Date: May 8, 2020
File: T-1-CR-2020-000033
T-1-CR-2020-000513
T-1-CR-2020-000748

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DANIEL EDDY LUCAS

REASONS FOR SENTENCE
of the
HONOURABLE JUDGE DONOVAN MOLLOY

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	May 8, 2020
Counsel for the Crown:	A. Kuntz
Counsel for the Accused:	S. Whitecloud-Brass

[Sections 145(5), 266 and 267(b)x2 of the *Criminal Code*]
[Sentencing]

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A. INTRODUCTION

[1] Intimate partner violence is a scourge across Canada and in particular in the Northwest Territories. In this jurisdiction, sentencing for these offences is more complicated when both offender and victim are Indigenous persons.

[2] The *Criminal Code* mandates that courts give *particular attention to the circumstances of Aboriginal offenders* (section 718.2(e)).

[3] Since September of 2019, courts are also statutorily mandated to give particular attention to the circumstances of Aboriginal female victims (sections 718.04 and 718.201) where they are victims of intimate partner violence.

[4] The appropriate balancing of these statutory mandates is something that has yet to be definitively determined, particularly in cases of intimate partner violence where both the offender and victim are Indigenous.

[5] Besides the legal issues, as a matter of practicality, repeated omissions by the Crown to speak to whether a victim of intimate partner violence is Indigenous,

and its frequent unpreparedness to advise if prior convictions for violence involved intimate partners, significantly detract from the ability of this Court to impose sentences that give effect to Parliament's intentions as reflected in the recent amendments to the *Criminal Code*. These omissions are of concern given that they have been raised (on the Court record) numerous times in the recent past with respect to the Crown's sentencing submissions in cases involving violence against intimate partners.

[6] The above difficulties in imposing a fit sentence can be compounded by the degree to which the ability of judges to exercise their own discretion to determine a fit sentence is circumscribed by the interpretation of the decision of the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[7] While judges, exercising their own unfettered discretion, may not impose sentences that are unfit or demonstrably unfit, such sentences must be acceded to where they result from joint submissions by legal counsel. This stems from the fact that *Anthony-Cook* mandates that judges not interfere with a joint submission unless it is *so unhinged from the circumstances of the offence and 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*.

[8] This legal threshold to depart from a joint submission is sufficiently high that I conclude that I must accept the joint submission made here by Crown and Defence. I therefore must impose a sentence upon Mr. Lucas (an offender with at least seven prior convictions for assaulting intimate partners-one of whom is a victim of the current offences before me) that is demonstrably unfit and fails to recognize the danger that Mr. Lucas poses to his current or prospective intimate partners. The sentence is also inadequate in effecting general deterrence.

[9] This is not an isolated occurrence. Where it occurs, some might question whether the actual functioning of our criminal justice system is unhinged. Part of the role of a judge is to decide, on an independent and impartial basis, what represents a fit sentence. In the case of joint submissions, as a matter of practical reality, this is often no longer possible.

[10] I agree that in more amenable circumstances, legal counsel are entirely capable of formulating joint submissions that are fair and consistent with the public interest. Anyone that has toiled on the front lines of our criminal justice system is aware however that prosecutors and legal aid counsel are generally overworked and under unrelenting pressure to keep cases flowing. By virtue of their

occupations, they are also regularly exposed to material that has a high potential to cause vicarious trauma. Theirs is an environment of significant pressure. To effectively preclude judicial discretion in the case of joint submissions generated in such environments will continue to result in sentences that are unfit.

B. CIRCUMSTANCES OF THE OFFENCES

[11] On January 4, 2020 Mr. Lucas committed a common assault (section 266) on an intimate partner, Lisa Rogers. For reasons that are unclear, he became upset with her while they were consuming alcohol and proceeded to grab her by the face and forcefully squeeze her face.

[12] On February 29, 2020, Mr. Lucas committed an assault causing bodily harm on an intimate partner, Michelle Kangegana. For reasons that are unclear, he became upset with her while they were consuming alcohol and threw her to the ground upon which he punched her in the head and her eye, causing significant soreness and bruising. Pictures of the injuries were tendered by the Crown.

[13] On March 3, 2020, Mr. Lucas committed yet another assault on Lisa Rogers (his ninth assault upon her), this one causing her bodily harm. He became upset with her while they were consuming alcohol because she wanted to go to sleep. Mr. Lucas punched Ms. Rogers in the head and tore a significant chunk of hair from her scalp. Pictures of the injuries were tendered by the Crown. Mr. Lucas was at the time of this assault bound by a release order with a condition prohibiting him from any contact or communication with Ms. Rogers.

C. THE OFFENDER'S CIRCUMSTANCES

[14] Mr. Lucas is a 50 year-old Indigenous male who was born and raised in Tuktoyaktuk, the community in which these offences occurred. Both of his parents were victimized by Canada's residential school system. Mr. Lucas' childhood involved substantial exposure to alcohol abuse in his home and frequently witnessing the abuse of his mother by his father.

[15] Mr. Lucas and Ms. Rogers, whose relationship has been on and off over a number of years, have a number of children together. Some of their children are minors presently not in either of their care.

[16] Substance abuse became a part of Mr. Lucas' life as a young adult and it continues to plague him at present. Mr. Lucas candidly acknowledges his alcoholism and he desires treatment. To his credit, he advised the Court that he consents to treatment should the Court decide to impose a treatment condition

pursuant to section 732.1(3)(g). His interest in treatment stems in part from his desire to regain custody of his minor children.

[17] Mr. Lucas engaged in many traditional activities as a youth, especially with his uncle whose passing in 2001 marked a significant loss of a positive role model for him.

[18] Mr. Lucas' criminal record contains many related convictions. Its 66 entries include 17 convictions for offences against the person, namely:

- One conviction for aggravated assault;
- Two convictions for assaulting a peace officer;
- Three convictions for uttering threats; and;
- 11 convictions for common assault.

[19] Ms. Rogers was the victim of seven of those violent offences. The Crown did not advise as to whether the victim of his aggravated assault conviction was an intimate partner. The Crown did not advise whether any of the remaining convictions for assaultive behaviour related to intimate partners.

[20] Mr. Lucas' most recent conviction in relation to Ms. Rogers was recorded on March 8, 2017, a common assault that resulted in a sentence of six months imprisonment. His most recent convictions on August 27, 2019 include an assault on a peace officer that resulted in 30 days imprisonment. The record also includes 26 prior convictions for breaching terms of probation and release orders.

D. PARTIES' POSITIONS

[21] The Court received a joint submission recommending a total period of 181 days imprisonment, less a remand credit of 100 days (granting a 1.5 to 1 credit for his 67 days on remand). A period of probation including no contact conditions would follow his period of imprisonment. A DNA order was noted by the Crown as mandatory. In terms of a potential firearms prohibition, the Crown noted that Mr. Lucas' current firearms prohibition does not expire until 2027.

[22] No case law or other sentencing authorities were filed by the parties.

[23] The Crown did not speak to whether or not either of the victims were Indigenous. On the Court asking that question, the Crown advised that while it was likely the victims self-identified as Indigenous, the Crown was unable to advise as to their status. This information has been particularly relevant since September of 2019 when sections 718.04 and 718.201 came into effect:

> 718.04 *When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.* [emphasis added]
>
> 718.201 *A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.* [emphasis added]

[24] It would strain credulity to infer that the Crown considered these sections in formulating its sentencing position when the Crown has no information regarding the status of the victims. Section 718.04 is not discretionary, it requires that in such circumstances the court shall give primary consideration to denunciation and deterrence.

E. THE PURPOSE, PRINCIPLES AND OBJECTIVES OF SENTENCING

[25] In determining a fit sentence for Mr. Lucas, I am guided by the:

- Purpose, principles and objectives of sentencing set out in the *Criminal Code*;
- Circumstances of the offences and of Mr. Lucas; and,
- Case law.

[26] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparation for harm done to victims or to the community; and

> (f) to promote a sense of responsibility in offenders, and acknowledgement of harm done to victims and to the community.

[27] The principle of proportionality is a fundamental principle of sentencing. It requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[28] The principle of parity states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

F. AGGRAVATING AND MITIGATING CIRCUMSTANCES

[29] There are mitigating circumstances. Mr. Lucas entered an early guilty plea. The complainants will not have to endure cross-examination, a stressful ordeal even when conducted in a non-confrontational style. He voluntarily waived the requirement that his guilt be proven by the Crown, to the beyond a reasonable doubt standard, despite no memory of the events due to his level of impairment.

[30] I also regard his consent to participate in a treatment program as mitigating and confirmative of his expressed desire to do better in the future.

[31] In terms of aggravating circumstances, obviously Mr. Lucas' criminal record generally is aggravating and specifically so in terms of its chronicling of a history of violence towards Ms. Rogers, a general propensity for violence and a disregard of conditions of probation and release orders.

G. *GLADUE* FACTORS

[32] I must consider section 718.2(e) and the guidance offered by the Supreme Court of Canada in applying Parliament's directive aimed at addressing the circumstances of Indigenous offenders (*R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688; *R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 SCR 433). Mr. Lucas is impacted by many *Gladue* factors that lessen his moral blameworthiness.

H. VICTIM IMPACT

[33] Ms. Rogers filed a victim impact statement that speaks to the significant physical and psychological impacts that she suffered as a result of again being victimized by Mr. Lucas (now his eighth and ninth convictions for violence against her). In addition to experiencing night terrors and other fears she has a bald spot on her scalp. Her educational pursuits were also interrupted as a consequence of these offences. In summary, in her own words Ms. Rogers stated *enough is enough*.

Sadly, the absence of any real deterrence (either specific or general) stemming from the sentence set forth in this joint submission results in a message fathoms apart from enough is enough.

I. PARITY

[34] The principle of parity requires that similar sentences be imposed on similar offenders for offences committed in similar circumstances. As already noted, no authorities were filed by the parties. This is common in this jurisdiction in regards to joint submissions. Perhaps the threshold set by *Anthony-Cook* in terms of deference to joint submissions leads parties to believe that case law or other authority is superfluous. Counsel cannot be faulted for now assuming the outcome of a joint submission is a *fait accompli*. This reality is recognised in *R. v. Blanchard*, 2017 NLPC 1317:

> *The Supreme Court also indicated in Anthony-Cook that counsel should "provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a 'corollary obligation upon counsel' to ensure that they 'amply justify their position on the facts of the case as presented in open court'" (at paragraph 54). However, it is important to understand that a failure by counsel to provide such detail does not enlarge the limited judicial discretion mandated by Anthony-Cook. A sentencing judge can request additional information, but a lack of information does not change the nature of the test which must now be applied by every sentencing judge in Canada. Finally, counsel can hardly be criticized for failing to refer to sentencing precedents or for failing to provide significant detail when they know their agreement on sentence is going to be endorsed.*

[35] The system in its present configuration not only requires deference to joint submissions but also discourages judges from looking behind them. By way of example, in *R. v. Kippomee*, 2019 NUCA 03, the Court of Appeal stated:

> *This approach is contrary to that established in Anthony-Cook where sentencing judges are to demonstrate restraint in considering joint submissions and should depart only rarely from joint submissions. Joint submissions, even those that may be demonstrably unfit, may be proposed but it is only where the joint submission meets the more stringent public interest threshold that a sentencing judge may reject the joint submission.*

> *Routinely sending counsel away to revise joint submissions undermines the process referred to in Anthony-Cook and risks adding to the inefficiency and delay warned of by the Supreme Court of Canada. Counsel must have confidence that joint submissions will be accepted and, as noted in Anthony-Cook at para. 44, counsel are "entirely capable of arriving at resolutions that are fair and consistent with the public interest."*

[36] It is not as if no relevant authorities exist. A cursory search yielded three authorities from the Supreme Court of the Northwest Territories that support the conclusion that the joint submission is demonstrably unfit.

[37] In *R. v. Ugyuk*, 2006 NWTSC 11, the 35 year old Indigenous accused entered guilty pleas to 2 counts of assaulting his girlfriend. His 5 prior convictions for offences of violence included 2 prior convictions for assaulting his girlfriend. The Crown sought a global sentence of 10-14 months imprisonment. The Court imposed a 12 month period of imprisonment in circumstances that in my view are significantly less aggravating than those of Mr. Lucas.

[38] In *R. v. Clillie*, 2016 NWTSC 61, the Indigenous accused was convicted after trial of assaulting his spouse (choking with no visible injuries). His 36 prior convictions included 9 for offences of violence, 1 of which was an assault on his spouse in 2008 for which he received 60 days imprisonment. The Crown sought a sentence of 15 months imprisonment. The Court imposed a 12 month period of imprisonment in circumstances that in my view are significantly less aggravating than those of Mr. Lucas.

[39] Finally, in *R. v. Gargan*, 2014 NWTSC 62, the 31 year old Indigenous accused pled guilty to an assault causing bodily harm to his spouse. The assault resulted in his spouse suffering a fractured jaw. Similarly to Mr. Lucas, Mr. Gargan's father attended residential school and Mr. Gargan also witnessed significant alcohol and domestic violence as a child. Mr. Gargan's fairly brief criminal record contained only 2 prior convictions for violent offences, neither of which involved an intimate partner. In imposing a sentence of 14 months imprisonment, the Court stated:

> *The principles of deterrence and denunciation have been repeatedly emphasized in sentencing offenders in cases of domestic violence for many years. Yet, domestic violence continues to be a serious problem in the Northwest Territories, and I will repeat what I said in the case of Inuktalik:*
>
> > *Despite the passage of time, Courts remain limited in our ability to solve the problem of domestic violence. It continues to be a broad*

> *social problem which needs to be addressed by society, by the government, by communities, by individual citizens. When the Courts get involved, the assault, the domestic violence, has already occurred. We are dealing with the often messy aftermath. As such, our role remains as it has been -to use sentencing policy to denounce domestic violence in clear terms and to deter the offender and other persons from committing acts of domestic violence.*

[40] Mr. Lucas has 17 prior convictions for offences of violence, at least seven of which Ms. Rogers was the victim of. His last conviction relating to Ms. Rogers was for common assault and resulted in a six month sentence of imprisonment. For the present offences involving Ms. Rogers, namely an assault and an assault causing bodily harm, the parties jointly submit that a total period of 121 days imprisonment must be imposed. For the offence of assaulting Ms. Kangegana, the parties jointly submit that a period of 60 days imprisonment be imposed on a consecutive basis. A total of 181 days imprisonment for what represent, at a minimum, his eighth, ninth and tenth convictions for violence against intimate partners. This sentence also encompasses the section 145 offence, in regards to which the parties sought a period of 30 days imprisonment to be served concurrently.

J. WHAT WOULD BE A FIT SENTENCE?

[41] The Crown was asked about any *quid pro quo* regarding the resolution of the case such that the joint submission could be considered a fit sentence. The Crown advised that there were some issues arising from the degree/quality of the investigation into the common assault charge. In regards to the assault causing charges both complainants cooperated with the investigation, including providing witness statements. I note that they also submitted to photographing of their injuries and Ms. Rogers filed a victim impact statement.

[42] This case does not fall within the unfortunate and too common scenario where the Crown faced prosecuting domestic violence charges without being able to avail of evidence from the complainants. In such cases, a sentence that appears on its face to be inordinately low may be the only feasible resolution and the only means to offer some protection to victims of intimate partner violence.

[43] In determining a fit sentence, part of the analysis involves considering the maximum available sentence. As the Crown proceeded by summary conviction on all three matters, the maximum potential punishment for the three assaults committed by Mr. Lucas is a total of six years imprisonment. By indictment, the maximum potential punishment for the three assaults would be a total of 25 years

imprisonment. Something that distinguishes this case from the authorities cited above is that in all of those cases the Crown proceeded by indictment, making the theoretical maximums higher in those cases than is the case here.

[44] While that is a significant distinction, in terms of the circumstances of the offender, those of Mr. Lucas are significantly more aggravating than those of the offenders in the above cases.

[45] Taking into account all of the principles of sentencing and the statutory imperatives in the *Criminal Code* (including ss. 718.04, 718.2(a)(ii), 718.2(e) and 718.201) the minimum global sentence of imprisonment that could constitute a fit sentence for Mr. Lucas is 14 months imprisonment. But for the totality principle, that sentence would be a period of 18 months imprisonment.

K. SENTENCE

[46] While the joint submission is for a sentence that is at best unfit and in my opinion, demonstrably unfit, I am unable to conclude that it meets the threshold of being so unhinged as to cause reasonable and informed persons to believe that the proper functioning of the justice system has broken down. The challenges associated with determining whether a joint submission is unhinged are also referenced in *Blanchard*:

> *The Supreme Court also indicated in Anthony-Cook that before a joint submission can be rejected the sentencing judge must conclude that its acceptance would cause a reasonable person to conclude that "the proper functioning of the justice system had broken down." It is hard to imagine any single sentencing submission ever having this effect and what do the words a "break down in the proper functioning of the criminal justice system" mean?*

[47] As such, in terms of the periods of imprisonment, I must sentence Mr. Lucas in the manner set out by the parties in their joint submission. I hereby sentence Mr. Lucas as follows:

- Section 266: 1 day of imprisonment (to be served consecutively);
- Section 267(b) on Michelle Kangegana: 60 days imprisonment (to be served consecutively);
- Section 267(b) on Lisa Rogers: 120 days imprisonment (to be served consecutively); and,
- Section 145(5): 30 days imprisonment (to be served concurrently).

[48] Based on crediting his 67 days on remand on a 1.5 to 1 day basis, a credit of 100 days will be applied towards the 181 day total period of imprisonment, leaving a balance of 81 days to be served.

[49] Following the expiry of his period of imprisonment, Mr. Lucas will be subject to a probation order for a period of 18 months. In terms of the conditions of that order, as the joint submission did not include a comprehensive list of stipulated conditions, I view crafting of the conditions as a matter permitting the exercise of judicial discretion. The terms of the probation order will require Mr. Lucas to:

> (a) Keep the peace and be of good behaviour;
>
> (b) Appear before the court when required to do so by the court;
>
> (c) Report to a probation officer within 2 business days of the expiry of your sentence of imprisonment and report thereafter as required by the probation officer;
>
> (d) Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
>
> (e) Abstain from being under the influence of alcohol to any degree in the presence of your minor children or any current or former spouse, common-law partner or dating partner;
>
> (e.1) Notify your probation officer prior to entering any new relationship with any intimate partner or resuming a relationship with any prior intimate partner;
>
> (f) Provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under subsection 732.1(9) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that you have breached a condition of this order that requires you to abstain from the consumption or being under the influence of alcohol;
>
> (g) Attend any and all counselling, programming or other related activities as directed by the probation officer;

(h) Pursuant to your consent as expressed on May 7, 2020, and subject to the program director's acceptance of you, participate actively in a treatment program approved by the territorial government;

(i) Refrain from any contact or communication with Lisa Rogers except for contact through a third party that is approved by your probation officer for the sole purpose of exercising any access to your children;

(j) Refrain from attending at Lisa Roger's residence, place of employment or schooling;

(k) Refrain any contact or communication with Michelle Kangegana and from attending at her residence, place of employment or schooling; and,

(l) Perform 100 hours of community service over the first 12 months of this order at a rate of not less than 8.5 hours per month.

[50] I decline to order the payment of any victim fine surcharges pursuant to section 737(2.1).

[51] In addition to the probation order the Court makes the following orders:

i. That Mr. Lucas provide a sample of a bodily substance pursuant to section 487.051 (a DNA order). I note this Order is discretionary, due to the Crown proceeding by way of summary conviction; and

ii. That Mr. Lucas be prohibited from possessing firearms and other items as enumerated in section 110 for life pursuant to section 110(2.1), however he may seek a sustenance exemption pursuant to section 113.

Donovan Molloy
T.C.J.

Dated at Yellowknife, Northwest Territories, this 8th day of May, 2020.

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