*R v Abdullahi,*

*2023 NWTSC 12*

 S-1-CR-2022-000040

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

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**-v-**

**YAHYA MUSA ABDULLAHI**

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**Transcript of the Sentencing Reason of the Honourable Deputy Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 16th day of May, 2023**

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**APPEARANCES:**

C. Brackley: Counsel for the Crown

L. McClean: Counsel for the Defence

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Charges under s. 344, 346(1.1)(b), and 346(1.1)(a.1) of the *Criminal Code*

**There is a ban on the publication, broadcast or transmission of any information that could identify the complainant pursuant to s. 486.4 of the *Criminal Code*.**

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(TELECONFERENCE COMMENCES)

THE COURT: Today I have to impose a sentence on Mr. Abdullahi for the two charges that he pleaded guilty to earlier this month on May 1. The first charge is for having used a restricted firearm to rob T.D-E. on November 1, 2021. The second charge is for having been in possession of cocaine for the purposes of trafficking on November 4, 2021. Both of these charges are very serious, but the facts on the robbery charge are particularly egregious.

 The victim of the robbery had been renting a room in a home in Yellowknife. On October 31, 2021, she came home to find three men waiting for her in the living room. The accused was one of them.

 These men believed that she had stolen some crack cocaine from them. They demanded that she pay them $6,000 or that she return the cocaine. She told them that she had not taken it, but they did not believe her. The men told her to go to her room. One of them had a pistol that he pressed against her head as he ordered her to the room.

 The three then proceeded to assault her. She was hit on the back of her hands and on the head with the gun. She was hit with a bat. Chunks of her hair were cut with a machete and some scissors. They threatened to kill her if she did not give them the money for the crack that they believed she had stolen. They also threatened to kill her if she told police about what happened. They stole some of her identification documents and her cell phone.

 An unusual feature of this case is that the accused filmed parts of this attack using cellphones. This footage was eventually retrieved by police during the investigation, and the videos were discovered. They were played at the sentencing hearing in this matter, and they were made exhibits. They were very disturbing to watch.

 This was a cruel, callous attack. These three men ganged up on her in her own home. Aside from striking her with a firearm, they put it to her head, they dragged her around the floor. Her mouth and her wrists were taped at some point while she was being attacked. They assaulted her physically but psychologically as well. The videos show that as they are assaulting her, they call her a “stupid bitch” a number of times. As they are chopping chunks of her hair with a machete, they comment on how beautiful her hair is and they all laugh.

 The objective was clearly to terrorize, humiliate and dominate someone who was at their total mercy. Did they film this to show others as a means of further intimidation, carrying out their illicit activities? Were they going to publish it somehow? Or did they just want to look at it after for another good laugh? The story does not tell.

 But this attack that Mr. Abdullahi admits being a part of and the behaviour described in the facts and shown in the videos is simply put, disgusting.

 The victim was injured as a result of the assault. She had a superficial cut to one of her toes, bruising on her legs, arms and face, and cuts, bruising and swelling to her knuckles.

 Aside from the physical injuries, one can only imagine the terror that she experienced. She has not prepared a victim impact statement, but it does not take a lot of imagination to figure out that the emotional scars that this left her with will be long lasting.

 The victim did not report this right away, but she did report it shortly thereafter on November 4.

 Police began an investigation, including surveillance on the house in question. And eventually, this led to the arrest of all three men. One of them, not the accused before me, was at the time of the arrest carrying a Smith & Wesson 38 Special revolver that was loaded. As for the accused, he was found in possession of 63 grams of cocaine.

 Other items were found during the execution of the search of the bedroom where he and one of the other men were staying. This included money, cell phones, scales, more cocaine and a machete. Mr. Abdullahi acknowledges that the cocaine found in his possession was for the purposes of trafficking.

 Crown and defence have presented a joint submission on this case for a sentence of six years for the robbery and two years concurrent on the possession for the purposes of trafficking. The law that governs the responsibility of the sentencing judge when a joint submission is presented was laid out by the Supreme Court of Canada in the case of *R. v. Anthony-Cook*, 2016 SCC 43. The threshold that must be met for a judge to reject a joint submission is incredibly high. The Supreme Court said that rejection is open to the sentencing judge only if the joint position is:

… so unhinged from the circumstances of the offence and of the offender that imposing that sentence would lead reasonable persons who are aware of all the circumstances and of all the benefits of resolving cases without trial to believe that the proper functioning of the justice system has broken down.

It follows that while in general the sentencing powers of a judge are broad and highly discretionary, that discretion is considerably curtailed when a joint submission is presented. And it goes without saying that what the Supreme Court of Canada says is binding on me.

 Counsel acknowledged at the sentencing hearing that the joint position was quite lenient. I could not agree more. I do recognize that the guilty pleas are significant, especially on the robbery charge, because it has spared the victim from having to testify about what happened to her. Presumably as part of her testimony, she would have had to be shown the videos of the assault. Given how sickening I found watching those videos, I can barely imagine what the experience would have been for her.

 At the same time -- and as I said during submissions -- there is something profoundly ironic that a person who subjects another person to cruel and traumatic treatment later gets to benefit from sparing that person the trauma of having to talk about it in court. And I can understand why members of the informed public might struggle understanding that concept. That being said, in the day-to-day life in courtrooms the reality is that victims of serious crimes are often revictimized by the harshness of the trial process, and sparing them that is in fact sparing them a lot.

 Another element to consider is totality, and I think that is another concept that members of the public might have difficulty understanding at times. The principle of totality says that if a person is sentenced for more than one crime, the sentencing Court has to be mindful of the global effect of the sentence on the offender to make sure that that global effect is not crushing.

 So it is not just about adding up what would otherwise constitute appropriate sentences. The duty is to adjust -- practically, this means "reduce" -- each individual sentence to ensure that the overall effect is not crushing on the person being sentenced. And that is particularly important when dealing with an offender who is as youthful as Mr. Abdullahi is. Here, totality is the reason why a concurrent sentence is being suggested on the drug charge.

 Standing alone, the possession of cocaine for the purposes of trafficking engages a starting point of three years in sentencing, which must then be adjusted to reflect the aggravating and mitigating factors of the case. So the two years being proposed on a guilty plea is certainly not out of order, but making it concurrent in effect means that this very serious offence will not give rise to any additional punishment for Mr. Abdullahi.

 I also have to consider parity. That principle says that people in similar situations convicted for similar crimes should receive similar sentences. Here one of the other men involved in this has been sentenced to a total of nine years, but the circumstances were different as he was sentenced on a third and very serious charge for conspiracy to traffic in cocaine. Mr. Abdullahi is not being sentenced for that conspiracy, so his sentence necessarily has to be less than that imposed on the other man. And as for the third person involved in this, I was advised he has not yet been dealt with.

 The guilty plea has avoided the trial and the victim of the robbery having to testify. It has saved, I am told, three weeks of court time. Counsel advised that despite the videos, there were defences available that the accused has given up by pleading guilty. Counsel know their cases, and this is one of the reasons why joint submissions that are the product of resolution discussions between counsel have to carry such a great weight.

 Mr. Abdullahi was born and raised in Edmonton, I was told. He is still in his early 20s. He has a criminal record with a number of entries, but nothing nearly as serious as what I have to sentence him for today. He grew up in a large family. I was told he has 10 siblings. I was also told he grew up in extreme poverty. But according to what he told his counsel, it was also a loving home and he speaks very highly of his parents.

 I was very struck by the fact that when I asked him if there was anything that he wanted to say at the conclusion of counsel’s submissions, aside from apologizing, he made a point of telling me that these offences are not a reflection of how his parents raised him and that they did their best. If Mr. Abdullahi’s parents are aware of what he is being sentenced for today, they must be appalled and they must be heartbroken.

 I understand how growing up with difficulties can lead to mixing up with the wrong circles and to criminality, but, Mr. Abdullahi, what you did to that woman, it is beyond getting involved with the wrong crowd, well, well beyond that. It is beyond stealing, it is beyond getting into fights and it is even beyond getting into trafficking drugs. It is in another category all together. It is cruel and sick.

 And I hope that these very sad circumstances have shaken you up. I hope you felt shock when you watched those videos. I have no way of knowing what goes on in your head, or what is going on in your head right now as I say these things to you, but I really hope that you are sincere in your apology and I really hope you are sincere in what you say you want to do with your future so that you can make your parents proud and not ashamed.

 You say that they did their best, and I believe that so they deserve better and they deserve for you to be your best.

 I have taken into account the cases that counsel referred me to, in particular *R. v. McIntyre*, 2016 ONSC 7498 and *R. v. Treleaven*, 2018 ONSC 1707 in considering the range of sentences that are imposed when firearms are used in the context of robberies.

 But the distinguishing feature of Mr. Abdullahi’s case is that I do not think the heart of this event was about stealing the victim’s papers or her phone. The goal evidently was to terrorize her. They also robbed her, and that is the charge that the Crown pursued. But this is factually different, for example, from the *McIntyre* case where the objective was to steal the victim’s luxury car.

 I am not of course saying that using firearms to rob people is not serious; obviously it is. But fundamentally, this event was not about stealing things from the victim. Fundamentally, this was about intimidation, humiliation and inflicting terror presumably to send a message over this perceived theft of drugs. And that, in my view, cries out for the highest form of denunciation.

 The sentence being proposed, as counsel have pointed out, is not an insignificant sentence, especially not for someone of Mr. Abdullahi’s age. Still, I have to say I had to think very carefully about whether I could go along with it, and I want to make it clear that I do not say this in a way that is critical at all of counsel. The Crown explained its reasons, and I understand them. Defence counsel pointed out that Mr. Abdullahi gave up defences and saved court resources by avoiding what would have been a complex trial, and I understand that too.

 The concern I am left with and struggled with is the public interest, the protection of the public and the message that courts need to send to those who choose to involve themselves in this type of activity, the drug trafficking but also all the collateral damage it causes. This case is a very good example of that collateral damage, and there has been more and more of that in recent years.

 Those who have lived in the city of Yellowknife for a while have seen changes in the criminality in the city. Some of the things we see in the courts, hear about in the news and I am sure many that we never hear about are things that we would not have fathomed happening in this town 30 years ago. This Court has talked in several cases about the impact of drug trafficking, how it tears the fabric of the community, how it makes vulnerable people even more vulnerable and the immense problems it leads to.

 And there may come a point where the Courts have to put denouncing that, and taking a much harsher stand on those things than it has up to now, the priority.

 All that being said and after careful consideration, I have concluded that the joint submission is not so lenient as to justify my not following it, based on the principles of law that I talked about previously. So I will follow it.

 I do so understanding and respecting the fact that counsel know their case, have put a lot of thought into this and have given me the reasons why they arrived at that position, which are all, as I said, valid considerations. But I must say, to me it is very close to the line and the sentence that I am about to impose should not be taken as having any precedential value whatsoever for this type of crime because it is not the sentence that I would have imposed had it not been for the joint submission.

 On the robbery charge, the sentence imposed will be six years. For the 544 days spent in pretrial custody, I will give Mr. Abdullahi 816 days credit, again, in line with the principles laid out in *R. v. Summers*. And that credit will be applied to the count of robbery, which by my count would leave a further jail term of 1,374 days, which is three years and 279 days.

 On the other count, the sentence will be two years concurrent. I will make a DNA order. It is mandatory because robbery is a primary designated offence. I will issue a firearms prohibition order commencing today expiring 10 years from release. I will waive the victim of crime surcharge given the duration of the jail term that I am imposing and also Mr. Abdullahi’s overall circumstances.

 And finally, I will grant the publication ban and sealing orders with respect to the photos of the victim’s injuries and the videos seized from the two cell phones, those being Exhibits A, C and D included in the agreed statement of facts, Exhibit S-1.

 I am granting these orders applying the same principles that I did and articulated in *R. v. St. Croix*, 2021 NWTSC 13 because I find that the usual open court principle in this case must take second place to the protection of the complainant’s dignity and personal integrity. And on balance, the public should not have access to these images.

 I want to express my thanks to counsel for their work on this case and for their submissions. Ms. Brackley, I know you were not counsel at the sentencing hearing, but can you see anything that I might have overlooked?

C. BRACKLEY: The only other order I wanted to address, Your Honour, is if there can be a -- I’m seeking a non-communication order with the named complainant T.D-E. under 743.21 of the *Criminal Code*.

THE COURT: Okay. I am just going to look that up because I do not think it was mentioned when the terms of the joint submission were presented to me at the sentencing hearing.

C. BRACKLEY: 4 -- 743.21.

THE COURT: 743.21 … 743.21?

C. BRACKLEY: Yes.

THE COURT: This was not mentioned as part of the joint submission. Mr. McClean, do you have any objection to that request that is being made now?

L. MCCLEAN: No, Your Honour. Just perhaps for Mr. Abdullahi’s benefit because it hadn’t been discussed previously, we’re discussing an order that you can’t contact the complainant in this matter for the period of time that you are in custody. Do you understand that, Yahya?

THE ACCUSED: Yeah.

THE COURT: All right. I will issue that order. I do not think I have issued an order like that before and if I have, it has been a while. Is it recorded on the warrant of committal ordinarily, or does the Crown prepare a separate order?

C. BRACKLEY: I believe it’s -- goes with the warrant of committal, Your Honour.

THE COURT: On the warrant of committal?

C. BRACKLEY: Yes. I believe so.

THE COURT: All right.

C. BRACKLEY: And my apologies that this wasn't part of the joint recommendation. I just thought based on the facts it made sense to have the non-communication order in place.

THE COURT: Oh, it certainly does. All right. So, Madam Clerk, the warrant of committal should be endorsed to reflect that -- did you want to add anything, Mr. McClean? I may have cut you off.

L. MCCLEAN: No, Your Honour.

THE COURT: Okay. So the warrant of committal will be endorsed to reflect that I am making an order pursuant to section 743.21 prohibiting Mr. Abdullahi from communicating directly or indirectly with the complainant on the robbery charge. She should be identified by name on the warrant of committal, Madam Clerk.

THE CLERK: Yes, Your Honour.

THE COURT: For the duration of the custodial period. Anything else you want to raise, Ms. Brackley?

C. BRACKLEY: No, that’s all. And just to confirm, Your Honour, it’s -- the publication ban under 486.5 is with respect to the identity of the complainant; is that correct? Yes?

THE COURT: Yes. That was issued on the other occasion.

C. BRACKLEY: Yes. Thank you. Okay. And then the sealing orders with respect to Exhibits A, C and D is also granted?

THE COURT: Yes.

C. BRACKLEY: Yes.

THE COURT: And so your office should submit a draft order for that. A temporary sealing order was made, but you should submit a draft order for the permanent publication ban and sealing order so that it can be attached to the agreed statement of facts.The envelopes that were included in the agreed statement of facts that contain the DVDs are already sealed.

C. BRACKLEY: Okay.

THE COURT: But there should be a written order just for future reference that it is -- makes it very clear what it is. This is what we normally do.

C. BRACKLEY: Okay. Just to clarify that it’s not a temporary order any longer as well --

THE COURT: No, it is --

C. BRACKLEY: It’s a permanent order?

THE COURT: No, no, it is a -- yes. Permanent order.

C. BRACKLEY: Yes. Thank you. That’s just what I wanted to clarify.

THE COURT: it was made temporary last time because the Crown advised the media outlets had been served but did not yet have the documents establishing proof of service.

C. BRACKLEY: Okay.

THE COURT: So I wanted to wait until those were filed before issuing permanent orders.

C. BRACKLEY: That was the only issue I wanted to confirm. Thank you.

THE COURT: Okay. Mr. McClean, do you have anything else or anything that I might have overlooked?

L. McCLEAN: No, Your Honour.

THE COURT: Thank you. Mr. Abdullahi, as I said, I hope you pursue the things that your lawyer told me in submissions that you wanted to do, continuing your education. It sounded like you had a few options for work, and I really hope you are sincere and that you realize the magnitude of what you did. And I guess time will tell.

 And I hope you succeed in making this really a turning point, a permanent turning point in your life. Because you have a lot of life ahead of you. So there is still ample time to make something good of it and make your parents proud.

(TELECONFERENCE CONCLUDES)

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Veritext Legal Solutions, Canada, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 5th day of June, 2023.

Veritext Legal Solutions, Canada

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