English translation of the judgment of the Court

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| Nowkawalk c. R. | 2024 QCCA 1730 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| QUEBEC CITY | SEAT |
| No.: | 200-10-700081-248 |
| (640-01-048431-234) (640-01-049070-239) |
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| DATE: | December 19, 2024 |
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| CORAM: | THE HONOURABLE | GUY GAGNON, J.A.SIMON RUEL, J.A.LORI RENÉE WEITZMAN, J.A. |
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| LUCY LISA NOWKAWALK |
| APPELLANT - Accused |
| v. |
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| HIS MAJESTY THE KING |
| RESPONDENT - Prosecutor |
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| JUDGMENT |
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1. On September 13, 2023, the appellant received a 15-month sentence to be served in the community for incidents involving physical violence against her former spouse and another person. In the months that followed, she breached the conditional sentence order on three occasions: on October 6, 2023, she did not answer a phone call from her supervisor; on January 3, 2024, she was not at her residence despite being required to be there at all times; moreover, she committed breaches in connection with an incident that occurred on December 22, 2023, for which she was charged with one count of assault and one count of assault with a weapon, both offences punishable on summary conviction.
2. The facts relating to the December 22, 2023 breaches and the new charges took place in a convenience store in Inukjuak, when the appellant’s former spouse approached the appellant to speak with her. The appellant was afraid, because she knew she was prohibited from having contact with her former spouse. A dispute arose and the appellant threw two soda cans in her former spouse’s direction. She fled to her home and was subsequently arrested. The breaches in connection with this incident are therefore: that she failed to keep the peace and be of good behaviour; that she did not abstain from communicating with the victim and being in his physical presence; that she did not abstain from harassing or bothering the victim; that she failed to be at her residence at all times; and that she did not refrain from consuming alcoholic beverages. At the time, the appellant was pregnant, the father of the unborn child being her former spouse, Mr. Nastapoka.
3. The appellant admitted the facts pertaining to the breaches and pleaded guilty to a new offence of assault with a weapon. In light of the particular circumstances of this case – that the appellant, an Inuk woman from Nunavik, was seven months pregnant and was due to give birth soon; that she would otherwise be imprisoned in the south, outside her community; that she was cooperative; and that the initial offence was her first conviction – the parties made a joint submission which consisted in modifying the optional conditions of the conditional sentence order so as to add 50 hours of community service to be performed within a period of 10 months.
4. At a hearing held on January 11, 2024, the judge rejected this joint submission. He was of the view that the presumption that a breach of a conditional sentence order results in the revocation thereof should be applied. In his opinion, since the situation involved a reoffence in a matter of conjugal violence, the public would be shocked to learn that, in such a context, the appellant would not be reincarcerated. He found that the parties were “putting an overemphasis” on the fact that the appellant was young and pregnant.
5. The judge therefore fully revoked the conditional sentence order, given the various breaches, and ordered that the appellant be committed to custody until the expiration of the sentence, in accordance with s. 742.6(9)(d) of the *Criminal Code*.[[1]](#footnote-1) With respect to the new offence, he sentenced the appellant to one day of detention, consecutive to any other sentence. This latter sentence is not under appeal. On February 26, 2024, a judge of this Court released the appellant from custody pending the determination of her appeal.
6. The appellant argues that in rejecting the parties’ joint submission, the trial judge erred in his application of *R. v. Anthony-Cook*.[[2]](#footnote-2)
7. An unusual element in this appeal is that the Crown supports the appellant’s position. It is the prosecution’s view that the joint submission, which favours community reintegration, is consistent with the principles of restorative justice, while also giving due regard to the public interest and the offender’s unique situation. Indeed, the particular circumstances of the appellant, who was then seven months pregnant and resided in the same remote community as the father of the unborn child, required a solution that would respect the parties’ community ties and cultural context. According to the Crown, the judge should therefore have shown deference to the parties’ suggestion, which also took into account the victim’s need for protection and the objective of deterrence, and was entirely consistent with the public interest.
8. The Court agrees with these assertions. The appeal should be allowed.
9. Joint sentencing submissions following a guilty plea play a vitally important role in the well‑being of the criminal and penal justice system.[[3]](#footnote-3) Such submissions benefit not only the accused, but also victims, witnesses, and the administration of justice generally.[[4]](#footnote-4)
10. They offer guarantees of predictability and certainty to parties and to criminal justice system participants.[[5]](#footnote-5) These agreements save the justice system precious time, resources, and expenses, which can be channelled into other matters.[[6]](#footnote-6) These considerations are particularly relevant in the context of justice in the north, where there are inevitably major issues of judicial availability, delays and logistics.[[7]](#footnote-7)
11. Trial judges should not lightly set aside a joint sentencing submission following a guilty plea.[[8]](#footnote-8) They may do so where the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest,[[9]](#footnote-9) provided they have first expressed their concerns to the parties and have informed the accused about the possibility of withdrawing the guilty plea.[[10]](#footnote-10)
12. This is the case when the sentence is 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,[[11]](#footnote-11) including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down, which would be contrary to the public interest.[[12]](#footnote-12)
13. In the case of Indigenous offenders, sentencing judges must take the *Gladue*[[13]](#footnote-13) factors into account. When the parties’ joint submission fails to consider the *Gladue* factors, the sentencing judge must reject it.[[14]](#footnote-14) Conversely, a joint submission that takes full account of the *Gladue* factors and is put forward by lawyers familiar with the context carries a great deal of weight.
14. As regards a breach of a conditional sentence order, the offender is subject to the measures set out in s. 742.6(9) of the *Criminal Code*, of which the most severe is the complete revocation of the conditional sentence order, resulting in the offender’s incarceration until the end of the prison sentence.
15. But, as with any other sentencing decision, determining the appropriate order when there has been a breach of a conditional sentence is an individualized process.[[15]](#footnote-15) The sentencing judge has the discretion to determine which of the measures – whose range is set out in s. 742.6(9) of the *Criminal Code* – is appropriate in light of all the circumstances.
16. In the case at bar, the trial judge committed a reviewable error in principle by failing to consider all the relevant factors in his analysis of the public interest test. He should have provided clear and cogent reasons for departing from the joint submission.[[16]](#footnote-16)
17. In this regard, he should have explained how the proposed sentence constituted “a breakdown in the proper functioning of the criminal justice system” and [translation] “[could not] serve the greater good”.[[17]](#footnote-17) He failed to do so.
18. The judge focused his attention on factors unfavourable to the joint submission, in particular the presence of three breaches and the fact that the new offence fell within the context of domestic violence and was committed against the same victim. But the judge failed to take into account the following considerations, which were presented by the lawyers and which supported the joint submission and provided a justification therefor under the public interest test, given the particular context of this case:
* The existence of the *Gladue* factors, in particular the issues of serious alcohol abuse and crime in Indigenous communities, issues that stem directly from Canada’s previous colonialist policies; the appellant herself suffers from alcohol abuse;
* The need to tailor sentences to the situation and realities of Indigenous peoples, which justifies considering alternative sanctions to imprisonment as a means of more effectively achieving the objectives of sentencing in a particular community;
* The fact that the accused is young, is an Inuk woman from a small northern community and was seven months pregnant; the fact that, in this context, revoking the conditional sentence would mean detention in a prison in the south, where she would have been forced to carry her pregnancy to term, without her family present and in an environment that was completely foreign in every respect;
* The particular circumstances of the second breach – namely, that it was the victim who approached the appellant, that the latter, who was aware of her conditions, panicked, and that the “weapon” used in the crime was soda cans;
* The appellant had no criminal record prior to the offence that led to the conditional sentence;
* Her probation officer had expressed the opinion that she was fit to continue serving her sentence in the community and that she had shown signs of rehabilitation since the beginning of her sentence; she had also been generally cooperative and transparent since the beginning of her sentence in the community.
1. The judge was required to engage with all of the case-specific elements and consider whether, in light of these, an informed member of the public would view the proposed sentence as a breakdown in the proper functioning of the justice system.[[18]](#footnote-18)
2. It is clear that, taking all the relevant considerations into account, the parties’ joint submission was not contrary to the public interest. On the contrary, it was entirely consistent with the public interest. It took into account the particular circumstances of the appellant and the victim, their indigenousness, and the interests of justice in settling this case in an efficient, fair and predictable manner.
3. The appeal should therefore be allowed and the parties’ joint submission implemented. It should be noted that, pursuant to the conditional sentence order, the appellant will remain under supervision and, in addition to the other conditions of the order, will also be required to perform 50 hours of community service.

**FOR THESE REASONS, THE COURT:**

1. **ALLOWS** the appeal;
2. **SETS ASIDE** the trial judgment rendered on January 11, 2024;
3. In Court of Québec file numbers 640-01-048431-234 and 640-01-049070-239, pursuant to s. 742.6(14) of the *Criminal Code*, **ORDERS** that the period between October 31, 2023 and December 22, 2023 be deemed to be time served under the conditional sentence order;
4. In Court of Québec file numbers 640-01-048431-234 and 640-01-049070-239, pursuant to s. 742.6(9)(b) of the *Criminal Code*, **ORDERS** that there be added to the conditional sentence order fifty (50) hours of community service to be performed within a period of ten (10) months.

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|  | GUY GAGNON, J.A. |
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|  | SIMON RUEL, J.A. |
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|  | LORI RENÉE WEITZMAN, J.A. |
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| Mtre Dave Drolet (ABSENT) |
| Centre communautaire juridique de l’Abitibi-Témiscamingue |
| For the appellant |
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| Mtre Johannie Simard (ABSENT) |
| Director of Criminal and Penal Prosecutions |
| For the respondent |
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1. *Criminal Code*, R.S.C. 1985, c. C-46. [↑](#footnote-ref-1)
2. *R. v. Anthony-Cook*, 2016 SCC 43. [↑](#footnote-ref-2)
3. *R. v. Anthony-Cook*, 2016 SCC 43, para. 25. [↑](#footnote-ref-3)
4. *R. v. Anthony-Cook*, 2016 SCC 43, para. 35. [↑](#footnote-ref-4)
5. *R. v. Anthony-Cook*, 2016 SCC 43, para. 40. [↑](#footnote-ref-5)
6. *R. v. Anthony-Cook*, 2016 SCC 43, para. 40. [↑](#footnote-ref-6)
7. Regarding these issues, see, in particular, Mtre Jean-Claude Latraverse, “Report on the Situation of the Itinerant Court in Nunavik”, Report prepared at the request of the President of the Makivik Corporation, Mr. Pita Aatami, and the Minister of Justice and Attorney General of Quebec, 2022, online: < <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/publications-adm/rapports/Report_Latraverse_2022-07-06.pdf> >; the report highlights, among many factors, the significant impact that postponements can have on delays, the fact that it may be impossible to travel to communities because of bad weather or mechanical breakdowns, and the fact that clients or witnesses may be absent because it is common for individuals to have to leave their community to obtain medical services, for example, p. 9. [↑](#footnote-ref-7)
8. *R. v. Anthony-Cook*, 2016 SCC 43, para. 34. [↑](#footnote-ref-8)
9. *R. v. Anthony-Cook*, 2016 SCC 43, para. 32. [↑](#footnote-ref-9)
10. *R. v. Anthony-Cook*, 2016 SCC 43, para. 58. [↑](#footnote-ref-10)
11. *R. v. Cheema*, 2019 BCCA 268, para. 23. [↑](#footnote-ref-11)
12. *R. v. Anthony-Cook*, 2016 SCC 43, para. 34. [↑](#footnote-ref-12)
13. *R. v. Gladue*, [1999] 1 S.C.R. 688, para. 66; *R. v. Ippelee*, 2012 SCC 13, para. 60. [↑](#footnote-ref-13)
14. *R v. Head*, 2020 ABPC 211, para. 58; *R c. Awashish*, 2020 QCCQ 3614, para. 64. [↑](#footnote-ref-14)
15. *R. v. Antaya*, 2022 ONCA 819, para. 9. [↑](#footnote-ref-15)
16. *R. v. Anthony-Cook*, 2016 SCC 43, para. 60. [↑](#footnote-ref-16)
17. *R. v. Anthony-Cook*, 2016 SCC 43, para. 47; *R. c. Reyes*, 2022 QCCA 1689, para. 36. [↑](#footnote-ref-17)
18. *R. c. Reyes*, 2022 QCCA 1689, para. 36, citing *R. v. Anthony-Cook*, 2016 SCC 43, para. 42. [↑](#footnote-ref-18)