IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

DEREK JOHN ROSS DENEYOUA

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

Transcript of the Reasons for Judgment delivered by The Honourable Justice A.M. Mahar, sitting in Yellowknife, in the Northwest Territories, on the 26th day of February, 2018.

APPEARANCES:

Ms. A. Paquin:	Counsel for the Crown
Mr. T. Pham:	Counsel for the Accused

(Charges under s.266 x2, s.733.1(1) x3 of the *Criminal Code*)

THE COURT: Thank you, everybody. Have a seat.

Mr. Deneyoua, that is you too. Thank you.

As I said this morning, I will order a transcript of today's decision. I may substantially edit it, so I would ask that the transcript will be both sent in Word and regular format, so I can edit it more easily.

Derek Deneyoua is before the Court appealing a decision after trial with respect to sentence; a trial on three charges. Though, I do not believe there was much issue taken of the fact that he was on probation at the time of the commission of the offences. The question is whether or not he committed the offences. He was found guilty of two counts of assault and one count of breach of probation. At that time, he was facing two other charges of breach of probation, on which he entered guilty pleas, and was also sentenced on those charges. So in total, he was sentenced on five charges.

The trial took place in October of 2017. The events in question took place in August of 2017. Mr. Deneyoua was drinking with his girlfriend and his cousin. He became upset for some reason, hit or shoved his cousin down the stairs causing his cousin to momentarily lose

consciousness, and struck his girlfriend in the face with a closed fist after pushing her down on the couch. He was found guilty of both of those offences, as well as the breach of probation for failing to keep the peace and be of good behaviour.

Mr. Deneyoua was 34 years old at the time of the commission of the offences; and he came before the Court with 69 previous criminal convictions, 18 of which were for offences of violence, 28 of which were for offences contrary to the administration of justice. He had four previous assault convictions against the girlfriend that he was convicted for assaulting in October.

In submissions on sentence, the Crown attorney sought five months on the assault charge. He was looking for a total of between 10 and 12 months, taking into account the totality principle and parity. Defence counsel was seeking a period of incarceration of six to nine months. The Crown was seeking a year of probation in addition to the sentence. Defence was not seeking probation.

The positions of the parties were substantially apart. The Crown asked that the two assault convictions result in consecutive

time while defence was seeking concurrent time. Defence counsel suggested five months as well on the assault on Mr. Deneyoua's girlfriend and did not mention specific times with respect to the other offences other than suggesting that both the breach of probation and the other assault charge be dealt with concurrently, and the more recent breaches be dealt with consecutively for a total of six and seven months.

There are essentially three issues before the Court. The first has to do with the application of remand time credit. Mr. Deneyoua served 48 days prior to his trial. He was given a one for one credit based on a misapprehension of the evidence by the trial judge. Both Crown and defence agree that this Court should apply the 1.5 to one typical credit ratio based on this misapprehension. I now do so. Mr. Deneyoua is given a further 24 days of credit based on the 48 days of actual custody referred to in the Crown's materials.

The other issues are, first; did the judge err in not properly applying the principles in Section 718.2(e) in the *Criminal Code*, in other words, did he not give sufficient consideration to what are commonly referred to as the *Gladue* principles, also referred to the case of *Ipeelee*

both of which are Supreme Court of Canada decisions.

The second issue is did the judge err in not flagging counsel to the fact that he was considering imposing a sentence in excess of what the Crown attorney was seeking. If there was an error, what should the result of that error be. The third issue is did the judge err in imposing consecutive time as opposed to concurrent time.

Dealing first with the issue of the *Gladue* considerations. Counsel for the accused at trial and at sentencing provided extensive information about his background. Mr. Deneyoua has had a difficult life. His father died when he was one while his father was incarcerated. His mother struggled with alcohol abuse. He grew up in a home that was plagued by alcohol abuse and violence. His mother is a residential school survivor. Mr. Deneyoua was taken out of the family home when he was nine years old and placed in temporary care. He began drinking at the age of 15 and very quickly developed a serious addiction, which is a major factor in his criminal record.

Despite this, he has been able to be gainfully employed on regular occasions, he has children, completed Grade 11, and engages in a

number of productive activities. But his record is one of someone with a serious substance abuse issue as well as serious recidivist issues. The defence also suggests that I should find that the sentence of the judge is overly harsh, and in that sense, demonstrably unfit.

Dealing first with the *Gladue* issue. As I have indicated, these considerations were clearly in front of the judge. The sentencing judge is presumed to know the law, and is not required to make reference to all the sentencing principles that he or she is applying. It was clear in the reasons of the judge that attention was paid to the circumstances of Aboriginal offenders in small communities. The judge paid particular attention to the circumstances of Mr. Deneyoua's victim, his girlfriend, indicating that in small communities, this sort of recidivist behaviour is a "crushing and depressive thing."

The sentence takes into account the need for a certain amount of reserve when dealing with convicted persons with the accused's antecedents. I believe that the judge did that, and I will have more on that when I conclude my reasons.

With respect to the application of consecutive versus concurrent time, this is also something that had been requested by the Crown

and not by the defence. These were two separate assaults on two different people occurring at different times. They may have occurred very shortly before one another, but on the facts as found by the judge and as indicated by the evidence, Mr. Deneyoua's cousin was first assaulted. Mr. Deneyoua's cousin did not even see the assault on the spousal complainant, but he did notice a bruise on her jaw when he attended upstairs.

This was not one continuous event, but rather two separate events on the same evening. It is clear that the trial judge had the discretion to impose consecutive as opposed to concurrent time, and he used that discretion. As well, the fact that the accused was on probation at the time of the commission of the offences is a further offence, and it was up to the trial judge, at that point, the sentencing judge, to determine whether a concurrent sentence would be appropriate. He decided instead to apply some leniency in finding that the further breaches of probation could be dealt with by way of a concurrent period of time.

The total time that the judge gave was five months on each of the assault charges, four months on the breach of probation charge, and

four months concurrent on the further two probation charges.

This sentencing took place after a trial. The three charges on which Mr. Deneyoua received substantive time are charges on which he was found guilty, not charges to which he pled guilty. It is clear, both in the older case law and the new case law after *Anthony Cook*, that significant consideration has to be given when the Court is faced with a joint submission.

When guilty pleas are entered and the Court wishes to exceed the range suggested by the Crown, considerations also apply. In these sorts of circumstances, as a matter of principle, judges should allow counsel the opportunity to make further submissions by informing them of the judge's discomfort with the recommended range.

The difference in this case is relatively minor. An issue of two months beyond the range suggested by the Crown. On the other hand, the judge did not impose 12 months of probation, which he otherwise might have. His finding was that the imposition of probation would simply be further punishment of Mr. Deneyoua because his ability to maintain sobriety and keep the peace and be of good behaviour was severely limited as evidenced by his record. He declined to impose a

probation order.

I do not believe I need to find one way or the other as to whether or not the judge in this case had to inform counsel, based on the relatively minor difference between the final sentence and the sentence requested at the top end of the range by the Crown. The question is whether counsel have been given an ample opportunity to completely canvass what would otherwise be their submissions before the Court.

As I indicated, the initial positions of both the defence and the Crown were significantly apart. The defence brought into issue all of the *Gladue* considerations that I referred to earlier through submissions. The defence requested concurrent as opposed to consecutive time, and the defence requested a significantly lower period of incarceration. I fail to see how knowledge that the Court was considering going slightly higher than what the Crown had suggested would have changed the submissions by the defence, but in any event, those submissions were fully made, they are fully before the Court on this occasion, and I cannot say that there was any procedural unfairness as a result of not allowing the defence to make full submissions, which is really the concern of the Court.

I will say as well that those procedural considerations become less pressing the further we move away from negotiated resolutions. As I indicated, we are dealing with guilty findings after trial and two relatively minor guilty pleas on unrelated matters that were dealt with by way of concurrent time.

So even if the judge was required to inform counsel of the possibility that the Court would go higher than the range suggested by the Crown, that requirement or the lack of application of that requirement did not result in any procedural unfairness because all of these considerations were made apparent both to the judge and to this Court today. So what we are left with, really, is the question of whether or not the sentence given to Mr. Deneyoua is demonstrably unfit, and that is the question that I must deal with.

As I said before, Mr. Deneyoua has an unenviable criminal record. It is extensive, and it is replete with violence. He is fortunate that the Crown attorney decided to proceed by summary conviction on these matters. The approach of the Crown and the approach of the judge indicate restraint as required by both the *Criminal Code* generally and required by both the *Criminal Code* and the appellate jurisprudence

with respect to sentencing Indigenous offenders.

The assault on his spouse was his fifth conviction for assaulting the same spouse. It was not a particularly minor assault. It involved a punch in the face with a closed fist. The assault on his cousin was also not minor, and I echo some of the comments made by the learned trial judge; this could have resulted in extreme injury. Somebody being pushed or hit so that they fall down a flight of stairs can easily result in severe injury or even death.

Those of us who have been in this business for a long time are unfortunately very aware of how easily people can die. I am not suggesting that this was an aggravated assault. I am not suggesting that Mr. Deneyoua should be sentenced beyond his conviction for simple assault, but this falls at the upper end of the range for simple assaults, and, again, the range must be seen in the context of what is available with respect to elections. You do not simply stop the range at six months and say that that is the absolutely worst possible offender and the worst possible offence.

The range goes anywhere from zero to five years based on how the Crown would choose to elect. This is definitely at the upper end of

the range for summary conviction assaults. And as I indicated, the fact that this is the fifth assault on his spouse is significantly aggravating, and Mr. Deneyoua is fortunate that the Crown did not proceed by indictment. This places it at the very upper end of the range for summary conviction assaults.

So the five months that was applied on both of the assault charges is entirely within the range. The four months on the breach of probation which carries a maximum penalty of 18 months proceeded by summary conviction was also not unreasonable. I am not suggesting that this is the sentence that this Court would have imposed. The question that I have to ask as the judge on appeal is whether or not the sentence is demonstrably unfit, and I find that it is very clearly not.

So the sentence will stand.

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Yellowknife, Northwest Territories, this 30th day of August, 2018.

Certified Pursuant to Rule 723
Of the Rules of Court

Karilee Mankow
Court Reporter