

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DARCY BRIAN NERYSOO

MEMORANDUM OF JUDGMENT
(DECISION ON SENTENCE)

[1] Darcy Nerysoo pleaded guilty to manslaughter for causing the death of Davey Firth Stewart. He was before me for sentencing on June 19, 2019. I sentenced him at that time, but said that I would be providing written reasons at a later time. These are those reasons.

[2] I try not to follow up decisions that are already done with further written reasons. I did so in this case because there were a number of issues raised by counsel relating to parity and other cases of manslaughter which have been dealt with by the courts. This was a difficult case in a small community and I wanted to focus my comments on Mr. Nerysoo and the family of the victim, Davey Firth Stewart. This decision follows closely the comments I made in Fort McPherson, with some additions and clarifications.

[3] On June 29, 2018, Darcy Nerysoo was 30 years old and his cousin and good friend Davey Firth Stewart was 31. They grew up together in Fort McPherson,

Northwest Territories. They cared about each other and they were both loved by their families. They had both been drinking very heavily on the day in question. Darcy Nerysoo had been drinking for about a week before this happened.

[4] I got the sense, from the Presentence Report and from what I heard about Davey Stewart, that both young men were struggling with alcohol and trying to find their place in the world. They were good friends and a support for each other in the course of their struggles, which makes this case even sadder.

[5] As indicated, both young men had been drinking very heavily on the night of June 29, 2018. They were over at a mutual friend's house when they got into a pointless fight over nothing. The mutual friend said they were not even making sense at that point and he had no idea what started the fight.

[6] They began by both fighting with each other. There was some wrestling, shoving, rolling around and swinging of fists. At first, they appeared to be evenly matched. Then, according to Darcy Nerysoo in his statement to police, he "lost it"; lost his temper with his friend and cousin. He punched Davey Stewart five times in the head and when he fell to the ground he stomped on Davey Stewart's stomach a couple of times.

[7] Darcy Nerysoo then ended the fight and left the residence. When the fight ended, Davey Stewart was conscious. He was helped to the couch by the mutual friend, who then began to clean up the home. He believed that Davey Stewart had passed out on the couch. He then noticed that Davey Stewart was not breathing. He tried to resuscitate him, without success, and Davey Stewart died.

[8] In an Agreed Statement of Facts, the cause of death was noted as multiple blunt force injuries consistent with a traumatic brain injury. It is on this basis that Darcy Nerysoo has taken responsibility for the death, and I accepted his plea to manslaughter accordingly. It should be noted, however, that the cause of death is not as clear as it usually is in cases like this. The violence Darcy Nerysoo did to Davey Stewart clearly contributed in a significant way to his death and this is a sufficient level of causation in a case of manslaughter. In the same paragraph of the Agreed Statement of Facts, however, it is noted that Davey Stewart's blood alcohol was slightly less than six times the legal limit. This is a stunning level of intoxication.

[9] I am not suggesting that the alcohol killed him. This was not the evidence I was given. It is agreed that the injuries he suffered were the cause of his death and

I accept this. I find it hard to believe, however, that such a gross level of intoxication was not at least a contributing factor. The injuries were not as specific as I am used to seeing in dealing with cases like this. Typically, we will see broken bones, ruptured internal organs or a clear indication of a hemorrhage in the brain. It is not as clear in this case.

[10] I make this point for a reason. The nature of the injuries speaks to the nature of the violence. They are connected. This was a consent fight that turned into a beating. It was a bad beating. We all know, both from common sense and basic life experience, that there are many fights that occur throughout this territory and this country on a daily basis in which people end up beaten, often badly. The vast majority of those people do not die.

[11] It is hard to find cases that are directly on point with the facts of this case, as the lawyers and I discussed during submissions. There are not many cases of consent fist fights that result in a death and a sentencing.

[12] There is a risk of death in any serious beating and that is acknowledged by Darcy Nerysoo through his guilty plea. There is always a risk associated with violence, but there are usually hallmarks of greater violence than are present in this case, even when no weapons are used. Some of the more common things we see are: choking; kicks to the head; sucker punches (an unprovoked attack on an unsuspecting victim, causing a fall from a height); or a fragile victim, as in one of the cases that was referred to where the victim was an 87 year old man; or a victim who is asleep when the attack begins.

[13] We also sometimes see repeated blows to an already unconscious victim. It was fairly noted in the Agreed Facts that there was no indication that Davey Stewart was ever unconscious during the fight. He was not lying insensate on the ground while blows were struck.

[14] The case of *R v Bourque*, 2015 NWTSC 48 (*CanLII*), a case from this Court relied on by the Crown, contains several of the hallmarks of greater violence referred to above. As in this case, there were two young men involved, but the accused was clearly the aggressor. He was dramatically larger and more powerful than his victim. He punched him suddenly in the head several times, knocking him out. The victim collapsed into a chair. People attempted to stop Mr. Bourque, but he continued punching the unconscious man, causing him to fall from the chair to the floor, striking his head on a piano on the way down. He then continued punching the victim while he lay unconscious on the floor. The Crown sought a

sentence of 5 to 5 ½ years and this was essentially joined by defence in recommending 5 years. Both counsel agreed that the range of sentences for similar cases was 3 to 6 years.

[15] It should be obvious that this case involves significantly less moral culpability than in Bourque.

[16] In sentencing most criminal cases, the court has to consider not only the actions and degree of responsibility of the accused, but also the amount of damage that resulted from those actions. In every case of manslaughter, however, there is a dead person. In every case, somebody has lost someone and that loss is tremendous. In this way, there is no difference between manslaughter and murder. The difference with manslaughter is that the sentencing judge has to carefully consider the moral culpability of the person who is found guilty. Moral culpability refers to the degree of guilt. It has to do with the behavior and the thought processes we infer about a person who is found guilty of manslaughter.

[17] In engaging in the balancing of aggravating and mitigating factors, levels of moral culpability and comparisons with other cases, judges have a difficult task in cases of manslaughter; in fact, in cases of homicide more generally. The balancing is never intended to diminish the loss suffered by those left behind after a death. This loss is tremendous no matter who we are dealing with or what circumstances we are dealing with. I need to deal specifically with the factors associated with Darcy Nerysoo. This does not mean that I have forgotten about the awful harm caused by his behavior.

[18] The task is to figure out where this case fits within the general spectrum of cases dealing with an unlawful death. Aside from some complexities that I do not need to address in this case, the difference between murder and manslaughter is the intention to kill; the intention to cause this degree of harm.

[19] Moving to manslaughter, we are dealing with a situation where death has been caused by an unlawful act by someone who did not intend the death of the victim. It is absolutely clear on the facts of this case that Darcy Nerysoo had no intention to kill Davey Stewart. I have to consider how this case fits with other cases of manslaughter to determine an appropriate sentence.

[20] This was a bad beating. I have seen the photographs. There is no question that, if Davey Stewart had not died, this would have been an assault causing bodily harm and would have fallen at the upper end of such a charge.

[21] In terms of a manslaughter, however, I find that this case falls at the lower end in terms of the actions that led up to the death. This was a consent fight where Darcy Nerysoo took things too far and death ensued. There were no weapons involved.

[22] Manslaughter describes a spectrum between near accident and near murder. What we have to determine in each case of manslaughter is where it fits on that spectrum. Was it close to accident? Was it close to murder? This question is primarily concerned with is the inference that can be drawn from the circumstances about the intentions of the accused.

[23] What we look at are aspects of the case that tell us whether somebody had an intention that was close to the intention required for murder; close to the intention to kill. Did they do something that objectively put someone else at serious risk of death? That is why death from a stabbing to the chest is significantly different from death from a beating. This is why choking, kicks to the head, and repeated blows to an unconscious victim are all more serious than the sort of beating that took place in this case. Anybody who is doing these sorts of things should and is usually assumed to know that there is a serious risk that the person they are assaulting could die.

[24] Apart from the inherent risk in all violence and more particularly blows to the head, there is nothing in the circumstances of this case that should have caused Darcy Nerysoo to anticipate the possible death of Davey Stewart. It is for this reason, primarily, that I find that it falls at the lower end of the spectrum for manslaughter.

[25] Once I have determined where I believe the circumstances of the case place it in terms of the spectrum of possibilities, I have to go on to consider a number of things about the person who has been convicted. The first thing I look for are indications of remorse. I watched Darcy Nerysoo carefully during the course of these proceedings, and he is obviously heartbroken about this. He appears to be someone who is very contained in his emotions, but he was quietly crying. He is clearly deeply sorry for what he has done. This was demonstrated very early on in this case. Within an hour of being arrested he confessed to the police. From the very beginning he told his lawyer that he wanted to plead guilty.

[26] The fact that this case took approximately a year to reach the sentencing stage in no way diminishes these indications of remorse. Disclosure had to be produced and reviewed. In the general picture of serious criminal cases, this case

took place quickly. I take from the early guilty plea, the waiving of a preliminary inquiry, and the fact that the medical evidence was not challenged that Darcy Nerysoo is genuinely and deeply remorseful about what he did and wants to take responsibility for it. I also take this from his comments to the court.

[27] Darcy Nerysoo has a criminal record. People should never be punished again for prior offences, but courts look at criminal records to get a picture of the type of person somebody is in terms of the risk they pose to the community.

[28] Darcy Nerysoo has been out of trouble for ten years. There was a brief period of time when he was a very young man that he got into trouble three times, the most serious of which resulted in a jail sentence of 60 days for an offence of violence. I took note of this record, but it does not point to a person who is a continuing problem for their community. This is something the court considers. Part of our role is to protect the communities we serve. There are some people who reach a point in their behavior where they have to be sent away not only for what they have done but also more generally to protect other people from what they will likely do in the future. This reasoning does not apply in this case.

[29] Darcy Nerysoo comes from a good family. He has important supports in his community. Those supports do not take away from the fact that he has had a difficult life, but they give me hope that he will be able to find his way and move forward in a positive direction.

[30] I have to say that the moving expressions of forgiveness give me hope as well. Fort McPherson is a small community where people care about each other. Something like this can destroy fragile relationships that are already tested by the aftermath of the residential schools program and other historical challenges that just made life more difficult. It is a powerful thing when people who have suffered a loss of this magnitude can say that, while this can never be forgotten, that forgiveness can triumph. Relationships can be re-forged, obviously never exactly the same as they were before, but perhaps in some way that works for everybody.

[31] There are a number of what are commonly referred to by the courts as *Gladue* factors. I do take note of these factors, but they are mostly factors that are often present in a lot of small indigenous communities. Specific to this case, Darcy Nerysoo's birth parents were unable to care for him for various reasons. There is an indication that his mother may have consumed alcohol while she was pregnant with him. There is poverty and a lack of opportunity.

[32] Darcy Nerysoo has excellent land skills. He struggled in school. He was born with a cleft palate. This was corrected through surgery, but he was left with a speech impediment and scarring which have led to a lifetime of bullying and teasing. This is an important consideration. It is easy to say, “Oh, well, he comes from a good home, he had good supports”, but he is also someone who has struggled. He has struggled to be accepted. He has struggled with alcohol and loneliness, and with the loss of people who were close to him through tragedy.

[33] Section 718.2(b) of the *Criminal Code*, and the Supreme Court of Canada decisions in *Gladue* and *Ipeelee* guide courts with the proposition that we should be especially careful in sentencing indigenous persons in recognition of the legacy of the residential school system and other harmful interventions by government. These have led, over many decades, to a cycle of poverty, frustration, chronic abuse of alcohol and violence; all of which have led to the overrepresentation of indigenous persons in the jails of this country.

[34] Every one of us who is part of this system for any length of time recognizes that there are too many indigenous people in jail and that jail does not make communities healthier. As I stated earlier, there are some times when the court has no choice but to remove someone from the community for a long time, because they are simply too dangerous to be dealt with on an ongoing basis. As I also stated earlier, Darcy Nerysoo is not one of those people.

[35] This case has provided an opportunity to consider two of the positions we can take as a justice system to serious violence when it occurs in a small community. In asking for a term of imprisonment of seven years, the Crown Attorney takes the position that greater periods of jail are required to deter this kind of behavior. There are simply too many people being hurt and something must be done. This is no doubt a very legitimate sentiment and reflects a brutal truth. In asking for three and a half years, Darcy Nerysoo’s counsel takes the position that a lesser period of custody is what is required to take into account all of the general factors in the sentencing of indigenous offenders as well as the specific factors that have affected his client.

[36] The criminal justice system is, for the most part, clumsy and ugly. It is a hammer. We are not good at therapy and this is not a particularly restorative arena. We have limited tools, and one of the dangers we confront can be described by a cliché: when you only have a hammer, every problem can look like a nail.

[37] I struggled with this and had some difficulty coming up with what I believe is a fair resolution to this case; a fair sentence. There has been a great loss and there needs to be a serious enough sentence to recognize the need for denunciation. There is a need to recognize that this sort of behavior cannot be tolerated.

[38] With respect to deterrence, there have been debates for generations. There is no question that the possibility of criminal sanctions, large or small, would have played no part in the highly intoxicated thought processes of Darcy Nerysoo on that fateful night. There is no way in which any kind of deterrence would have been effective in stopping this particular event.

[39] This is not the end of the analysis, however. The above compelling logic is often used by defence counsel to suggest that there is no point to deterrence at all. My response to this is as follows. While deterrence may not have been effective in stopping any particular crime, I believe it obvious that without any deterrence, with no police and no jail, there would be a lot more crime. It is a balance, and the need for denunciation and deterrence are real and apply in this case.

[40] But when I am considering the appropriate sentence for an indigenous offender in a small community whose life contains a number of the factors I am supposed to consider in these types of cases, the balance can perhaps be shifted a little, such that the more punitive aspects of sentencing like denunciation and deterrence are a bit less important.

[41] When a court is trying to determine an appropriate sentence in a case like this, where the remedial provisions of the Criminal Code so clearly apply, I am of the view that the protection of the public is both a greater and more nuanced consideration. On the one hand, we can see that there are too many people in jail because of violence resulting from social problems. This will not be fixed by either putting more people in jail or putting them in jail for longer. But there are also circumstances in which communities and people have to be protected from some people, and the courts have that unfortunate and unpleasant duty.

[42] However, where there is not a clear indication of risk to the public, where there is a clear indication of remorse and where someone wants to make amends, the court is able to take a more restorative approach to sentencing and exercise restraint.

[43] In this case: because of the guilty plea and other clear demonstrations of remorse; because of the circumstances of the offence and my assessment that the

usual aggravating factors in manslaughter cases were absent; because I am dealing with an offender with a dated and relatively minor criminal record which indicates a lack of risk to the community; because Darcy Nerysoo has the sort of supports that make his plan to live an alcohol free life possible, I believe that the appropriate sentence is 3 years of imprisonment.

[44] This is 1095 days. I am giving him credit for being in custody since June 29, 2018, which is 357 actual days. At a rate of 1.5 to 1 as is standard when dealing with remand time, he has credit for 535 days, leaving 560 days left to serve.

[45] This will be followed by three years of probation. In addition to the terms suggested by counsel, I am going to prohibit the consumption and possession of alcohol. Darcy Nerysoo has indicated that he wishes to abide by such an order. This terrible event seems to mark a turning point in his life. This term of the order is somewhat punitive, but it is primarily to assist him in making healthy decisions. There will be times when he is tempted to drink and an order prohibiting this may assist him in making the best decision. As requested by the Crown Attorney, there will also be 200 hours of community service, to be performed within one year of release, as well as a term to take treatment.

[46] Ancillary orders as follows: section 109 firearms order with a 113 exemption. There will also be a DNA order.

A.M. Mahar
J.S.C.

Dated at Yellowknife, NT, this
2nd day of December, 2019

Counsel for the Public Prosecution Service of Canada: Alexander Godfrey
Counsel for Darcy Brian Nerysoo: Ryan Clements

S-1-CR-2019-000 008

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