experiences, Mr. Quash is fearful of being physically harmed by others. To some measure, this fear was possibly a contributing factor to Mr. Quash's excessive response to the actions of Mr. Smith as he moved quickly towards Mr. Quash.

[42] It is also apparent that Mr. Quash has a more positive impression of his abilities than is borne out by the results of the Assessment and within the information provided by collateral sources.

[43] Mr. Quash meets the diagnostic criteria required to categorize him as suffering from a mild intellectual disability.

[44] A number of recommendations were provided at the end of the Assessment, all of which emphasized the importance of structure, supports and different methods of communicating and interacting with Mr. Quash that work with his relative strengths.

[45] It is the opinion of the author of the PSR and Ms. Bradford that Mr. Quash would benefit from involvement with support groups such as Disability Services and the Yukon Association for Community Living.

[46] Mr. Quash states that while he was in custody for approximately three and one-half months on remand between his arrest on October 14, 2016 and his ability to perfect bail on January 27, 2017, he took advantage of every program and work opportunity that he was able to.

**Case Law**

[47] I have reviewed the following cases provided by counsel, many of which make reference within to the circumstances and sentences imposed in other cases of aggravated assault, as well assault with a weapon and assault causing bodily harm:

Yukon Cases

***R.*** v. ***Elias***, 2009 YKTC 59; ***R.*** v. ***McGinty***, 2002 YKTC 81 (also cited as ***R.*** v. ***D.B.M.***, 2002 YKTC 81); and ***R.*** v. ***Wiebe***, 2006 YKTC 80 (affm'd 2007 YKCA 7).

Non-Yukon Cases

***R.*** v. ***Clymer***, 2017 ONCJ 548; ***R.*** v. ***Hunter***, 2015 ONSC 325; ***R.*** v. ***Peters***, 2010 ONCA 30; ***R.*** v. ***Foley***, 2017 NLTD(G) 86; ***R.*** v. ***Moller***, 2012 ABCA 381; ***R.*** v. ***Tourville***, 2011 ONSC 1677; and ***R.*** v. ***Willier***, 2005 BCCA 404.

[48] I have also reviewed the following cases:

Yukon

***R.*** v. ***Quock***, 2015 YKTC 32; ***R.*** v. ***Bland***, 2006 YKTC 103; ***R.*** v. ***Dick***, 2008 YKTC 6; ***R.*** v. ***Nehass***, 2010 YKTC 92; ***R.*** v. ***Simms***, 2013 YKTC 60; ***R.*** v. ***Nolan***, 2007 YKTC 8; ***R.*** v. ***Pope***, 2012 YKSC 42; ***R.*** v. ***Washpan***, [1994] Y.J. No. 79 (Y.T.C.A.); ***R.*** v. ***Jordan***, 2003 YKTC 104; ***R.*** v. ***Gordon***, [1997] Y.J. No. 136 (Y.K.T.C.); ***R.*** v. ***Perez***, unreported, May 31,1996 (Y.K.T.C.) No. ***R.*** v. ***Porter***, 2017 YKTC 13; ***R.*** v. ***Derksen***, 2009 YKSC 66; ***R.*** v. ***D.J.A.***, 2017 YKTC 56; ***R.*** v. ***S.J.***, [1997] Y.J. No. 123 (Y.K.T.C.); and ***R.*** v. ***Blanchard***, 2007 YKTC 62.

Non-Yukon Cases

***R.*** v. ***Hulshof***, 2001 BCCA 308; ***R.*** v. ***Sidhu***, 2005 BCCA 178; ***R.*** v. ***Craig***, 2005 BCCA 484; ***R.*** v. ***L.D.W.***, 2005 BCCA 404; ***R.*** v. ***Finlay***, 2016 BCCA 299; ***R.*** v. ***MacDonald***, 2012 BCCA 155; ***R.*** v. ***Grant***, 2016 BCSC 2588; ***R.*** v. ***Kaspers***, 2018 BCSC 1558; ***R.*** v. ***Kavinsky***, 2017 ONSC 379; ***R.*** v. ***Leslie,*** 2018 ONSC 41; ***R.*** v. ***Mckie***, 2018 ONCJ 103 (s. 267(b)); and ***R.*** v. ***Deering***, 2016 ABPC 125.

[49] The *Code* allows for the sentence for an aggravated assault offence to be as low as a fine, to a maximum of 14 years' imprisonment.

[50] I have considered what was stated in the above cases, the sentences that were imposed, and the circumstances in which these sentences were imposed, in determining Mr. Quash's sentence.

[51] It is clear from a review of the case law that the sentences imposed for aggravated assault convictions cover a very broad range, depending on the circumstances of the offence and the offender. The above noted cases are helpful to varying degrees, both for their similarities and dissimilarities to the circumstances of the offence and the offender that are before me.

[52] While there may be a general range of sentence for cases involving an aggravated assault in similar circumstances, it must be remembered that a generally accepted range remains essentially no more than:

> …suggestions or guidelines. They are not rules. The sentencing of every accused is of necessity an individualized exercise, which must have due regard for the principles of sentencing in s. 718 of the *Code*, as well as the particular circumstances of the offences and offender.
>
> (***R.*** v. ***Kim***, 2010 BCCA 590, para. 39. See also ***R.*** v. ***Charlie***, 2015 YKCA 3, para. 30).

[53] In para. 13 of ***Porter***, Lilles J. reiterated his comments in ***McGinty***:

> A review of the case law and sentencing principles establishes a wide range of sentences for the offence of aggravated assault….I am satisfied that the range of sentence for aggravated assault generally is between 6 months and 6 years imprisonment. Sentences in the lower range tend to be imposed in situations lacking aggravating factors: for example, two adults, not in a position of trust, engaging in a consensual fight, which escalates and results in injuries to the victim. At the higher end of the range, the victim is usually attacked by a weapon, the injuries are life-threatening or result in permanent injury, and other aggravating factors are present such as a position of trust or the presence of children.

[54] Lilles J. also noted in para. 14 that in ***Dick***, Faulkner J. reaffirmed what he had stated in ***Bland***, that the range of sentence for aggravated assault was from 16 months to six years.

[55] I am also aware that in ***Craig***, the Court stated in para. 10 that:

> It is not disputed, and it appears clear on the cases, that a sentence of two years' imprisonment for the commission of an aggravated assault (which is the sentence that was effectively imposed by the judge) is at the low end of the range of sentences imposed on similar offenders in similar circumstances….The range of sentence for similar offences was described as being between 16 months and six years in *R. v. Johnson* (1998), 131 C.C.C. (3d) 274, (B.C.C.A.),

> two years less a day to six years in *R. v. Biln*, 1999 BCCA 369 (B.C.C.A.), and, most recently, between 18 months and six years in *R. v. Willier*, 2005 BCCA 404 (B.C.C.A.). In determining an appropriate sentence within this broad range, an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end…

[56] In ***Craig***, the circumstances were described by the trial judge as being particularly vicious. The offender, who had recently separated from his partner of 23 years, approached her where she was sitting with her daughter and a friend. Using a knife he had armed himself with, and without any provocation or warning, he stabbed the victim at least three times in the lower abdomen, as well as cutting her hands as she attempted to defend herself. Her injuries were severe and life-threatening, and the negative impacts on the victim were ongoing. The offender admitted that he intended to disfigure and maim the victim when he attacked her.

[57] The offender was in his early 50's, currently unemployed, although he historically had been, and had an unremarkable family background, as well as a limited but unrelated criminal record.

[58] The Court of Appeal increased the sentence to one of three years' custody.

[59] These were the circumstances of the offence and the offender which were the basis for which the Court in ***Craig*** stated the general range.

[60] The circumstances of Mr. Quash and of the offence he committed are certainly more mitigating and less aggravated.

[61] I am satisfied that the general range of sentencing for aggravated assault cases in the Yukon is from six months to six years, with cases falling outside of either end of the range when the circumstances warrant it.

[62] For premeditated and deliberate actions causing serious injury, a penitentiary sentence is generally warranted.

[63] Where the aggravated assault is unplanned and in response to some degree of provocation, some sense of a need to defend oneself not amounting to self-defence in law, or arising out of a consensual fight, even where there is serious injury as a result of the assault, when a custodial sentence is imposed, such a sentence will generally be within territorial or provincial time.

[64] In ***Elias***, the 29-year-old offender was angry at one individual, grabbed a kitchen knife and, in a somewhat random act, slashed the face of a third individual, causing a seven centimetre long wound from the victim's chin to her upper cheek. The victim also received a cut to her hand. The wounds required 10 and nine stitches respectively to close.

[65] Ms. Elias was of Inuvialuit ancestry, had significant cognitive deficits and a long-standing alcohol addiction issue, in addition to drug abuse issues. She had a significant criminal record, including nine prior assaults.

[66] Ms. Elias entered a guilty plea to an assault with a weapon charge contrary to s. 267(a).

[67] An effective sentence of 15 months' custody was imposed, plus two years of probation.

[68] In ***Porter***, the 36-year-old offender threatened to kill the victim and when he was told to "go ahead" pulled out a folding pocketknife and stabbed the victim twice in the torso and at least once in the upper arm. Although not insignificant, the injuries were not as serious as those suffered by Mr. Smith in this case. ***Gladue*** factors were relevant to sentencing and were considered as factoring into Mr. Porter's difficult and unstable background.

[69] Mr. Porter had four prior assault convictions, two convictions for assaults causing bodily harm and two convictions for assault with a weapon. He had received a custodial disposition of eight months' custody for the most recent assault with a weapon conviction in 2015. He was on probation at the time of the commission of the offence for which he was now being sentenced.

[70] Mr. Porter's plans for his future, while stated to be laudable, were also considered to be unrealistic.

[71] Mr. Porter had entered a guilty plea.

[72] An effective sentence of fifteen months' custody was imposed.

[73] In ***Blanchard***, the 34-year-old offender was being sentenced after a guilty plea to having committed a s. 267(a) offence. He had picked up a kitchen knife in the course of an argument and attacked the victim, causing a superficial cut under the eye, a wound

on the neck, just missing the jugular, two wounds to the chest, one of which just missed striking vital organs, a wound to the hand, and a scraping wound to the torso.

[74] Little detail was provided in the decision as to the circumstances of Mr. Blanchard, any victim impact, or the criminal record of Mr. Blanchard.

[75] He received a custodial disposition of nine months.

**Application to Mr. Quash**

[76] The injury to Mr. Smith was very serious and, had the wound been a little lower and on the neck, we may well have been talking a homicide sentencing. The seriousness of the injury militates towards a higher sentence.

[77] The circumstances of the offence, however, are towards the lower end. Mr. Quash did not pre-meditate his action of slashing Mr. Smith with the knife. He was not looking for a fight. He, unfortunately for everyone involved, decided to speak to Mr. Smith as he walked by about how loud Mr. Smith was being. He did not need to do that.

[78] Unfortunately, Mr. Smith did not simply continue on his way but decided to run towards Mr. Quash, which I found resulted in Mr. Quash having a reasonable subjective fear that he may need to defend himself against the use of force. Unfortunately, Mr. Quash did so, using unreasonable, excessive and the potentially deadly use of force.

[79] The aggravating circumstances are as follows:

- the severity of the injury;
- the use of a knife; and
- the prior criminal history of Mr. Quash.

[80] The mitigating circumstances are as follows:

- the presence of ***Gladue*** factors;
- the cognitive limitations Mr. Quash suffers from;
- Mr. Quash's positive employment history and future prospects; and
- the circumstances in which Mr. Quash's actions were a response to an act of aggression by Mr. Smith.

[81] In saying this about Mr. Smith's aggression, I am in no way attempting or intending to place any blame upon him for what happened to him. In approaching Mr. Quash as he did, Mr. Smith was not intending to assault Mr. Quash; in fact I specifically did not accept Mr. Quash's testimony that Mr. Smith assaulted him first. Mr. Smith's actions were simply an unfortunate choice by him to react, in his intoxicated state, to the unexpected comment made to him by Mr. Quash about being loud.

[82] Mr. Quash does not have the mitigation of a guilty plea. Of course, his choosing to take the matter to trial based upon his belief that he acted in self-defence is not an aggravating factor or something that can weigh against him. He was certainly within his rights to do so without fear of a negative consequence as a result.

[83] I am mindful of the need to denounce Mr. Quash's act of violence and to impose a sentence that deters him, and others, from such acts of violence, and in particular from using a weapon in the context of an assault.

[84] The sentence I impose must hold Mr. Quash accountable for his actions.

[85] I am also mindful of the principle of proportionality. As stated in s. 718.1, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[86] As stated, this is a very serious offence of considerable gravity.

[87] However, Mr. Quash's degree of responsibility must be weighed in the context of his significant cognitive deficiencies and limitations. He cannot be held accountable for his actions to the same degree that someone without such deficiencies and limitations can be. His ability to act in a rational and considered manner is someone diminished when compared to someone who does not suffer from the same cognitive deficiencies.

[88] See, for example, ***R.*** v. ***Harper***, 2009 YKTC 18, paras. 29-42 in the context of an FASD offender suffering from FASD-related cognitive limitations. It is not the fact that an offender suffers from FASD alone that requires the offender to be considered as having a lower level of responsibility such as would result in a sentence reduction; it is the associated cognitive limitations that result in the offender being considered to have a lower level of moral blameworthiness. This consideration remains, of course, to be applied to the particular circumstances of each case.

[89] The principle of rehabilitation is also an important factor in this case. Mr. Quash has a demonstrated ability to be a capable, productive and valuable employee. Both his interests and the greater interests of society are best served if the sentence to be imposed does not take him out of the workforce for any longer a period of time than is required, and encourages and enables him to continue to be steadily employed in the future. The more stability there is in Mr. Quash's life, the less the risk of his committing

a violence offence in the future. Conversely, the less stability in his life, the greater the risk.

[90] By virtue of ss. 718.2(d) and (e), a custodial disposition is only to be imposed on an offender when a non-custodial disposition cannot adequately serve to give the required emphasis to the applicable purposes and principles of sentencing. Jail is a “last resort” to be used when there are no other reasonable alternatives, properly considering and applying all the relevant statutory requirements set out in ss. 718 – 718.2. This also includes a consideration of the appropriate length of a custodial disposition to be imposed, in those circumstances where it is necessary to impose a custodial disposition.

[91] This is particularly true when considering the circumstances of Aboriginal offenders and the overrepresentation of Aboriginal offenders in the Canadian federal, provincial and territorial correctional systems.

[92] This does not mean, however, that custodial dispositions are to be imposed only sparingly; it simply means they must be imposed correctly and with the principle of restraint in mind.

[93] I find that the circumstances in this case are distinguishable from that in the ***Elias*** case and support a lesser sentence for Mr. Quash. There, the assault was random and without any provocation. There was no element of self-defence. The 29-year-old Ms. Elias had a significant criminal record with 49 convictions, 10 of which were for offences of violence, including one for uttering threats.

[94] While the injuries were less severe in that case, they were still significant. Ms. Elias was considered to be at a 100% probability for her risk of re-offending and her rehabilitative prospects were tentative at best, with little structure to assist her.

[95] Like Mr. Quash, Ms. Elias was of Aboriginal ancestry (Inuvialuit) and struggled with cognitive issues.

[96] I am aware that Ms. Elias had the mitigation of a guilty plea. Mr. Quash does not have any such mitigation, but I accept that he is remorseful for his actions and the harm caused to Mr. Smith. I find that Mr. Quash's decision to take the matter to trial was not, indicative of any lack of remorse, but rather a belief that he acted in self-defence.

[97] I am also aware that the exercise of discretion which allowed Ms. Elias to plead to a lesser charge than a s. 268 charge does not, however, alter what actually occurred, the nature of the assault and the nature of the injuries suffered.

[98] Insofar as the circumstances of the offence are relevant to the moral culpability of the offender at the time of the commission of the offence, it cannot be said that this moral culpability is heightened or lessened by the subsequent exercise of discretion by the Crown with respect to the offence charged. Ms. Elias' actions and the injuries caused as a result could well have resulted in an aggravated assault charge and conviction. I am not aware of the circumstances and factors which resulted in her being convicted on the lesser 267(a) charge.

[99] I also find the ***Porter*** case similarly distinguishable. Mr. Porter was older and had a much more significant record of criminal convictions, in particular for offences of

violence. He was the aggressor in the situation with respect to the violence and inflicted more than one blow. He was on probation at the time of the offence. He had little established with respect to rehabilitative steps moving forward.

[100] Mr. Porter was of Aboriginal ancestry and had entered a guilty plea.

[101] I appreciate that, as was the case in ***Elias***, in ***Blanchard*** the conviction was on a guilty plea to a s. 267(a) offence. The reality, however, is that Mr. Blanchard inflicted several wounds on the victim using a knife, some of which were potentially capable of having caused a severe or life-threatening injury.

[102] Again, the exercise of discretion which allowed Mr. Blanchard to plead to a lesser charge than a s. 268 does not, however, alter what actually occurred, the nature of the assault and the nature of the injuries suffered. As in ***Elias***, the circumstances of Mr. Blanchard's offence could also have resulted in an aggravated assault charge and conviction.

[103] I also am aware that there is little information in the decision with respect to the circumstances of Mr. Blanchard, so this diminishes somewhat the ability to compare this case to that of Mr. Quash.

[104] While appreciating that different offences and different elections, where elections are available, may have different statutory consequences and limitations, and being mindful of this, it nevertheless remains my obligation, in determining a just and fit sentence for Mr. Quash, to sentence him for what he actually did, and who he is.

[105] In saying this, I am sentencing Mr. Quash for the offence of aggravated assault, not assault with a weapon or assault causing bodily harm, and, in doing so, in consideration of the general range of sentences for aggravated assaults.

[106] Taking into account the circumstances of the offence and of Mr. Quash, the aggravating and mitigating factors, the sentencing precedents in case law, the harm caused to Mr. Smith, and being mindful of my need to impose a sentence that strikes a balance between all the relevant considerations set out in ss. 718 – 718.2, I find that a custodial disposition of ten months is appropriate.

[107] Mr. Quash was in custody on remand for 106 days between October 14, 2016 and his ability to perfect bail on January 27, 2017. As a result of being arrested for a separate offence, Mr. Quash was also in custody for an additional 10 days between September 23 and his release, with Crown consent, on October 2, 2017. Notwithstanding that a s. 524 application was not made and granted until October 2, 2017, Crown counsel takes no issue with these 10 days being available for credit on the s. 268 offence.

[108] On February 1, 2017, Mr. Quash received a sentence of 45 days time served on a s. 253(1)(b) offence. At that sentencing hearing counsel agreed in their joint submission that a portion of Mr. Quash's time in remand between October 14, 2016 and January 27, 2017 could be credited to him for the entirety of this sentence. I do not intend to look behind the decision to allow Mr. Quash's remand credit on the s. 268(2) charge to be applied to the s. 253(1)(b) conviction.

[109] It was unclear at the time of the sentencing hearing before me, as to whether Mr. Quash was using 30 days of his time on remand at the usual credit of one and one-half to one, or using 45 actual days at a credit of one to one. I have since listened to the Digital Audio Recording System to hear what took place at the sentencing hearing. Counsel for Mr. Quash provided the Justice of the Peace a date range of 45 actual days. As a result, Mr. Quash received a credit of only one to one for his time on remand, instead of the normal one and one-half to one.

[110] Therefore, Mr. Quash has a total of 71 days of remand credit which, at one and one-half to one, allows for a credit of 107 days pre-trial custody to be deducted from the 10 month sentence. I will allow Mr. Quash three and one-half months credit for his time on remand.

[111] Therefore, Mr. Quash will have a remanet of six and one-half months to be served in custody.

[112] In addition, Mr. Quash will be placed on probation for a period of 30 months. The terms of the probation order are as follows:

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, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with Steven Smith or Bobbi Bishop except with the prior written permission of your Probation Officer;

5. Do not got to any known place of residence, employment or education of Steven Smith or Bobbie Bishop;

6. Remain within the Yukon unless you obtain written permission from your Probation Officer or the court;

7. Report to a Probation Officer immediately upon your release from custody and thereafter, as and when directed by your Probation Officer;

8. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer for alcohol abuse, psychological issues and any other issues identified by your Probation Officer;

10. Perform 60 hours of community work service as directed by your Probation Officer or such person as your Probation Officer may designate. This community service is to be completed no later than six months before the end of this order.

11. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

12. Not possess any firearm, ammunition, explosive substance or any weapon as defined by the *Criminal Code* except as required by your employment or otherwise with the prior written permission of your Probation Officer.

[113] Mr. Quash will be required to provide a sample of his DNA.

[114] He will also be subjected to a s. 109 firearms prohibition for a period of 10 years.

[115] The knife that was used in the offence and seized will be forfeited to the Crown.

[116] There is a $200.00 victim surcharge. I order that this be payable forthwith, note Mr. Quash to be in default, and order that his default time be served in custody concurrent to the time remaining to be served in custody on the s. 268(2) conviction.

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COZENS T.C.J.