***R v Deneyoua,* 2018 NWTSC 34 S-1-CR-2017-000155**

# 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.

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**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*)

1. THE COURT: Thank you, everybody. Have a
2. seat.
3. Mr. Deneyoua, that is you too. Thank you.
4. As I said this morning, I will order a
5. transcript of today's decision. I may
6. substantially edit it, so I would ask that the
7. transcript will be both sent in Word and regular
8. format, so I can edit it more easily.
9. Derek Deneyoua is before the Court appealing
10. a decision after trial with respect to sentence;
11. a trial on three charges. Though, I do not
12. believe there was much issue taken of the fact
13. that he was on probation at the time of the
14. commission of the offences. The question is
15. whether or not he committed the offences. He was
16. found guilty of two counts of assault and one
17. count of breach of probation. At that time, he
18. was facing two other charges of breach of
19. probation, on which he entered guilty pleas, and
20. was also sentenced on those charges. So in
21. total, he was sentenced on five charges.
22. The trial took place in October of 2017.
23. The events in question took place in August of
24. 2017. Mr. Deneyoua was drinking with his
25. girlfriend and his cousin. He became upset for
26. some reason, hit or shoved his cousin down the
27. stairs causing his cousin to momentarily lose
28. consciousness, and struck his girlfriend in the
29. face with a closed fist after pushing her down on
30. the couch. He was found guilty of both of those
31. offences, as well as the breach of probation for
32. failing to keep the peace and be of good
33. behaviour.
34. Mr. Deneyoua was 34 years old at the time of
35. the commission of the offences; and he came
36. before the Court with 69 previous criminal
37. convictions, 18 of which were for offences of
38. violence, 28 of which were for offences contrary
39. to the administration of justice. He had four
40. previous assault convictions against the
41. girlfriend that he was convicted for assaulting
42. in October.
43. In submissions on sentence, the Crown
44. attorney sought five months on the assault
45. charge. He was looking for a total of between 10
46. and 12 months, taking into account the totality
47. principle and parity. Defence counsel was
48. seeking a period of incarceration of six to nine
49. months. The Crown was seeking a year of
50. probation in addition to the sentence. Defence
51. was not seeking probation.
52. The positions of the parties were
53. substantially apart. The Crown asked that the
54. two assault convictions result in consecutive
55. time while defence was seeking concurrent time.
56. Defence counsel suggested five months as well on
57. the assault on Mr. Deneyoua's girlfriend and did
58. not mention specific times with respect to the
59. other offences other than suggesting that both
60. the breach of probation and the other assault
61. charge be dealt with concurrently, and the more
62. recent breaches be dealt with consecutively for a
63. total of six and seven months.
64. There are essentially three issues before
65. the Court. The first has to do with the
66. application of remand time credit. Mr. Deneyoua
67. served 48 days prior to his trial. He was given
68. a one for one credit based on a misapprehension
69. of the evidence by the trial judge. Both Crown
70. and defence agree that this Court should apply
71. the 1.5 to one typical credit ratio based on this
72. misapprehension. I now do so. Mr. Deneyoua is
73. given a further 24 days of credit based on the 48
74. days of actual custody referred to in the Crown's
75. materials.
76. The other issues are, first; did the judge
77. err in not properly applying the principles in
78. Section 718.2(e) in the *Criminal Code*, in other
79. words, did he not give sufficient consideration
80. to what are commonly referred to as the *Gladue*
81. principles, also referred to the case of *Ipeelee*
82. both of which are Supreme Court of Canada
83. decisions.
84. The second issue is did the judge err in not
85. flagging counsel to the fact that he was
86. considering imposing a sentence in excess of what
87. the Crown attorney was seeking. If there was an
88. error, what should the result of that error be.
89. The third issue is did the judge err in imposing
90. consecutive time as opposed to concurrent time.
91. Dealing first with the issue of the *Gladue*
92. considerations. Counsel for the accused at trial
93. and at sentencing provided extensive information
94. about his background. Mr. Deneyoua has had a
95. difficult life. His father died when he was one
96. while his father was incarcerated. His mother
97. struggled with alcohol abuse. He grew up in a
98. home that was plagued by alcohol abuse and
99. violence. His mother is a residential school
100. survivor. Mr. Deneyoua was taken out of the
101. family home when he was nine years old and placed
102. in temporary care. He began drinking at the age
103. of 15 and very quickly developed a serious
104. addiction, which is a major factor in his
105. criminal record.
106. Despite this, he has been able to be
107. gainfully employed on regular occasions, he has
108. children, completed Grade 11, and engages in a
109. number of productive activities. But his record
110. is one of someone with a serious substance abuse
111. issue as well as serious recidivist issues. The
112. defence also suggests that I should find that the
113. sentence of the judge is overly harsh, and in
114. that sense, demonstrably unfit.
115. Dealing first with the *Gladue* issue. As I
116. have indicated, these considerations were clearly
117. in front of the judge. The sentencing judge is
118. presumed to know the law, and is not required to
119. make reference to all the sentencing principles
120. that he or she is applying. It was clear in the
121. reasons of the judge that attention was paid to
122. the circumstances of Aboriginal offenders in
123. small communities. The judge paid particular
124. attention to the circumstances of Mr. Deneyoua's
125. victim, his girlfriend, indicating that in small
126. communities, this sort of recidivist behaviour is
127. a "crushing and depressive thing."
128. The sentence takes into account the need for
129. a certain amount of reserve when dealing with
130. convicted persons with the accused's antecedents.
131. I believe that the judge did that, and I will
132. have more on that when I conclude my reasons.
133. With respect to the application of
134. consecutive versus concurrent time, this is also
135. something that had been requested by the Crown
136. and not by the defence. These were two separate
137. assaults on two different people occurring at
138. different times. They may have occurred very
139. shortly before one another, but on the facts as
140. found by the judge and as indicated by the
141. evidence, Mr. Deneyoua's cousin was first
142. assaulted. Mr. Deneyoua's cousin did not even
143. see the assault on the spousal complainant, but
144. he did notice a bruise on her jaw when he
145. attended upstairs.
146. This was not one continuous event, but
147. rather two separate events on the same evening.
148. It is clear that the trial judge had the
149. discretion to impose consecutive as opposed to
150. concurrent time, and he used that discretion. As
151. well, the fact that the accused was on probation
152. at the time of the commission of the offences is
153. a further offence, and it was up to the trial
154. judge, at that point, the sentencing judge, to
155. determine whether a concurrent sentence would be
156. appropriate. He decided instead to apply some
157. leniency in finding that the further breaches of
158. probation could be dealt with by way of a
159. concurrent period of time.
160. The total time that the judge gave was five
161. months on each of the assault charges, four
162. months on the breach of probation charge, and
163. four months concurrent on the further two
164. probation charges.
165. This sentencing took place after a trial.
166. The three charges on which Mr. Deneyoua received
167. substantive time are charges on which he was
168. found guilty, not charges to which he pled
169. guilty. It is clear, both in the older case law
170. and the new case law after *Anthony Cook*, that
171. significant consideration has to be given when
172. the Court is faced with a joint submission.
173. When guilty pleas are entered and the Court
174. wishes to exceed the range suggested by the
175. Crown, considerations also apply. In these sorts
176. of circumstances, as a matter of principle,
177. judges should allow counsel the opportunity to
178. make further submissions by informing them of the
179. judge's discomfort with the recommended range.
180. The difference in this case is relatively
181. minor. An issue of two months beyond the range
182. suggested by the Crown. On the other hand, the
183. judge did not impose 12 months of probation,
184. which he otherwise might have. His finding was
185. that the imposition of probation would simply be
186. further punishment of Mr. Deneyoua because his
187. ability to maintain sobriety and keep the peace
188. and be of good behaviour was severely limited as
189. evidenced by his record. He declined to impose a
190. probation order.
191. I do not believe I need to find one way or
192. the other as to whether or not the judge in this
193. case had to inform counsel, based on the
194. relatively minor difference between the final
195. sentence and the sentence requested at the top
196. end of the range by the Crown. The question is
197. whether counsel have been given an ample
198. opportunity to completely canvass what would
199. otherwise be their submissions before the Court.
200. As I indicated, the initial positions of
201. both the defence and the Crown were significantly
202. apart. The defence brought into issue all of the
203. *Gladue* considerations that I referred to earlier
204. through submissions. The defence requested
205. concurrent as opposed to consecutive time, and
206. the defence requested a significantly lower
207. period of incarceration. I fail to see how
208. knowledge that the Court was considering going
209. slightly higher than what the Crown had suggested
210. would have changed the submissions by the
211. defence, but in any event, those submissions were
212. fully made, they are fully before the Court on
213. this occasion, and I cannot say that there was
214. any procedural unfairness as a result of not
215. allowing the defence to make full submissions,
216. which is really the concern of the Court.
	1. I will say as well that those procedural
	2. considerations become less pressing the further
	3. we move away from negotiated resolutions. As I
	4. indicated, we are dealing with guilty findings
	5. after trial and two relatively minor guilty pleas
	6. on unrelated matters that were dealt with by way
	7. of concurrent time.
	8. So even if the judge was required to inform
	9. counsel of the possibility that the Court would
	10. go higher than the range suggested by the Crown,
	11. that requirement or the lack of application of
	12. that requirement did not result in any procedural
	13. unfairness because all of these considerations
	14. were made apparent both to the judge and to this
	15. Court today. So what we are left with, really,
	16. is the question of whether or not the sentence
	17. given to Mr. Deneyoua is demonstrably unfit, and
	18. that is the question that I must deal with.
	19. As I said before, Mr. Deneyoua has an
	20. unenviable criminal record. It is extensive, and
	21. it is replete with violence. He is fortunate
	22. that the Crown attorney decided to proceed by
	23. summary conviction on these matters. The
	24. approach of the Crown and the approach of the
	25. judge indicate restraint as required by both the
	26. *Criminal Code* generally and required by both the
	27. *Criminal Code* and the appellate jurisprudence
217. with respect to sentencing Indigenous offenders.
218. The assault on his spouse was his fifth
219. conviction for assaulting the same spouse. It
220. was not a particularly minor assault. It
221. involved a punch in the face with a closed fist.
222. The assault on his cousin was also not minor, and
223. I echo some of the comments made by the learned
224. trial judge; this could have resulted in extreme
225. injury. Somebody being pushed or hit so that
226. they fall down a flight of stairs can easily
227. result in severe injury or even death.
228. Those of us who have been in this business
229. for a long time are unfortunately very aware of
230. how easily people can die. I am not suggesting
231. that this was an aggravated assault. I am not
232. suggesting that Mr. Deneyoua should be sentenced
233. beyond his conviction for simple assault, but
234. this falls at the upper end of the range for
235. simple assaults, and, again, the range must be
236. seen in the context of what is available with
237. respect to elections. You do not simply stop the
238. range at six months and say that that is the
239. absolutely worst possible offender and the worst
240. possible offence.
241. The range goes anywhere from zero to five
242. years based on how the Crown would choose to
243. elect. This is definitely at the upper end of
244. the range for summary conviction assaults. And
245. as I indicated, the fact that this is the fifth
246. assault on his spouse is significantly
247. aggravating, and Mr. Deneyoua is fortunate that
248. the Crown did not proceed by indictment. This
249. places it at the very upper end of the range for
250. summary conviction assaults.
251. So the five months that was applied on both
252. of the assault charges is entirely within the
253. range. The four months on the breach of
254. probation which carries a maximum penalty of 18
255. months proceeded by summary conviction was also
256. not unreasonable. I am not suggesting that this
257. is the sentence that this Court would have
258. imposed. The question that I have to ask as the
259. judge on appeal is whether or not the sentence is
260. demonstrably unfit, and I find that it is very
261. clearly not.
262. So the sentence will stand.

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# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Yellowknife, Northwest
7. Territories, this 30th day of August, 2018.

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1. Certified Pursuant to Rule 723
2. Of the Rules of Court

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1. Karilee Mankow
2. Court Reporter

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