

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

GARY EDWARD YELLE

Transcript of the Reasons for Sentence delivered by The Honourable Justice K. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 4th day of June, A.D. 2012.

APPEARANCES:

Mr. M. Lecorre: Counsel for the Crown

Mr. G. Wool: Counsel for the Accused

(Charges under s. 271 and 266 of the Criminal Code of Canada)

BAN ON PUBLICATION OF THE COMPLAINANT/WITNESS
PURSUANT TO SECTION 486.4 OF THE CRIMINAL CODE

1 THE COURT: Good afternoon.

2 MR. WOOL: Good afternoon, Your Honour.

3 THE COURT: Mr. Yelle, Counsel.

4 On May 31st, 2012, a jury found Gary Yelle
5 guilty of assault on Ms. W. pursuant to
6 Section 266 of the Criminal Code. Sentencing
7 submissions from both Crown and defence, as well
8 as comments from Mr. Yelle himself, were heard on
9 June 1st, 2012. Today it is my responsibility to
10 impose a fit and proper sentence on Mr. Yelle and
11 to provide the reasons for that sentence.

12 Mr. Yelle was charged with sexual assault
13 and with uttering a threat to cause bodily harm.
14 The only witness was the victim, Ms. W.
15 The jury was instructed that they could accept
16 all, some, or none of her evidence. Instructions
17 were provided on the elements of both sexual
18 assault and the lesser and included offence of
19 assault. It was put to the jury that what set
20 sexual assault apart from assault is the
21 intentional application of force in circumstances
22 of a sexual nature. The jury was also instructed
23 on elements of the offence of uttering a threat
24 to cause bodily harm. Ultimately, the jury found
25 Mr. Yelle guilty of assault but not sexual
26 assault, nor uttering a threat to cause bodily
27 harm.

1 As noted by my colleague Justice Charbonneau
2 in R. v. Courouble, which is an unreported
3 decision found at 2012 NWTSC 10:

4 To the extent that a jury's
5 verdict leaves any ambiguity about
6 the facts that it found were
7 proven beyond a reasonable doubt,
8 it is the responsibility of the
9 trial judge to make findings of
10 fact that should form the basis of
11 sentence.

12 Ms. W. testified to various actions by
13 Mr. Yelle: that he punched her, that he
14 scratched her, and he choked her. She identified
15 the pictures in Exhibit 2 as injuries that were
16 caused to her by Mr. Yelle, to her limbs and to
17 her torso. She also said that Mr. Yelle punched
18 her in the head. This was in relation to
19 questions about why she was having difficulties
20 remembering the events, and it was not among the
21 injuries that she had described on direct or
22 under cross-examination, nor in any previous
23 statements. In the circumstances, I am not
24 convinced beyond a reasonable doubt that
25 Mr. Yelle punched Ms. W. in the head and,
26 therefore, this part of her testimony does not
27 form part of the facts upon which this sentence

1 will be based.

2 Ms. W. testified that Mr. Yelle pulled
3 her pants down and that he had oral and vaginal
4 sex with her. She testified this is when she
5 sustained the scratches to her buttocks and lower
6 back pictured in photograph number 4 in Exhibit
7 2. In finding Mr. Yelle was not guilty of sexual
8 assault, it is clear that the jury rejected
9 Ms. W.'s testimony about these things,
10 including, as Crown conceded, her testimony about
11 the photographs of the scratch marks. None of
12 this evidence can or should be taken into account
13 in this sentencing. Similarly, as there was a
14 finding of not guilty on the charge of uttering a
15 threat to cause bodily harm, the jury obviously
16 rejected Ms. W.'s testimony about any
17 threatening words spoken by Mr. Yelle.

18 I have made the following conclusions.
19 Sometime on the evening of September 3rd, 2011,
20 Gary Yelle assaulted Ms. W. The two were
21 known to each other. Ms. W. testified that
22 she met Mr. Yelle many years ago while she was
23 living in Fort Resolution.

24 On that night, she was visiting Yellowknife
25 from her home community of Behchoko. She was
26 staying with her sister. She met Mr. Yelle by
27 chance on the street, which she called the Gold

1 Range street during her testimony. Mr. Yelle had
2 a bottle of alcohol, possibly wine, possibly
3 vodka, with him. The two of them walked to a red
4 truck that was parked in what appears from
5 photographs tendered in Exhibit 3 to be a fairly
6 secluded area behind a local high school. They
7 got into the cab of the truck and it was
8 following this that Mr. Yelle punched and choked
9 Ms. W. Ms. W. tried to escape but she
10 could not open the door. She did testify that
11 the pictures of the truck in Exhibit 3, which
12 were taken by the RCMP and which show that the
13 truck has a broken window, accurately depicted
14 what the truck looked like at the time of the
15 assault. In my view, however, the fact that the
16 window was broken would not necessarily provide
17 an opportunity for Ms. W. to leave, and,
18 accordingly, I accept her testimony that she was
19 unable to get out of the truck.

20 Ms. W. did not consent to Mr. Yelle's
21 actions.

22 The assault left Ms. W. with bruises to
23 her torso and arms and a scratch on her lower
24 leg. In submissions, Mr. Wool, the defence
25 counsel, pointed out that when Ms. W.
26 testified, she said Mr. Yelle punched her in the
27 stomach and identified the injury therefrom as

1 being shown in pictures 2 and 3 of Exhibit 2.
2 These pictures are of bruising to the hip area
3 and not to the stomach. In my view, however,
4 nothing turns on this. What is important is that
5 Ms. W. testified that she sustained the
6 injuries which were pictured in Exhibit 2, with
7 the exception of the picture number 4 in Exhibit
8 2 as I noted earlier, as a result of the assault.

9 There are no pictures of injuries to
10 Ms. W.'s neck as a result of being choked.
11 This does not, in and of itself, though, mean
12 that she was not choked or that Mr. Yelle did not
13 have his hands around her neck as she testified.
14 The lack of a picture simply means that there was
15 no photographic evidence tendered that would show
16 bruising or marks. Ms. W.'s testimony was
17 clear and credible that Mr. Yelle choked her and
18 she did not waiver from this position.

19 The Criminal Code sets out the principles of
20 sentencing that provide a framework to guide the
21 Court in imposing an appropriate sentence. The
22 fundamental purpose of sentencing "is to
23 contribute, along with crime prevention
24 initiatives, to respect for the law and
25 maintenance of a just, peaceful, and safe society
26 by imposing just sanctions that have one or more
27 of the following objectives", and those

1 objectives are: to denounce unlawful conduct; to
2 deter the offender and other persons from
3 committing offences; to separate offenders from
4 society where necessary; to assist in
5 rehabilitating offenders; to provide reparations
6 for harm done to victims or to the community; and
7 to promote a sense of responsibility in
8 offenders, an acknowledgment of the harm done to
9 the victim and to the community.

10 Section 718.1 talks about the
11 proportionality principle in sentencing, which is
12 that a sentence must be proportionate to the
13 gravity of the offence and the degree of
14 responsibility of the offender. Then Section
15 718.2 sets out other principles, including that
16 found in subsection (e) which provides:

17 all available sanctions other than
18 imprisonment that are reasonable
19 in the circumstances should be
20 considered for all offenders, with
21 particular attention to the
22 circumstances of aboriginal
23 offenders.

24 When prosecuted by indictment, assault
25 carries with it a maximum penalty of five years.
26 The range of sentences is very wide and that is
27 not surprising. The severity of the actions that

1 form the basis of assault vary widely, so we tend
2 to characterize assaults on a continuum with
3 those less severe, such as the often-cited
4 example of a shove, at one end, all the way up to
5 those where there is more violence and the victim
6 sustains more significant injuries.

7 In this case, the Crown submitted that this
8 was a grave assault. Defence counsel argued that
9 the assault was relatively minor. In my view,
10 the circumstances of the assault place it at the
11 higher end of the seriousness continuum and
12 Mr. Yelle bears a very high degree indeed of
13 moral blameworthiness.

14 The assault was unexpected and unprovoked.
15 Ms. W. went willingly with Mr. Yelle, a
16 person she knew. She obviously trusted that he
17 would not harm her since she was willing to go to
18 a secluded location with him. Ms. W. was
19 trapped in cab of a truck with Mr. Yelle for a
20 period of time. She was punched and she was
21 choked. She was left with bruises, the ones on
22 her hip being very large. I believe Ms. W.'s
23 testimony when she said that she was scared while
24 she was in the truck with Mr. Yelle. It would be
25 unreasonable and illogical to find otherwise.

26 The Crown submitted Mr. Yelle's criminal
27 record during sentencing submissions. I point

1 out that Mr. Yelle's criminal record is not the
2 basis upon which he is to be punished; however,
3 it is a very important consideration in
4 determining the nature of the sentence to be
5 imposed to meet the principles and objectives of
6 sentencing. Thirteen of the adult convictions
7 contained in the record are directly relevant
8 here. There are ten assault convictions, two
9 convictions for assault with a weapon, and one
10 conviction for assaulting a peace officer. They
11 go all the way back to 1990, and it is fair to
12 say that they occur with relative regularity,
13 particularly over the last ten years. The most
14 recent assault conviction is dated April 15th,
15 2011, for which Mr. Yelle received a four-month
16 sentence. This means he would have been released
17 only shortly before he assaulted Ms. W. on
18 September 3rd, 2011.

19 Mr. Yelle's record also contains no less
20 than 43 convictions for offences against the
21 administration of justice, including breaches of
22 recognizance, failures to appear, and breaches of
23 probation. These are, in my view, highly
24 relevant to the type of sentence that should be
25 imposed to ensure that the principles and
26 objectives of sentencing are met.

27 Mr. Wool made submissions with respect to

1 Mr. Yelle's personal circumstances. Mr. Yelle is
2 44 years old and he is the father of a new baby
3 with his common-law wife. He has a Grade 10
4 education and he has struggled for many years
5 with alcohol addiction. He is a talented artist
6 and he has worked as a hunting and fishing guide.

7 While in pre-trial custody, Mr. Yelle put
8 his time to very good use and took advantage of
9 available programming through the correctional
10 facility. These were the Embracing Our Human
11 Nest Program through the Healing Drum Society,
12 which he completed in February 2012, Community
13 Reintegration Program at North Slave Correctional
14 Centre, which he completed on May 11th, 2012, a
15 number of life skills courses, and a Bible study
16 course. As well, Mr. Yelle regularly attended
17 Alcoholics Anonymous meetings at the North Slave
18 Correctional Centre starting in September 2011.

19 Mr. Yelle is an aboriginal man. As I noted
20 earlier, Section 718.2(e) of the Criminal Code
21 provides that "all available sanction other than
22 imprisonment that are reasonable in the
23 circumstances should be considered for all
24 offenders, with particular attention to the
25 circumstances of aboriginal offenders". This
26 last phrase is what is known as the Gladue
27 principle. It is important to bear in mind that

1 this does not create a separate sentencing regime
2 for aboriginal offenders. As stated recently by
3 the Supreme Court of Canada in Ipeelee at
4 paragraph 60:

5 ... courts must take judicial
6 notice of such matters as the
7 history of colonialism,
8 displacement, and residential
9 schools and how that history
10 continues to translate into lower
11 educational attainment, lower
12 income, higher unemployment,
13 higher rates of substance abuse
14 and suicide, and of course higher
15 levels of incarceration for
16 Aboriginal peoples. These
17 matters, on their own, do not
18 necessarily justify a different
19 sentence for Aboriginal offenders.
20 Rather, they provide the necessary
21 context for understanding and
22 evaluating the case-specific
23 information presented by counsel.
24 Counsel have a duty to bring that
25 individualized information before
26 the court in every case, unless
27 the offender expressly waives his

1 right to have it considered.

2 In this case, there is not a great deal of
3 information about Mr. Yelle's personal
4 circumstances before the Court, and so it is
5 difficult to undertake an evaluation in any
6 detail. That said, it still remains incumbent
7 upon me as the sentencing judge to consider all
8 available sanctions besides imprisonment that may
9 be reasonable in the circumstances of this case,
10 and I have done so.

11 Mr. Lecorre, for the Crown, submitted that a
12 term of imprisonment of two years less a day with
13 one-to-one credit for the time, which is
14 approximately nine months, that Mr. Yelle spent
15 in pre-trial custody is appropriate, followed by
16 a one-year term of probation with minimal
17 conditions. Defence counsel says that a term of
18 probation plus the time served with no additional
19 jail time is appropriate.

20 In my view and in all of the circumstances,
21 this is a case where a longer term of
22 imprisonment is required to meet the goals and
23 objectives of sentencing. This was a serious,
24 ugly assault with many aggravating factors, and
25 the sentence imposed must send a strong message
26 to Mr. Yelle and others that this type of conduct
27 is completely and utterly unacceptable in our

1 society. As I noted at the time he committed the
2 offence, Mr. Yelle had only just been released
3 from a four-month prison term for assault for the
4 thirteenth time. Clearly, the message that this
5 is unacceptable and that he has to take
6 responsibility for his actions is not getting
7 through to him. The sentence that is imposed
8 today has to be meaningful, and I am not
9 convinced that a probationary sentence plus time
10 served would be meaningful to Mr. Yelle. This is
11 not to say that Mr. Yelle is not capable of
12 changing the direction of his life. He is still
13 a relatively young man, being 44 years of age.
14 As noted earlier, he has used his time awaiting
15 trial very productively.

16 In sentencing submissions, Mr. Yelle was
17 provided with an opportunity to speak and he
18 acknowledged that he needs to take treatment for
19 alcohol use and that he can finally see where his
20 problems in life originate. His willingness to
21 work to change is encouraging and admirable, but
22 that in and of itself does not justify what the
23 defence proposes, that being time served followed
24 by a minimally intrusive probation.

25 Mr. Yelle, can you please stand. You are
26 sentenced to a term of imprisonment of one year
27 which is net of the one-to-one credit for time

1 spent in remand. This will take your term of
2 imprisonment to approximately 21 months in total.
3 This will be followed by a term of probation of
4 one year. The terms of the probation order will
5 be that you will, in addition to the mandatory
6 conditions which will be explained to you, report
7 to a probation officer within seven days of being
8 released and, thereafter, as directed by the
9 probation officer; remain within the Northwest
10 Territories unless you have written permission to
11 go outside of the Northwest Territories from your
12 probation officer; and you will have no contact
13 whatsoever with Ms. W.

14 In addition, there will be an order for a
15 DNA sample to be taken in accordance with Section
16 487.051 of the Criminal Code. I note your
17 counsel's comment that your DNA is already in the
18 system, Mr. Yelle, but I do not have any evidence
19 of that before me. This is a relatively
20 unintrusive procedure and, therefore, I will make
21 the order.

22 I will also make a discretionary prohibition
23 order under Section 110 of the Criminal Code with
24 respect to all of the weapons listed therein for
25 a period of three years from the day Mr. Yelle is
26 released. Should you need to obtain a firearm
27 for the purposes of sustenance or hunting,

1 Mr. Yelle, you may make application to a
2 competent authority under Section 113 of the
3 Criminal Code for an exception. That decision
4 will be within the exclusive decision of the
5 competent authority, however. There will be no
6 victims of crime surcharge. Mr. Yelle, do you
7 understand?

8 THE ACCUSED: Yes.

9 THE COURT: Mr. Yelle, let me say that the
10 steps you have taken to deal with your problems
11 to date are encouraging. You are a new father
12 and you are a young man and you have many years
13 ahead of you with your new family. Please use
14 your time in prison and on probation to try and
15 change the direction of your life. You may sit
16 down.

17 Counsel, is there anything else?

18 MR. LECORRE: Thank you, Your Honour. The
19 110 order, that's for ten years, Your Honour?

20 THE COURT: It is for three years.

21 MR. LECORRE: Just three years. Okay.

22 Thank you. Thank you, Your Honour.

23 MR. WOOL: Nothing further.

24 THE COURT: Court is closed.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter