

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KIRK MANTLA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This is an appeal from conviction and a sentence imposed on March 2, 2018 sentencing the Appellant to 6 months' incarceration and 2 years of probation for the offence of Assault Causing Bodily Harm, contrary to s. 267(b) of the *Criminal Code*. In coming to this sentence, the Sentencing Judge rejected a joint submission proposed by counsel of a 6 month Conditional Sentence Order followed by a 12 month probation order.

BACKGROUND

[2] The Appellant was charged on an Information with four counts: aggravated assault, assault with a weapon, assault causing bodily harm and assault. All four counts were alleged to have occurred on August 18, 2017 in the community of Behchokò and involved the same victim.

[3] The Crown withdrew the aggravated assault charge on October 10, 2017 and elected to proceed by summary conviction. The Appellant plead not guilty to all charges and a trial date was set for January 11, 2018.

[4] The trial commenced on January 11, 2018 with the victim Guy Tlokka and two other witnesses testifying. A number of exhibits were entered into evidence including photographs of the victim, a metal pipe and a piece of wood. The matter was adjourned to January 12, 2018 for continuation of the trial.

[5] When the trial was called on January 12, 2018, counsel for the Appellant advised the Court that the Appellant wanted to change his plea to count 3, the assault causing bodily harm. The Appellant's counsel advised the court that the provisions of s. 606(1.1) of the *Criminal Code* had been canvassed with the Appellant. Counsel advised that a Pre-Sentence Report was not being requested and they were prepared to proceed to sentencing.

Facts

The Crown and Defence agreed to the following facts:

[6] On August 18, 2017, at approximately 5:00 a.m., Guy Tlokka, Jerrick Eyakfwo and Jem Huskey were hanging out in Behchokò and had been drinking. Kirk Mantla and two of his friends walked by. Mr. Tlokka picked up a steel bar, a photograph of this steel bar was entered in the trial. As Mr. Mantla was walking away, Mr. Tlokka started yelling at Mr. Mantla and the two of them exchanged words. Mr. Tlokka called Mr. Mantla a crack head.

[7] Mr. Mantla believed that Mr. Tlokka was going to hit him with the steel bar, and Mr. Mantla picked up a 2x4 which was nearby, a photograph of the 2x4 was also in evidence. Mr. Mantla then hit Mr. Tlokka in the back with the 2x4 causing Mr. Tlokka to fall down and hit his head. After Guy Tlokka had fallen down, Mr. Mantla kicked Mr. Tlokka in the face and then walked away.

[8] When Mr. Mantla kicked Mr. Tlokka in the face, at least one of Guy Tlokka's teeth was knocked out and others were broken. Guy Tlokka suffered scratches and bruising, a bump on the back of his head, missing and broken teeth, swollen gums and a sore wrist. Photographs of Mr. Tlokka after the assault were entered as exhibits and show the extent of his injuries. Mr. Mantla was intoxicated at the time.

[9] Kirk Mantla was 30 years old and Guy Tlokka was 20 years old. Kirk Mantla and Guy Tlokka are both indigenous men from Behchokò.

Sentencing Hearing

[10] Counsel advised the Court there was a joint position on sentence. The matter was adjourned to February 7, 2018 to permit the Crown to contact the victim.

[11] On February 7, 2018, a Victim Impact Statement was filed and made an exhibit. The Crown also filed the Appellant's criminal record. The criminal record included 6 convictions for violent offences, the last one in 2013 for which the Appellant was sentenced to 3 months' custody. The record also included 6 convictions for offences against the administration of justice, the last in 2013 for obstructing justice for which he received a sentence of 3 months' imprisonment consecutive. The Appellant's last conviction was in 2016 for mischief.

[12] Counsel proposed a joint submission of a 6 month Conditional Sentence Order to be followed by a 12 month probation order. The Crown was also seeking a DNA order which was mandatory and a discretionary Firearm Prohibition Order pursuant to s. 110 of the *Criminal Code*.

[13] The proposed terms of the Conditional Sentence Order were that the Appellant be under house arrest for the entire 6 months unless he was working or actively seeking employment, with the prior written permission of his supervisor, 4 hours every Saturday to conduct errands between 2:00 p.m. and 6:00 p.m., medical appointments or emergencies for his immediate family, and to care for his father twice a day between 12:00 p.m. and 1:00 p.m., and 5:00 p.m. and 6:00 p.m. Other proposed conditions were to have no contact with Guy Tlokka and not to attend his residence, to report to the Conditional Sentence Supervisor, to abstain from the consumption of alcohol or other intoxicating substances and to attend counselling.

[14] The Crown acknowledged before proposing the joint submission that it was at the "lower-end range" but that it was still an appropriate sentence in the circumstances.

[15] The Crown characterized the situation as an unusual one as the guilty plea occurred during trial following a discussion with a witness who was going to testify. Following this discussion, it was determined that there was a triable issue which was disclosed to defence counsel and which subsequently led to the resolution discussions.

[16] In their submissions, the Crown acknowledged that, objectively and subjectively, the offence was serious and that the Appellant's moral blameworthiness was relatively high. The Crown also acknowledged the Appellant's personal circumstances and *Gladue* factors reduced his moral blameworthiness.

[17] The Crown also noted the injuries and the impact on the victim as aggravating factors. In mitigation, the Crown referred to the unusual guilty plea which should be given significant weight, the Appellant's remorse and his personal circumstances.

[18] The Crown submitted that the sentencing principles of denunciation and deterrence should be addressed but also rehabilitation and restraint.

[19] It was apparent that the Sentencing Judge had concerns about the suitability of a conditional sentence for this offence. The Sentencing Judge raised the principle of parity and expressed concern about the proposed sentence stating:

I have never seen, either from me or other judges, a conditional sentence imposed for this type of violent offence in Behchokq because of the harm done to the community and the victims.

Transcript of the Sentencing Hearing, February 7, 2018, p. 14.

[20] The Sentencing Judge questioned the Crown regarding the triable issue which arose during the trial noting that the admitted facts disclosed that an offence had been committed. The Sentencing Judge advised counsel that she was having "a lot of difficulty with this."

[21] The Crown then stated that:

It's not a case where someone enters a guilty plea in the middle of a trial realizing that there's – that the person's going to be convicted at the end of the day.

This is a matter where we – the – the Crown, after talking with the witness, received additional information, change of version, which affected the case significantly and discussed with defence, as a result. And that's how the guilty plea was entered because he was taking responsibility for what the Crown at that point was alleging because of that additional disclosure that was provided to the

Crown.

Transcript of the Sentencing Hearing, February 7, 2018, p.18.

[22] The Crown also noted that there were no issues with the Appellant while he had been on release for the offence and that his last conviction for a breach was in 2013.

[23] The Appellant's counsel characterized the offence as one where the Appellant over-reacted to a threat that was posed to him, but that it was not a case of unprovoked violence.

[24] In describing the plea negotiations, the Appellant's counsel stated:

Once a different version of facts was laid out to the Crown, if I can put it that way, and it was realized that there were significant issues with the complainant's testimony, not based just on that witness but on other witnesses that may have been called as well, that's when the guilty plea was entered.

Transcript of the Sentencing Hearing, February 7, 2018, p. 20-21.

[25] The Appellant's counsel noted that one of the different facts was that the complainant had a steel bar in his hand which provided important context to the offence.

[26] The Appellant's counsel referred to the Appellant's personal circumstances and the Appellant's father's medical situation who the Appellant assisted in providing care on a daily basis when he was not working outside the community.

[27] Counsel also referred to the Appellant's *Gladue* factors and advised the court about his aboriginal background including his parents and grandparents attendance at residential school, alcohol abuse within his home, and his educational background.

[28] Counsel referred to the Appellant's work history, his child support obligations and his community activities. Counsel also noted the Appellant's compliance with his release conditions while awaiting trial.

[29] The Appellant's counsel referred to the circumstances of the offence which were different from the facts initially alleged and reflected that the situation was not of the Appellant's creation. The victim had engaged with the Appellant first and the Appellant was scared and over-reacted to the situation.

[30] During the Appellant's counsel's submissions, the Sentencing Judge expressed concerns about parity and the Appellant's failure to walk away from the situation.

[31] The Appellant's Counsel referred to the Supreme Court of Canada's decision in *R v Anthony-Cook*, 2016 SCC 43, regarding joint submissions noting that joint submissions should not be rejected lightly. Counsel requested an opportunity to make further submissions and to provide case law if the Sentencing Judge was considering rejecting the joint submission.

[32] Counsel also spoke of the positive impact that Conditional Sentence Order would have for the Appellant and submitted that it was an appropriate sentence in the circumstances.

[33] The Sentencing Judge advised counsel that she had "significant concerns" about the suitability of a conditional sentence and whether the sentence addressed parity, the harm done to the victim or the harm done to the community.

[34] The matter was adjourned to March 2, 2018 for counsel to make further submissions in support of the joint submission.

[35] On March 2, 2018, counsel made further submissions in support of the joint submission and submitted a joint book of authorities.

[36] The Crown's position was that the sentence was admittedly low but not so low that it would bring the administration of justice into disrepute or be contrary to the public interest. The Crown submitted that even if the proposed sentence was demonstrably unfit, the Court was still bound to follow the joint submission unless it would bring the administration of justice into disrepute.

[37] The Appellant's Counsel provided two additional letters of support for the Appellant. The Appellant's counsel acknowledged that the proposed sentence was at the low end of the range but also submitted that it was not unhinged from the circumstances of the offence or the offender and that it would not bring the administration of justice into disrepute.

[38] The Appellant's counsel requested that if the Sentencing Judge was still considering not following the joint submission, that the Appellant be given an opportunity to consider withdrawing his guilty plea and that she would have to seek instructions from the Appellant on how he wanted to proceed.

[39] The Sentencing Judge expressed concern about whether that could be done in the circumstances where a conviction had been entered and the facts had been accepted. The Sentencing Judge also expressed concern that this was contrary to section 606(1.1) of the *Criminal Code* where the court may accept a guilty plea only if it is satisfied that the accused understands that the court is not bound by any agreement made between the accused and the prosecutor.

[40] The Sentencing Judge declined to adjourn the matter further noting that the matter would be concluded on that day.

[41] The Sentencing Judge proceeded to sentence the Appellant, rejecting the joint submission and imposing a sentence of 6 months' imprisonment, followed by a term of probation of two years. The Sentencing Judge provided oral reasons for sentence and later filed written reasons for sentence.

ISSUES

[42] The Appellant appeals from conviction and sentence. The Appellant claims that the Sentencing Judge erred in rejecting the joint submission and erred in not permitting him to apply to withdraw his guilty plea when she decided to reject the joint submission.

[43] In this case, it makes sense to consider the sentence appeal first as the conviction appeal is dependent on the result of the sentence appeal. If the sentence appeal is successful, then there is no need to consider the conviction appeal.

[44] On the sentence appeal, the Appellant argues that the Sentencing Judge erred by not approaching the joint submission from a position of restraint and employed a "fitness" test to reject the joint submission.

[45] On the conviction appeal, the Appellant argues that the Judge erred in denying the Appellant an opportunity to consider applying to withdraw his guilty plea. The Appellant argues:

- 1) That the Judge erred in law in concluding that it was not legally possible to withdraw a guilty plea after a conviction had been entered; and
- 2) The Judge erred by not exercising her discretion to grant an adjournment in a judicial manner.

ANALYSIS

Sentence Appeal

Standard of Review

[46] Sentencing is very fact-specific exercise. Trial judges have a broad discretion to impose a sentence that they consider appropriate in the circumstances of each case. For this reason, the standard of review on a sentence appeal is subject to significant deference. The Supreme Court of Canada has repeatedly stated that absent an error in principle, the failure to consider a relevant factor or the overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if it is demonstrably unfit. See *R v M.(C.A.)*, [1996] 1 S.C.R. 500; *R v Lacasse*, [2015] 3 S.C.R. 1089.

[47] In cases involving the rejection of a joint submission, the standard of review is different. It is the “public interest” test and was established by the Supreme Court of Canada in *R v Anthony-Cook*. The standard of review was recently summarized in *R v Jacobson*, 2019 NWTSC 9 at paras. 22-23:

This standard of review is altered significantly if counsel have presented a joint submission at the sentencing hearing: in that situation, a sentencing judge must follow the joint submission unless it is contrary to the public interest or would otherwise bring the administration of justice into disrepute. This very high standard refers to a sentence that is “so unhinged from the circumstances of the offence and of the offender that its acceptance would lead reasonable and informed persons, aware of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system has broken down”. *R v Anthony-Cook*, 2016 SCC 43, paras. 32-34.

Therefore, if the sentencing judge declines to follow a joint submission and the sentence is appealed, the focus of the analysis on the appeal is the reasonableness of the joint submission, not the fitness of the sentence imposed.

The Sentencing Judge’s Decision to Reject the Joint Submission

[48] When considering rejecting a joint submission, sentencing judges are required to notify counsel of their concerns and give counsel an opportunity to

make further submissions to address the judge's concerns before sentence is imposed. If those concerns are not alleviated, a judge may allow the accused to apply to withdraw the guilty plea. A sentencing judge should provide clear and cogent reasons for departing from the joint submission. *Anthony-Cook, supra* at paras. 58-60.

[49] In this case, the Sentencing Judge notified counsel of her concerns early on in the process. Counsel were given an opportunity to make further submissions and to provide caselaw which they did. The Appellant's complaint is not about the procedure followed with respect to the sentence appeal (aside from the failure to permit the Appellant to apply to withdraw his guilty plea which is more appropriately considered on the conviction appeal). The Appellant raises issues relating to the Sentencing Judge's exercise of restraint and effectively applying a "fitness" test. The Appellant also complains about the Sentencing Judge's assessment of the facts and application of *Gladue*.

Assessment of the Facts

[50] The Appellant complains that the Sentencing Judge approached the agreed statement of facts in a manner that enhanced rather than diminished the Appellant's moral blameworthiness.

[51] The facts read in by the Crown regarding the assault were as follows:

On August 18, 2017, at approximately 5 AM, Guy Tlokka, Jerrick Eyakfwo and Gem Huskey were hanging out around the 6-plex in Behchokò, drinking. Kirk Mantla walked by with two of his friends. At this time, Mr. Tlokka picked up a steel bar. Mr. Mantla began to walk away, at which time Mr. Tlokka started yelling at Mr. Mantla. Mr. Mantla and Mr. Tlokka began to exchange words, and Mr. Tlokka called Mr. Mantla a crack head.

Mr. Tlokka held the steel bar in his hands, and Mr. Mantla believed that Mr. Tlokka was going to hit him with this bar. In response, Mr. Mantla hit Mr. Tlokka once on the back with a piece of wood after picking up a piece of wood in that area. Mr. Tlokka fell down, at which time Mr. Mantla – when he fell down, he hit his head. At this time, Mr. Mantla kicked Mr. Tlokka in the face and walked away.

Transcript of the Trial Continuation, January 12, 2018, p. 3, lines 4-23.

[52] In considering the gravity or seriousness of the offence and the degree of responsibility of the offender, the Sentencing Judge said:

The seriousness of this offence cannot be ignored – Kirk Mantla kicked Guy Tlokka in the face hard enough to knock his tooth out, and break other teeth. And then he walked away leaving Guy Tlokka lying there on the road. It is not an exaggeration to say that Guy Tlokka could have been killed.

On behalf of Mr. Mantla it is said that he did not provoke or instigate the situation. Mr. Mantla who is 30 years old, was walking away; Guy Tlokka, who is 20 years old, yelled at him. Mr. Mantla did not keep walking, he engaged with Guy Tlokka, there was yelling, and then Guy Tlokka called him a name, a crack head. Mr. Mantla thought that Guy Tlokka was going to hit him with the steel bar, so Mr. Mantla picked up a 2x4 from nearby. I have not heard that Guy Tlokka did anything or made any move that made Mr. Mantla think he was going to be hit, but simply that Mr. Mantla believed it, and I accept that. But thinking this Mr. Mantla did not keep walking or continue on his way, no, in response to his belief, he picked up a 2x4 from nearby, and hit Guy Tlokka across the back with enough force to knock him over, and then kicked Guy Tlokka hard enough in the face to knock out and break his teeth. It is notable that Mr. Mantla hit Guy Tlokka across the back.

I accept the facts that have been put before me, and I realize that these are the facts for which I'm sentencing Mr. Mantla. But that being said, I will not minimize these facts to a situation where Mr. Mantla was a vulnerable, defenceless would be victim here. Mr. Mantla engaged in this situation and Guy Tlokka suffered significant injuries and now has two or three fewer front teeth! Mr. Tlokka's actions are closer to Mr. Fabian's actions in the *Gladue* case, *infra*, that counsel have filed, and that I refer to further at paragraph 42.

I have to consider the degree of responsibility of Kirk Mantla, the moral blameworthiness. Guy Tlokka yelled at Mr. Mantla first, he called him a name, and he had a steel bar in his hand. Again, Mr. Mantla is 30 years old, Guy Tlokka is 20. Did Mr. Mantla do anything to help after he kicked Guy Tlokka in the face? No, he walked away. But for the fact that Guy Tlokka "started it" as we might say when dealing with children, this would be a situation where Mr. Mantla's degree of responsibility was the utmost.

Reasons for Sentence, paras. 20-23.

[53] Clearly, the Sentencing Judge viewed the Appellant's actions as serious and his degree of responsibility as high. The Sentencing Judge stated that she accepted the Agreed Facts, she accepted that Mr. Tlokka initiated the encounter, picked up a steel bar, and then called the Appellant a name. She also accepted that the Appellant thought the victim was going to hit him but also noted that he did not keep walking or continue on his way. The Appellant instead responded by picking up a 2x4 and hitting Mr. Tlokka across the back knocking him over and then kicking him in the face.

[54] The Sentencing Judge was aware that this encounter was not initiated by the Appellant and that the Appellant acted because he thought the victim was going to hit him. There is nothing wrong in the Sentencing Judge questioning the Appellant's response and why he did not walk away. It is the Appellant's response that resulted in the charge before the Court. There was no error in the Sentencing Judge's interpretation of the facts and these conclusions were available to her on the facts agreed to by the Crown and Appellant. Her conclusions regarding the facts were reasonable.

Consideration of the Gladue factors

[55] The Appellant is an aboriginal offender which required the Sentencing Judge to consider section 718.2(e) of the *Criminal Code* which states that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[56] The Supreme Court of Canada established the principles that a judge must consider in sentencing an aboriginal offender in the cases of *R. v Gladue*, [1999] 1 S.C.R. 688 and *R. v Ipeelee*, 2012 SCC 13.

[57] Section 718.2(e) requires a sentencing judge to consider:

- a) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
- b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

Gladue, supra at para. 66.

[58] A judge sentencing an aboriginal offender will require information about the offender:

Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report.

Ipeelee, supra at para. 59.

[59] In this case, counsel made submissions regarding the Appellant's *Gladue* factors and the Sentencing Judge referred to section 718.2(e) in her sentencing decision.

[60] The Sentencing Judge stated:

I do not see any factor specifically related to Mr. Mantla's indigenous heritage that have led him to being before the court. I am not ignoring the systemic factors, or the negative effects that his parents and his grandparents attending residential school may have had. But I have not been told of any serious or tragic circumstances that Mr. Mantla experienced growing up that may have led to him being continually before the court. From what I've been told Mr. Mantla had a mostly positive background and upbringing, and has a supportive family.

Reasons for Sentence, para. 45.

[61] The Appellant argues that the Sentencing Judge erred in her application of *Gladue* and that it was an error for the judge to state that there were no factors specifically related to Mr. Mantla's indigenous heritage that led him to being before the Court. The Appellant argues that the Sentencing Judge did not refer to the Appellant's exposure to alcohol abuse as a child or that he suffered from alcoholism as an adult, including committing the offence under the influence of alcohol.

[62] The Sentencing Judge was aware of and considered the Appellant's personal circumstances, stating:

Kirk Mantla is an indigenous man from Behchokò. He has a partner, Shania Sabourin and together they care for their 2.5 year old daughter. I am told that Mr. Mantla's spouse is "a good influence on him", and as one would expect, is very supportive of him; a letter of support from Ms. Sabourin was filed on the sentencing. His aunt Georgina Mantla has also written a letter of support for her nephew. It is clear that Mr. Mantla has a supportive family, and in return he too supports and is supportive of his family.

Mr. Mantla's mother died when he was 17, and his father had a stroke last year. Mr. Mantla's parents went to residential school, and I am told that their experience was very bad. I accept that this fact alone would have a negative impact on Mr. Mantla. I am told that Mr. Mantla's father drank too much sometimes, but there was no physical violence in the home when Mr. Mantla was

growing up. After Mr. Mantla's mother died, he lived with his grandparents; his grandparents also attended residential school....

A letter of support has been filed on Mr. Mantla's behalf outlining the volunteer work he does in the community. Further, two days ago Mr. Mantla met with Christopher Merklinger, a counsellor in Behchokò, for an intake assessment and to arrange for counselling and/or treatment to deal with his alcohol addiction.

Reasons for Sentence, paras. 12-15.

[63] In this case, the Sentencing Judge was aware of the requirements of *Gladue* and *Ipeelee*. She referred to the systemic factors and the negative effects of the Appellant's parents and grandparents attending residential school. She also noted that she had not been told of any serious or tragic circumstances that the Appellant experienced growing up. In reviewing sentencing submissions, the Appellant's counsel had not referred to any specific serious or tragic circumstances in the Appellant's background that led him to be before the Court. The Sentencing Judge also referred to the Appellant's specific personal circumstances in her decision and was aware of the impact of alcohol on his life. Therefore, I am unable to conclude that she erred in her analysis of the Appellant's circumstances as an aboriginal offender.

Application of the Test

[64] The Appellant argues that the Sentencing Judge did not approach the joint submission from a position of restraint as she was required to do and in considering the joint submission, the Sentencing Judge applied the "fitness" test rather than the more stringent "public interest" test mandated in *Anthony-Cook*.

[65] In *Anthony-Cook*, the Court emphasized that a joint submission should not be rejected lightly and that sentencing judges must exhibit restraint:

rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system.

Anthony-Cook, *supra* at para. 42.

[66] This is a more stringent test than the "fitness" test or the "demonstrably unfit" test which were rejected in *Anthony-Cook*. It requires that a joint submission be so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in

the proper functioning of the criminal justice system.” *Anthony-Cook, supra* at para. 33.

[67] The discretion of Sentencing Judges to depart from a joint submission is very circumscribed. The Court described rejection of a joint submission as follows (*Anthony-Cook, supra* at para. 34):

Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[68] In rejecting the joint submission, the Sentencing Judge stated:

With all due respect, I find the reasonable person would view this as an example of a *breakdown in the proper functioning of the criminal justice system*. To impose a far more lenient sentence than any sentence Mr. Mantla has previously received for less serious violent offences other than for his very first conviction when he would’ve been 20 years old with no criminal record is contrary to common sense; it is also contrary numerous principles of sentencing, and ignores numerous considerations that have to be taken into account on sentencing. If I were to accept the joint submission in the circumstances I would be rendering a decision that would cause an informed and reasonable public to lose confidence in the institution of the courts. Consequently, I will not accept the joint submission on sentence for this offence.

Reasons for Sentence, para. 88.

[69] The Sentencing Judge was clearly concerned about a number of issues including the Appellant’s criminal record, parity, the harm done to the victim and the community and whether the joint submission addressed those concerns. She referred to these concerns during counsel’s submissions and during her decision. These were valid concerns in the circumstances of the case.

[70] The Appellant argues that the Sentencing Judge was wrongly focused on parity and concerned with the fitness of the proposed sentence rather than the public interest test. I do not agree. In determining whether a joint submission is so “unhinged from the circumstances of the offence and the offender” or is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case”, it will be necessary to consider other cases.

[71] Sentencing an offender does not occur in a vacuum, isolated from considerations of other offenders and other offences. It is difficult to imagine how

a Sentencing Judge would determine what a reasonable person's expectations might be regarding an appropriate sentence without some consideration of the similarities and differences in sentences imposed on other offenders for similar offences.

[72] The Appellant also complains that the Sentencing Judge referred to her own decisions in her reasons, many of which were distinguishable. There is no prohibition on a judge referring to their own cases and in a small jurisdiction like the Northwest Territories, with only 4 Territorial Court Judges and 4 Supreme Court Judges, it is sometimes inevitable. Moreover, this ignores the Sentencing Judge's purpose in referring to the cases which was to address the harm done to the community of Behchokò. The Sentencing Judge listed some crimes of violence that she had personally dealt with over the 20 years that she had been going to Behchokò to illustrate that violence, such as that committed by the Appellant, also does harm to the community. She stated at para. 36:

Crimes of violence make not only the victim of the crime, but each one of us, feel a little less safe. The effects of violent crimes are even more so in small communities, perhaps because we do not expect small communities to be as violent or to have such serious crimes committed, perhaps because often in smaller communities most of the community may know the victim, and the harm done to the victim is just that much closer to those who know him or her.

[73] The proposed joint submission involved a conditional sentence order. Section 742.1 of the *Criminal Code* sets out the criteria for the imposition of a conditional sentence. There are offences for which a conditional sentence is not available. A conditional sentence can be imposed for assault causing bodily harm where the Crown proceeds summarily, which was noted by the Sentencing Judge.

[74] In order to impose a conditional sentence, the court must be satisfied that the conditional sentence would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing.

[75] The Sentencing Judge concluded that, given the Appellant's criminal record for offences of violence and offences against the administration of justice and that the Appellant had not taken counselling or programs to address his alcohol abuse, she was not satisfied that the Appellant serving his sentence in the community would not endanger the community.

[76] With respect to the fundamental purpose and principles of sentencing, the Sentencing Judge concluded that a conditional sentence would could not achieve the purposes and principles of sentencing and would "offend the principle of

parity, and would not promote a sense of responsibility in acknowledging the harm done to the victim and the community.”

[77] Once the Sentencing Judge concluded that the pre-requisites for the imposition of a conditional sentence had not been met, she determined that the imposition of a conditional sentence would be contrary to law. She stated (at paragraph 89):

And as Justice Charbonneau explained in *R. v Moore*, 2018 NWTSC 11 (at p. 45), a judge’s discretion is curtailed significantly when a joint submission is proposed, but not to the point of going along with a position that I find is wrong in law.

[78] The Appellant’s counsel has seized upon the term “wrong in law” and argues that the Sentencing Judge erred in referring to the proposed conditional sentence as “wrong in law” which conflated appropriateness and availability and impacted on her assessment of the joint submission.

[79] In the *Moore* case, one of the issues facing the Court was whether a firearm prohibition order could be imposed in sentencing the offender for impaired driving causing death and impaired driving causing bodily harm. Counsel had presented the Court with a joint submission which included the imposition of a firearm prohibition order. The Court ultimately concluded the offences were not offences of violence as required by the *Criminal Code* section. In *Moore*, Chief Justice Charbonneau stated (at p. 45):

As I have explained at length, the joint submission curtails my discretion considerably, but not to the point of going along with a position that I think is wrong in law.

[80] The Court declined to impose the firearm prohibition order because the Court concluded that it was not available. I do not see how this is any different than what the Sentencing Judge concluded in this case: a conditional sentence was not available because, in the circumstances of the case, it did not meet the pre-requisites established by the *Criminal Code*. However, that is not to say that a conditional sentence order would not be available in another sentencing for the offence of assault causing bodily harm.

[81] Ultimately, the focus on this appeal is on the reasonableness of the joint submission. The Appellant plead guilty during the trial as a result of a change in what the anticipated evidence was going to be, the evidence now going to be more

in line with the Appellant's version of events. The change impacted on the Crown's case and the guilty plea was the product of true resolution discussions.

[82] The Appellant pled guilty to assault causing bodily harm which began when he was confronted by the victim. The victim had a steel bar and the Appellant believed the victim was going to hit him. The Appellant picked up a 2x4 and hit the victim across the back knocking him down. Then he kicked him in the face, causing significant, lasting injuries. The victim lost teeth and the offence had a significant impact on him emotionally.

[83] The Appellant was 30 years old and had a criminal record which included:

- 1) A 2007 conviction for assault causing bodily harm with a sentence of a suspended sentence and 18 months' probation;
- 2) Two convictions for assault in 2008 for which he received 30 days' imprisonment on each count;
- 3) Two conviction for assault in 2011 for which he received 4 months' concurrent and 3 months imprisonment;
- 4) A 2013 conviction for assault for which he received 3 months' imprisonment (after taking into account 76 days of pre-sentence custody); and
- 5) 6 convictions for offences against the administration of justice.

[84] Counsel referred to the gap in the Appellant's record but the Appellant's last conviction before this offence was in 2016 for a mischief for which he received a fine and 9 months' probation. At the time of this offence, he would still have been on probation. The gap between offences of violence was 4 years.

[85] The Appellant was intoxicated during the offence and acknowledged that he had an alcohol problem. He had not taken any counselling or addictions programs. It wasn't until February 28, 2018, that the Appellant met with a counsellor to pursue counselling and treatment.

[86] The joint submission proposed a conditional sentence with 6 months of house arrest to be followed by 12 months' probation, with a number of other proposed terms.

[87] Considering the joint submission and the circumstances of the offence and the offender, this is a shocking sentence to propose for someone with 6 prior convictions for violence who also has convictions for offences against the administration of justice and who, after the victim was down on the ground, kicked him in the face.

[88] I find it difficult to imagine that a reasonable and informed person, aware of the circumstances of the case, would find that this is an appropriate sentence. A reasonable and informed person would instead view the proposed sentence as a breakdown in the proper functioning of the criminal justice system. I agree with the Sentencing Judge's reasoning on this point.

[89] I recognize that the discretion of Sentencing Judges to reject joint submissions is very limited, should only occur when the test in *Anthony-Cook* is met and that the rejection of joint submissions will only occur rarely. I fully support those principles. However, in this case, I am satisfied that the proposed joint submission was so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[90] Considering the Appellant's personal circumstances, including his aboriginal background, the sentence imposed by the Sentencing Judge adequately reflects what an appropriate sentence might be, taking into account section 718.2(e) of the *Criminal Code*. I see no reason to interfere with the sentence imposed. Therefore, the sentence appeal is dismissed.

Conviction Appeal

Standard of Review

[91] There are two aspects to the conviction appeal: 1) whether the Sentencing Judge erred in deciding that the Appellant could not withdraw his guilty plea; and 2) whether the Sentencing Judge erred in denying the Appellant an adjournment.

[92] The first issue is a question of law which is reviewed on a standard of correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para. 8.

[93] A decision to grant or refuse an adjournment is a discretionary decision that must be exercised judicially. The test is whether the judge has given sufficient

weight to all the relevant considerations: *R. v Anderson*, 2013 ABCA 160 at para. 8; *R. v White*, 2010 ABCA 66 at paras. 14-15.

[94] The Appellant argues that the Sentencing Judge erred in stating that it was not possible to withdraw a guilty plea when a conviction had already been entered and then in denying the Appellant an adjournment to consider bringing an application to withdraw the plea.

Withdrawal of Guilty Plea after Conviction

[95] On March 2, 2018, the Appellant's counsel concluded her submissions by asking the Sentencing Judge that the Appellant be given the opportunity to consider withdrawing his guilty plea and that she would have to seek instructions on how the Appellant wished to proceed if the Sentencing Judge was considering not going along with the joint submission.

[96] The Sentencing Judge and counsel had the following exchange:

The Court: I don't understand, and perhaps you can enlighten me, a conviction has been entered in this case. Mr. Mantla has accepted the facts. I don't understand how a guilty plea could be withdrawn.

Ms. Langille: This is something that specifically contemplated in Anthony-Cook...

The Court: But not expounded on. That's why - I know that. And I say, but I don't see how that could happen. I know I'm not required to, I may, but in the circumstances, I don't know how it could be done. I believe there may be circumstances where conviction is not entered, but I don't - I can't see in law once a conviction is entered how a guilty plea can be withdrawn.

Transcript of the Sentencing, March 2, 2018, p. 39

[97] The Sentencing Judge and the Appellant's counsel had a further exchange where the Sentencing Judge stated:

Yes. But saying all that is contrary to Section 606 where it says that the accused understands that even if the joint submission is put to the Court, that it is the Court's ultimate –

Transcript of the Sentencing, March 2, 2018, p. 40-41.

[98] A court may permit an accused to withdraw a guilty plea at any time prior to sentence. The decision is a discretionary one and, if exercised judicially, will not be lightly interfered with. *Thibodeau v The Queen*, [1955] S.C.R. 646 at p. 653-654.

[99] In *Anthony-Cook*, *supra* at para. 59, the Supreme Court of Canada contemplated the possibility of an accused applying to withdraw a guilty plea if a joint submission was not accepted stating:

...[I]f the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea. The circumstances in which a plea may be withdrawn need not be settled here. However, by way of example, withdrawal may be permitted where counsel have made a fundamental error about the legality of the proposed joint submission, for example, where a conditional sentence has been proposed but is unavailable.

[100] The Supreme Court of Canada did not elaborate on when a plea might be withdrawn although for a guilty plea to be valid, it must be voluntary, unequivocal and informed: *R v Wong*, 2018 SCC 25 at para. 43.

[101] While the Sentencing Judge may have been mistaken about whether a guilty plea could be withdrawn after a conviction had been entered, she was not ultimately asked to make that determination. Counsel for the Appellant did not seek to withdraw the plea but sought an adjournment so the Appellant could consider withdrawing his guilty plea and to seek instructions from the Appellant.

[102] The exchange between the Sentencing Judge and the Appellant's counsel regarding the possibility of withdrawing the guilty plea, in light of the comments of the Supreme Court of Canada in *Anthony-Cook*, demonstrate that the Sentencing Judge was aware of the possibility but that she was not clear how it could occur given the provisions of section 606(1.1) of the *Criminal Code*. The Appellant's counsel referred to needing to provide additional authorities. The Sentencing Judge's response to Appellant's counsel was "if you had authorities, those should have been with you today." The Sentencing Judge went on to deny the application for an adjournment.

Denial of the Adjournment Request

[103] The Sentencing Judge has the discretion to grant or refuse an adjournment. The circumstances surrounding the denial of the adjournment request have to be examined. The Appellant's trial began on January 11, 2018 and was adjourned to January 12, 2018. On January 12, the Appellant changed his plea to guilty and the

facts were read in. Sentencing was adjourned to February 7, 2018 when counsel proposed the joint submission. The Sentencing Judge advised counsel that she had “significant concerns” about the proposed sentence and advised counsel of her concerns. The matter was adjourned to March 2, 2018 so that counsel could make further submissions in support of the joint submission. Counsel provided a joint book of authorities and made further submissions on that date.

[104] It was apparent from the February 7, 2018 appearance that the Sentencing Judge had serious concerns about the proposed conditional sentence and that there was a possibility that the Sentencing Judge would not go along with the joint submission. Despite this possibility, the Appellant’s counsel did not have final instructions from the Appellant regarding applying to withdraw the guilty plea and was not prepared to make that application on March 2, 2018.

[105] The Appellant and his counsel filed affidavits on the appeal in which counsel deposed that she believed that she would have recommended that the Appellant apply to withdraw his guilty plea and the Appellant deposed that he would have asked his lawyer to “take back” his guilty plea.

[106] The only apparent basis for seeking to withdraw the guilty plea would have been the Sentencing Judge’s rejection of the joint submission. The Appellant argues that, in entering a guilty plea, he relinquished his claim of self-defence which was critical to the plea negotiations. However, in submissions before the Sentencing Judge, the Appellant’s counsel explained the change of plea in relation to the facts changing to a version consistent with what the Appellant believed happened:

Mr. Mantla did wish to go to trial so that a version of the true – what he felt to be the truth would emerge through the Court process.... So once we were at a point where the facts were what he believed actually happened that’s when he was willing to admit the guilty plea.

Transcript of the Sentencing Hearing, February 7, 2018, p. 31-32.

[107] The agreed facts which were what the Appellant believed happened demonstrate that the Appellant’s claim of self-defence likely would not have been successful as they established that the Appellant kicked the victim in the face when he was lying on the ground.

[108] In entering the guilty plea, the Appellant’s counsel acknowledged that she had canvassed the provisions of section 606(1.1) with the Appellant. Section 606(1.1) of the *Criminal Code* states:

- (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
- (a) is making the plea voluntarily; and
 - (b) understands
 - (i) that the plea is an admission of the essential elements of the offence,
 - (ii) the nature and consequences of the plea, and
 - (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

[109] It is difficult to reconcile the possibility of withdrawing a guilty plea when a joint submission is rejected as contemplated in *Anthony-Cook*, with the clear provisions of section 606(1.1). There is no evidence that the Appellant did not understand the provisions of the section or that there was a risk that the Sentencing Judge would not accept the joint submission. The issue was not argued before the Sentencing Judge and has not been fully argued before me but withdrawing the guilty plea in these circumstances seems problematic.

[110] Taking all of this into account, I am satisfied that the Sentencing Judge's decision to refuse an adjournment was a discretionary decision that was exercised judicially. To the extent that the Sentencing Judge erred in stating that withdrawing a guilty plea after a conviction had been entered could not occur, I am satisfied that the error was minor and it did not result in any substantial wrong and no miscarriage of justice occurred. Therefore, the appeal from conviction is dismissed.

CONCLUSION

[111] For these reasons, the sentence appeal and the conviction appeal are dismissed.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
3RD day of May, 2019

Counsel for the Appellant:
Counsel for the Crown:

Ryan Clements
Jeff Major-Hansford

S-1-CR-2018-000024

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN

KIRK MANTLA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT
OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
