SUPREME COURT OF YUKON

Citation: *H.M.Q.* v. *Gainz*, 2010 YKSC 15

Date: 20100415
S.C. No. 09-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

TOMMY OTIS GAINZ

Before: Mr. Justice L.F. Gower

Appearances:

Kevin Komosky — Counsel for the Crown
Robert Dick — Counsel for the Defence

REASONS FOR SENTENCE

INTRODUCTION

[1] This is an unusual case. Mr. Gainz is before me to be sentenced on a charge of common assault under s. 266 of the *Criminal Code* and a charge of extortion under s. 346 (1.1) (b) of the *Code*. Both charges arose on April 14, 2009, and involved Gary Smith, who was then a neighbour, as the victim. Mr. Gainz pled guilty to the assault, but pled not guilty and went to trial on the charge of extortion. I found Mr. Gainz guilty of extortion in my reasons cited at 2009 YKSC 76.

[2] There are a number of mitigating circumstances. However, the case law clearly indicates that, for the offence of extortion, general deterrence and denunciation are the primary factors in sentencing and that jail terms are commonly imposed. Further, although prior to 2007 a number of courts had imposed conditional sentences in extortion cases, the enactment of s. 742.1 in 2007 now prevents the imposition of a conditional sentence for extortion if it constitutes a “serious personal injury offence” as defined in s. 752 of the *Code*. Under s. 752, a “serious personal injury offence” includes an indictable offence involving the use of violence against another person for which the offender may be sentenced to imprisonment for 10 years or more. On the facts of this case, the extortion involved the commission of an assault by a kick to the head, and a number of punches or slaps to the head, by Mr. Gainz upon Mr. Smith. The offence is punishable by a maximum of life imprisonment. Consequently, s. 742.1 is engaged and a conditional sentence is unavailable to Mr. Gainz.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

[3] Crown counsel is seeking a jail term of nine to 12 months. In support of that submission, he cites two aggravating circumstances. The first is Mr. Gainz’ criminal record, which is comprised of three convictions in 2007 and one in 2006. The related convictions are two counts of uttering threats under s. 264.1(1)(a) of the *Criminal Code*, for which Mr. Gainz received four months in jail and probation for eighteen months. Given that his previous conviction was for an unrelated drinking and driving charge, the fact that Mr. Gainz received a jail term for these threats indicates that the matter was relatively serious. Crown counsel says that the second aggravating circumstance is that Mr. Gainz inflicted actual physical violence upon Mr. Smith in committing the extortion, as opposed

to such lesser possible means as uttering threats or accusations, or by way of menacing the victim.

[4] Crown counsel concedes two mitigating factors: first, that this offence was unplanned and unorganized, in distinction to the fact scenarios in the case authorities he filed; and second, that Mr. Gainz has acknowledged at least some responsibility for the offences.

[5] Relating to this latter point, Crown counsel curiously submitted that the guilty plea to the common assault should be looked at as a “neutral” factor, rather than a mitigating one. Perhaps I misunderstood the submission, but I am unable to agree with it. There was never any question that Mr. Gainz accepted his responsibility for wrongfully assaulting Mr. Smith. The only triable issue was whether he did so with the intent to induce Mr. Smith to repay a sum of money which Mr. Gainz had previously loaned to him, in order that Mr. Smith could take advantage of an air travel seat sale. Mr. Gainz’ evidence at the trial was to the effect that he simply lost his temper immediately before attacking Mr. Smith, and that he had no particular intention in mind. While I did not believe Mr. Gainz’ evidence on the point, I did find him to be a remarkably candid witness in many respects. For example, when cross-examined about the evidence of Mr. Smith’s 21 year old daughter, who testified that Mr. Gainz was asking about the money he was owed during the assault, Mr. Gainz did not automatically deny the truth of that evidence, but rather acknowledged that “it could have happened”. In other words, he did not staunchly deny the allegations probative of the extortion charge.

[6] Further, the probation officer who prepared the pre-sentence report stated that he has had “a fairly extensive history with Mr. Gainz and has witnessed him at his most difficult”. Having said that, he cautioned:

> “Mr. Gainz revealed that he knows what he did was wrong and is aware no matter what the circumstances are he cannot act in that manner. He relayed, “I know it’s wrong and I’m never going to do it again either that’s for sure… I know I shouldn’t have and I felt bad afterwards.”

[7] Admittedly, Mr. Gainz continued to share with the probation officer that he did not feel that his actions constituted extortion. However, based upon the unopposed submission by defence counsel, that may well be due in large part to the fact that Mr. Gainz was originally charged only with the assault, and that it was not until after a charge review by the Crown that the second count of extortion was laid. That would help to explain Mr. Gainz’ sense of injustice, if he rationalized that the police themselves did not initially feel they had grounds to charge him with extortion.

[8] Relevant to this point, are the observations of the probation officer that, in the past, Mr. Gainz has refused to take any responsibility for his blatant anti-social behaviour, stating, “It did not matter what the situation was or what his reaction to that situation would be, he always claimed it was somebody else’s fault.” However, the probation officer continued that Mr. Gainz’ present attitude:

> “… appears to be completely different. Although he provided some rationale for his actions he readily admits he was wrong and is aware that his behaviour was unacceptable. It is apparent that he has new priorities and worries less about how unfairly he has been treated in the past and focuses on what he can do to improve his life now.”

[9] It is also mitigating that Mr. Gainz provided an apology to Mr. Smith as part of the written statement he filed with this Court. Because of a no contact condition on his

recognizance, he was previously unable to provide that apology directly to Mr. Smith. However, as Mr. Smith was present in court for the sentencing submissions, I felt it was appropriate to read the statement into the record, which included the following comments:

> "…I would like to start by apologizing. I understand that my actions were inappropriate. I had lent Gary money in good faith…With all the stress I was under, I let frustration get the best of me. For that I am deeply sorry…I would have liked to apologize to Gary, but due to bail conditions I could not do this. I am hoping in the future to have the opportunity to…"

[10] On this last point, Crown counsel argued that Mr. Gainz is still making excuses for his behaviour and the fact that he had a legitimate debt owing from Mr. Smith is also nothing more than a "neutral" factor. While I agree with the latter part of that submission, I disagree with the suggestion that the sincerity of the apology is vitiated by Mr. Gainz' references to the loan and his attempts to recover it through the court process. It may be helpful here to restate that the original amount of the loan was approximately $850, and when Mr. Gainz was not repaid, he pursued an action in Small Claims Court and obtained a judgment against Mr. Smith for a total of $943.88, plus post-judgment interest. However, Mr. Gainz testified at the trial that, because the loan was made by way of an advance or purchase one of Mr. Gainz' credit cards, and because that credit card carried a high interest rate, Mr. Gainz was actually repaying the credit card company more money than he was able to collect from Mr. Smith through the court process. Indeed, as I noted in my reasons for judgment following the trial, Mr. Gainz had arranged an appearance before the Small Claims Court on the date of the offence, because he thought there had been an error in the interest calculation. Although he was persuaded by the Court that the judgment was correctly drafted, he was nevertheless very upset that he was not going to collect all that he thought he was entitled to. He then returned to his

residence and, in a very angry state, approached Mr. Smith, who was standing near his car, and assaulted him. In these circumstances, I find that Mr. Gainz' references to the issue of the loan in his written statement is not an attempt to excuse his conduct, but rather to explain it.

[11] Defence counsel also quite properly highlighted the evidence from the trial that once Mr. Gainz realized that the police had been called in response to his assault upon Mr. Smith, he made no attempt to leave the scene or otherwise deny his involvement. Rather, when the police officer arrived, he described Mr. Gainz as being cooperative to the extent of putting his hands out and offering to be handcuffed. Mr. Gainz also provided a subsequent voluntary statement to the police at the detachment, in which he made a number of incriminating admissions.

[12] Another mitigating circumstance of significance to me in this sentencing is the fact that Mr. Gainz is now 29 years old and, despite what he described as a "fairly unstable, chaotic and inadequate upbringing", he has a relatively short criminal record and has nevertheless achieved a degree of relative success in his current relationship, lifestyle and employment.

[13] Mr. Gainz' parents were divorced when he was seven years old. He recalled being on social assistance while residing with his mother and his two younger brothers. There was a reference in the pre-sentence report to the fact that Mr. Gainz' family moved a total of 25 times by the time Mr. Gainz was 20 years old. Further, his younger brothers were routinely in trouble with the criminal justice system and Mr. Gainz complained that, as a result, he was often lumped in with them and received "constant unmerited scrutiny", even though he had no criminal record by the time he completed high school in 1999.

Incidentally, Mr. Gainz reported that in grade 12 he made the honour roll three out of four terms.

[14] In addition to struggling with this challenging family history, Mr. Gainz has also had to deal with a forensic psychiatric assessment that he suffered at one time from a "persecutory delusional disorder", for which he was prescribed medication. He claims that he does not feel like he currently has any mental health issues. He states that since 2002 his consumption of alcohol has been very minimal. He began smoking marihuana at the age of 18, quit temporarily when he was on his psychiatric medication, but returned to marihuana usage after going off the medication in 2006. He explained in the pre-sentence report that his current marihuana usage of about three times per week is to calm himself down or to help him with his anxiety and is, therefore, more beneficial than problematic. He has never used any hard drugs.

[15] With this background, Mr. Gainz is presently in an apparently stable family relationship with Deanna Kneller, a 32-year-old woman who came into the relationship with two children of her own. The couple have been together for over two and a half years and have had a two-year-old boy and a one-year-old girl together. In his written statement to the Court, Mr. Gainz emphasized the importance of his immediate family as a source of stability in his life, and indicates that he is very involved with his children, teaching them to skate, swim and play hockey.

[16] With respect to his employment, Mr. Gainz has been relatively steadily employed in a variety of jobs for the past several years, and has only periodically found it necessary to seek social assistance. Since September 2007, he has been regularly employed as an arborist for Yukon Tree Services. Although he worked his way up from labourer to

foreman, as a result of the current court proceedings and his uncertain future, he was replaced as foreman, but still remains on the payroll. His employer was interviewed by the probation officer and spoke very fondly of Mr. Gainz as someone he likes both as an employee and as a person. He stated that Mr. Gainz is very good at what he does and is "extremely reliable". Mr. Gainz has indicated that he would like to obtain his journeyman certification as an arborist.

[17] The relative stability of Mr. Gainz' present circumstances is corroborated by the three risk assessment instruments which were administered to him. On the one assessing potential alcohol issues, Mr. Gainz' score suggested "no level of problems relating to alcohol abuse". On the instrument assessing drug abuse issues, his score indicated a "low level of problems". On the broad-based instrument assessing risk of future criminal conduct, Mr. Gainz was again placed "at the low range".

THE CASE LAW

[18] As I indicated earlier, the Crown is relying upon a number of case authorities in establishing the proposed sentencing range of nine to 12 months. In a relatively recent case from this Court, *R.* v. *Smarch*, 2008 YKSC 47, Veale J. concluded, at para. 26, that the appropriate range of sentence for extortion is one to five years. However, that was a case where the offender had a lengthy and serious criminal record, including convictions for breaking and entering and committing an assault and uttering threats. Also, the issue precipitating the extortion was the collection of a drug debt. Further, the pre-sentence report was negative and the offender showed no remorse. Most importantly, the extortion included an element of a home invasion and, therefore, the statutory aggravating circumstance under s. 348.1 of the *Criminal Code* applied. In the result, Veale J. imposed

a jail term of two years less a day, with credit for remand time, plus probation for one year.

[19] A case which I found more relevant and helpful was *R.* v. *Cromwell*, 2007 BCSC 601. The offender had been found guilty by a jury of extortion of two victims following an incident at a motor vehicle dealership in Vancouver, British Columbia. Although there was no evidence of any actual physical violence in that case, Ehrcke J., found that the jury's verdict must have been based on a finding that the offender used menaces or threats in order to get the two victims to pay him some $200,000 U.S.D., which he claimed they owed him from a Las Vegas drug deal. Ehrcke J. summarized the relevant evidence at paras. 9 and 10 as follows:

> "In this case, the evidence is clear that Mr. Vonhiltgen approached the two complainants in a manner that was calculated to induce fear. As the complainants were sitting in their truck on South West Marine Drive, Mr. Vonhiltgen unexpectedly came speeding toward them from the opposite direction, then suddenly cut across traffic and stopped his car immediately in front of them, blocking their way. He then approached the driver's window of the truck, reached in, and took the keys. These actions would inevitably have the effect of conveying to the complainants that they were not free to leave and that their movements were now under the direction of Mr. Vonhiltgen.
>
> Both complainants testified that Mr. Vonhiltgen told them they would not be going home that night and that someone was coming to pick them up. He said there were people all around the dealership watching them. Those words, in my view, are not unconnected to the manner in which Mr. Vonhiltgen drove up and removed the keys from the truck. Those physical actions reinforced the effect of the menacing words. Together, they carried the powerful message that Smith and Teunissen were not free to leave and, indeed, would not be leaving of their own accord. Rather, <u>there was the [unmistakable] and powerful implication that some terrible, unspecified fate awaited them.</u>" (my emphasis)

[20] Ehrcke J. went on to find that there were a number of aggravating circumstances in that case. First, the offender did not act alone, but rather in concert with two other men,

whose presence would have clearly magnified the intimidating effect of his demand for the $200,000. Second, the extortion was in furtherance of pre-existing illegal drug activity. Third, the events at the car dealership were not an isolated event, but rather followed earlier demands in the preceding weeks and months, which were designed to make the victims extremely fearful of the offender. The mitigating circumstances were that the accused had no previous criminal record, he was 33 years old, and at one time was a professional hockey player. He had a supportive wife and three children, as well as support within his community.

[21] At para. 21, Ehrcke J. noted that Crown counsel had referred him to a number of cases where the sentence for extortion ranged from three months to five years. At para. 24, he noted the case authorities supplied by defence counsel, in which conditional sentences were imposed in a number of cases. However, all of those cases pre-dated the enactment of s.742.1 of the *Criminal Code*, which was assented to on May 31, 2007, and came into force six months later. Consequently, as s.742.1 was not applicable, Ehrcke J. went on to consider the possibility of imposing a conditional sentence on those facts. At paras. 30 and 31, he concluded that a conditional sentence was not appropriate and seemed to rely heavily on the aggravating circumstance that the extortion took place in the context of an illegal drug business:

> "The most difficult question is whether a conditional sentence of up to two years less a day with conditions, including perhaps house arrest and community work service, would adequately address the need for general and specific deterrence and denunciation. I have concluded that it would not. <u>The offence which the jury found Mr. Vonhiltgen to have committed is an extremely serious one. Although it did not involve the infliction of any violence, it is an offence which by its very nature has a tendency to breed violence.</u>

> This is an offence which took place in the context of the drug underworld. The extortion was carried out in order to enforce a demand for a very large sum of money in connection with a large illegal drug transaction in the United States. When those involved in the illegal drug business need to enforce a deal or a perceived obligation to pay, they cannot resort to the police or the courts to force compliance as those in a lawful form of business would do. Rather, they rely on intimidation, and the intimidation is backed by either an implied or explicit intimation of violence. Such unlawful behaviour has the potential to cause harm not only to the individuals involved but also to the rest of society. The potential harm to society is so great that, in my view, a conditional sentence would not be adequate to advance the paramount sentencing goals of deterrence and denunciation." (my emphasis)

In the result, Ehrcke J. imposed a sentence of nine months imprisonment, plus a ten year firearms prohibition and a victim fine surcharge of $100.

[22] *R.* v. *Brazeau*, [1995] Y.J. No. 126, was another decision in this Court, although now somewhat dated, by Deputy Judge Hirschfield. There were two offenders in that case, who were found guilty by a jury of threatening the victim in order to get him to return certain goods and equipment which they thought he had, ranging in value as high as $40,000. The offence also involved a break and enter of the victim's private property, which the sentencing judge seemed to accept as an aggravating circumstance. The Judge also found it aggravating that the threats, which he described as "horrifying", were made not only against the victim but also against his wife and children. He also seemed to view the fact that the two accused were acting in concert as an aggravating circumstance. He found that there was no expression of remorse by either offender and imposed jail sentences of 12 months on each, plus two years probation. In my view, the aggravating circumstances in *Brazeau* distinguish it from the case at bar.

[23] The remaining three cases filed by the Crown, *R.*v. *Le*, [1992] A.J. No. 819 (ABCA); *R.* v. *Duong*, [1995] A.J. No. 528 (ABCA); and *R.* v. *Hayes*, [1998] B.C.J. No.

2752 (BCCA), imposed sentences ranging from three years to five years in jail, but involved significantly greater aggravating circumstances such as organized street gangs, preconceived plans of “strong arm debt collection” and significant violence over an extended period of time. Crown counsel did not purport to rely upon these authorities.

ANALYSIS

[24] On the facts of this case, there is no minimum penalty for either the assault or the extortion offence. Therefore, as urged by defence counsel, it is theoretically open to me to consider suspending the passing of sentence and imposing a probationary term. However, I feel I must reject that suggestion for two principle reasons. First, is the clear direction from the case authorities that general deterrence and denunciation are the paramount factors in sentencing for the extortion offence. In my view, those objectives would not be met by the imposition of a non-custodial sentence. Second, I have some significant concern about Mr. Gainz’ two prior related convictions for uttering threats, for which he received a concurrent jail term of four months plus probation for 18 months. That sentence was imposed on March 27, 2007 and, just over two years later, Mr. Gainz committed the present offences. This suggests to me that Mr. Gainz is also in need of a sentence which specifically deters him from contemplating any such conduct in the future, and a jail term is necessary to meet that objective.

[25] On the other hand, I must also be mindful of the purpose and principles of sentencing set out in ss. 718 through to 718.2 of the *Criminal Code*. In particular, pursuant to s. 718(d), the sentence should be one which also meets the objective of assisting Mr. Gainz in his rehabilitation. Given that Mr. Gainz has demonstrated an ability

to achieve relative success in his life, notwithstanding a number of significant challenges, I am of the view that his potential for rehabilitation in the long run is high.

[26] Under s. 718.1, I must impose a sentence which is proportionate to the gravity of the offence and the degree responsibility of the offender. While the Crown points to the fact that actual physical violence was imposed as an aggravating circumstance, I also note that the assault was of a relatively short duration, involving a single kick to the head and number of blows to Mr. Smith's face. While Mr. Smith was taken to the hospital for a medical assessment, his injuries were limited to a visible bump on his forehead, a sore neck and a skinned elbow. There was no evidence that he received any further medical treatment. Clearly, Mr. Gainz accepted full responsibility for his actions by waiting until police arrived and surrendering himself into their custody. Further, in the cases which I have reviewed, it is not uncommon to find situations where victims have been terrorized or horrified by alternative means of extortion through threats or menaces. Therefore, I find it difficult to accept as a general principle that an actual physical assault is necessarily more aggravating than threats or menacing behaviour. In my view, the degree of aggravation depends on the facts of each case.

[27] I am also mindful of the provisions in paras. 718.2(d) and (e) that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances and that all available sanctions other than imprisonment that are reasonable should be considered.

[28] The probation officer made no reference to s. 742.1 in the pre-sentence report, which suggests to me that he was unaware of the provision. Nevertheless, he stated that "If a community disposition is deemed appropriate, the writer feels that Mr. Gainz could

be effectively managed in the community", and went on to suggest a number of conditions for inclusion in a probation order.

[29] The sentence in *Cromwell* was nine months jail with no probation. A number of cases were referred to the Court where the sentences for extortion ranged from as low as three months to five years. The aggravating circumstances were significantly worse than in the case at bar. Even though there was no actual physical violence in *Cromwell*, the fear the offender apparently inspired in the two victims was extreme. In Mr. Gainz' case, the extortion was committed more as a result of the offender losing his temper, than a premeditated desire to menace or terrorize.

CONCLUSION

[30] In the result, I find that the sentencing objectives of general deterrence, denunciation and specific deterrence can be met by a relatively short jail term of 90 days, applicable to each offence, but to be served concurrently. Further, having regard to the age and character of the offender, the nature of the offences and the circumstances surrounding their commission, I am satisfied that the 90 day jail sentence can be served intermittently pursuant to s. 732(1) of the *Criminal Code* and, while doing so, Mr. Gainz will be subject to the conditions of a probation order pursuant to s. 732(1)(b). I also find that it would be appropriate in these circumstances for that probation order to continue for a lengthy period of two years following his release from prison on the intermittent sentence. The terms of the probation order will be as follows:

1. The statutory conditions under s. 732.1(2) of the *Criminal Code*;
2. Report to a probation officer within two working days, and thereafter when and in the manner directed by your probation officer;

3. Reside as approved by your probation officer and not change your residence without the prior written permission of your probation officer;
4. Take such assessment, counseling and programming as directed by your probation officer, including anger management programming;
5. Have no contact directly or indirectly or communicate in anyway with Gary Smith and Maria Noksana, except through third parties for the legitimate purpose of civil enforcement, or for the purpose of making an apology, if permitted in writing by your probation officer;
6. Make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;
7. Provide your probation officer with consent to release information with regard to your participation in any programming, counseling, employment or educational activities that you have been directed to do pursuant to this probation order;
8. Complete 50 hours of community service, to be determined by your probation officer or his designate, by December 31, 2010; and,
9. Appear before me after the first 12 months of the probation order, on a date to be arranged by your probation officer, for a review of your performance. If appropriate, you may apply at that time for a variation of your probation order, including one resulting in its earlier termination.

[31] In addition, I am required under s. 109(1)(a) of the *Criminal Code*, to prohibit you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited

device, ammunition, prohibited ammunition and explosive substance for a period of 10 years.

[32] Still further, as extortion is a primary designated offence under s. 487.04 of the *Criminal Code*, you are required to provide samples of bodily substances for DNA analysis.

[33] Lastly, you shall pay a victim surcharge of $100 pursuant to s. 737(2)(b)(ii) of the *Criminal Code*.

[34] Madam Clerk, I can provide you with a copy of those conditions if that would be helpful.

[35] THE CLERK: Yes, thank you.

[36] THE COURT: Counsel, have I omitted anything?

[37] MR. KOMOSKY: We'll -- we'll need to discuss the terms of the intermittent sentence and I was just wondering how the $100 victim fine surcharge breaks down per count. Statutorily, it would be $100 per count but you can vary that as well.

[38] THE COURT: It's $100 per count?

[39] MR. KOMOSKY: That would be the starting point, yes.

[40] THE COURT: Yes, that is what I am going to order.

[41] Now I did neglect to mention when the sentence would commence and the times and I had intended to put that in. My intention is that it will commence this Friday at 8:00 p.m. and that Mr. Gainz will be in custody at the Whitehorse Correctional Centre from that time until 8:00 a.m. on Sunday morning and it will continue each weekend thereafter until the sentence is served.

[42] THE CLERK: Time to pay for the surcharge, Your Honour?

[43] THE COURT: Is that usually ordered?

[44] THE CLERK: Yeah, I think so.

[45] THE COURT: Is it?

[46] MR. DICK: Yes, Your Honour. In a sentence intermittent it's quite usual to have it -- have it Friday and released Monday morning and that way, you know, there's more progress, then, on getting it over. Mr. Gainz would suggest that that be considered but -- and it's also the normal times for going in and going out are 7:00 p.m. and 7:00 a.m. that way they can facilitate being released on Monday morning getting to work.

[47] THE COURT: Crown?

[48] MR. KOMOSKY: Absolutely no problem with 7:00 and I would prefer the Monday release, the Friday to Sunday morning winds up getting credit for three days after 36 hours and it isn't really my preference.

[49] THE COURT: All right. I'll make it 7:00 p.m. Friday for reporting to Whitehorse Correctional Centre and released 7:00 a.m. on Monday each weekend, starting this coming weekend.

[50] MR. DICK: I'd also ask that 30 days time to pay the surcharge?

[51] THE COURT: So ordered. Anything more? Okay. Thank you, counsel.

Gower J.