Citation: *R. v. Haggard*, 2016 YKTC 15

Date: 20160414
Docket: 13-10046
15-00784
15-00784A
15-00785
15-00785A
Registry: Whitehorse
Watson Lake
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

JAMES HENRY PHILLIP HAGGARD

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Christiana Lavidas — Counsel for the Crown
Norah Mooney — Counsel for the Defence

REASONS FOR SENTENCE

Introduction

[1] CHISHOLM J. (Oral): Mr. James Haggard has pleaded guilty to two sexual assault charges contrary to s. 271(a) of the *Criminal Code*; and one assault charge contrary to s. 266 of the *Criminal Code*, against his former girlfriend. At the time of these crimes, he was 18 years of age and his victim, 15 years of age. He also pleaded

guilty to two offences of failing to report to his bail supervisor as directed contrary to s. 145(3) of the *Criminal Code*.

Relevant Facts

[2] Between December 25, 2012 and March 23, 2013, Mr. Haggard sexually assaulted T.L. in Watson Lake, Yukon. The first incident occurred at the residence of T.L.'s aunt on December 25. Mr. Haggard and T.L. were in a boyfriend-girlfriend relationship.

[3] The couple ate Christmas dinner at the residence and stayed overnight. They were talking and kissing when Mr. Haggard attempted to touch T.L. on her legs and thighs. She told him to stop, as this touching made her uncomfortable. He began trying to take her shirt off. She objected. He ultimately took her shorts off. She kept looking away from him. He became upset when she pushed him away. He grabbed her wrists and put them over her head. He vaginally penetrated her despite her protests. She stopped moving and looked the other way. He stopped after approximately five minutes. T.L. had never had sexual relations prior to this sexual assault.

[4] Approximately a week later, the couple were again staying at the aunt's residence. In the early morning, T.L.'s aunt left for work. Mr. Haggard and T.L. had been watching movies while on a couch. She indicated she was tired. They were kissing when he attempted to touch her breasts. She told him she was uncomfortable. He told her she had to do what he was asking. He grabbed her by the arms and got on top of her. She was upset and slapped him. He took off his clothes and most of her

clothes. He vaginally penetrated her. After the sexual assault, she gathered her things and left the house when she heard him snoring.

[5] A few months later, Mr. Haggard and T.L. were still seeing each other. They attended a party. Mr. Haggard became very intoxicated from alcohol. When T.L. attempted to leave the party, he asked to talk to her in the washroom. He became angry with her and prevented her from exiting the washroom. When he began to undress her, she expressed her desire to leave. He pulled her pants to her knees and attempted sexual intercourse. He penetrated her vaginally, but, due to her resistance, the sexual assault ended shortly thereafter. When she tried to leave, he pulled her by the hair. He apologized and told her he loved her. She shoved him and left the washroom and the house.

[6] The second sexual assault charge is in relation to a sexual assault in northern British Columbia. Mr. Haggard waived this charge, the assault charge, and the two failure to report charges to the Yukon for the entering of guilty pleas and sentencing. An Agreed Statement of Facts was filed with the Court with respect to these charges. I have summarized the facts.

[7] In early April 2013, Mr. Haggard and T.L. moved to the Blueberry Indian Reserve near Fort St. John, British Columbia. They were staying with Mr. Haggard's grandfather.

[8] In mid-April, while in a bedroom of the residence, Mr. Haggard told T.L. he was ending the relationship. He was intoxicated. When he asked if they could continue to have sexual relations, an argument ensued. T.L. slapped him in the face. He got on

top of her, ripping her shirt. He placed his knees on her shoulders, preventing her from moving. She swore at him. He removed her pants and underwear, and then his own. He applied pressure to her neck with both of his hands to keep her down. He sexually assaulted her by vaginally penetrating her. She was panicking during the sexual assault, as she believed he was trying to choke her. He was not wearing a condom.

[9] On April 16, 2013, Mr. Haggard assaulted T.L. by spitting on her and punching her in the face, as he tried to make her leave the residence. She pulled out her pocketknife to keep him away. At one point he grabbed her, threw her on the floor, and jumped on her back. He grabbed one of her arms and wrapped his other arm around her neck. He began choking her. T.L. began to lose consciousness, but Mr. Haggard finally stopped. He left the residence.

[10] Between January 6 and February 6, 2014, while bound by a recognizance, Mr. Haggard failed to report to his bail supervisor as directed. Between June 25 and July 4, 2014, while bound by a recognizance, he again failed to report to a bail supervisor as directed.

Position of the Crown and the Defence

[11] The Crown submits that a global sentence of 39 months' imprisonment is warranted. Mr. Haggard has been in pre-sentence custody for 10 months. The Crown concedes that he is entitled to 15 months' credit for his pre-sentence custody. Considering this pre-sentence custody, the Crown submits that a further two years less a day, plus three years' probation is the appropriate overall sentence.

[12] The Crown argues that a significant period of imprisonment is appropriate due to the nature of the sexual assaults and due to the fact that the two sexual assaults are comprised of four separate incidents over approximately a four-and-a-half month period.

[13] The Crown points to the ongoing relationship between the offender and the victim as an aggravating factor. The offender breached his position of trust in committing these offences.

[14] The Crown seeks a DNA order, a 10-year firearms prohibition, a SOIRA order, certain prohibitions pursuant to s. 161 of the *Criminal Code*, and a non-communication order while in custody.

[15] The defence submits that the mitigating factors in this case support a global sentence of 30 months' imprisonment plus a lengthy period of probation. The defence argues that the s. 161 prohibitions being sought by the Crown are inappropriate in the circumstances of this case.

Victim Impact

[16] T.L. has been severely traumatized by Mr. Haggard's crimes. Her father described the emotionally devastating impacts that have resulted. Her mental health has been negatively affected, leading to suicidal ideations. She has had to seek assistance from mental health professionals.

Circumstances of Mr. Haggard

[17] Mr. Haggard is 21 years of age. He is a member of the Blueberry River First Nation.

[18] His family circumstances and those of his home community are set out in the decision of *R. v. Pouce Coupe*, 2014 BCCA 255. Mr. Pouce Coupe is Mr. Haggard's older brother, who was being sentenced for a serious sexual assault.

[19] Part of the Court of Appeal decision reads:

> 11 In his written statement on the appeal, the appellant listed the following unique systemic and background factors affecting him as an Aboriginal offender that were identified in the *Gladue* report:
>
> * His community has a history of dislocation and displacement from their lands which caused a loss of culture;
>
> * His community has high rates of domestic abuse, gang violence, substance abuse, unemployment and children in the foster care system;
>
> * Racism is prevalent in the region due in part to the compensation the Band receives from negotiated agreements and court cases;
>
> ...
>
> * The appellant's family avoided residential school by hiding out on the trap lines, but his grandfather did attend Indian Day School where he was strapped frequently;
>
> ...

[20] The *Gladue* report for Mr. Haggard's brother also spoke to the issue of sexual abuse in the Blueberry River First Nation Reserve. This excerpt of the report is found at para. 12 of the decision:

> Counsellors, Mr. Rattray, Ms. Greyeyes, and Dr. Totten, all reported that sexual abuse is a serious issue in Blueberry and that violence against women has been normalized in Aboriginal communities, such that women and children are not believed when they come forward and men are not held to account for their actions.
>
> ...

[21] I have had the benefit of reviewing a comprehensive Pre-Sentence Report ("PSR") and a sexual offender risk assessment. Mr. Haggard was subjected to a dysfunctional, neglectful, and abusive upbringing. He was taken into care at an early age. His mother was a chronic drug and alcohol abuser. Anthony Pouce Coupe was taken into care with Mr. Haggard and another brother. Mr. Pouce Coupe described to the author of the PSR that the boys sustained abuse and trauma.

[22] Around the age of 10, Mr. Haggard's father became involved in his life. Mr. Haggard lived with his father and step-mother, away from the reserve, until he was in his teens. His father was often away from the home due to the nature of his work. Mr. Haggard's step-mother was emotionally abusive to him. When his father was present, he was, at times, physically abusive to Mr. Haggard.

[23] His father and step-mother began to use drugs and Mr. Haggard's living situation deteriorated. Mr. Haggard returned to the Blueberry First Nation Reserve, where he was reunited with his mother. He stayed with her and his grandfather. However, his mother continued to drink alcohol to excess and abuse drugs. He witnessed family violence between his mother and various boyfriends. On one occasion, he attempted to intervene and was assaulted.

[24] When Mr. Haggard turned 19, he was given $200,000 by his First Nation as a result of its land claims process. He bought various vehicles, lent $40,000 to family members (which money has not been repaid), and spent the rest on living expenses and “partying”.

[25] Mr. Haggard reported to the author of the PSR that his father had told him when he was a teenager that “he had been tested at school and was found to be FASD”. There is hearsay evidence from family members that Mr. Haggard's mother drank alcohol while pregnant. One of Mr. Haggard's aunts, a sister of his mother, advised the author of the PSR that Mr. Haggard's mother did drink during her pregnancies. The author of the PSR was unable to obtain any formal FASD diagnoses.

[26] A colleague of the author who had commenced the PSR did indicate in the February 15, 2016, memo to the Court:

> James does not present behaviourally in a manner consistent with his chronological age, suggestive of a developmental delay.

[27] His lawyer also noted that her interactions with Mr. Haggard suggest some cognitive issues.

[28] At the time of these offences, Mr. Haggard did not have a criminal record. He has had three convictions registered since that time for minor, unrelated offences.

[29] Mr. Haggard has indicated to the author of the PSR that he does not wish to engage in treatment for issues with which he is dealing, for example, alcohol abuse.

[30] Although the PSR and risk assessment have been of assistance, there is, regrettably, no psychological assessment before the Court. Based on the background material I have reviewed, it would have been beneficial to have such an assessment. I have decided not to prolong the sentencing hearing any further in order to obtain such a report.

[31] Mr. Haggard entered a guilty plea on the Watson Lake sexual assault just prior to trial, approximately six months after his arrest. The matter of sentencing was adjourned to allow for the preparation of a PSR and to presumably waive the other offences to this jurisdiction.

[32] The preparation of the PSR was delayed once, due to Mr. Haggard's actions.

[33] As indicated, Mr. Haggard has been in pre-sentence custody for a significant period of time. I am told that his custody status at the Whitehorse Correctional Centre has negatively affected programming and work opportunities there. In my view, it would be inappropriate to delay the sentencing decision further.

Analysis

Principles of Sentencing

[34] The fundamental purpose of sentencing as set out in s. 718 of the *Criminal Code* is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions with objectives which include:

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

[35] As per s. 718.1 of the *Criminal Code*:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[36] The Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, stated:

> 37 The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. …

[37] Later, in the same paragraph, the Court says:

> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender.
>
> …

[38] Pursuant to s. 718.01, when an offender is sentenced for abusing a person under the age of 18, primary consideration shall be given to the objectives of denunciation and deterrence.

[39] Other pertinent principles to this case that a court must take into account pursuant to s. 718.2 are:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...
>
> ...
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health...
>
> ...
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[40] As outlined in *Ipeelee* and *R. v. Gladue*, [1999] 1 S.C.R. 688, the Court must impose a sentence that fits the offence, the offender, the victim, and the community.

[41] Sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender. (see *R. v. Ipeelee* at para. 38 and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, para. 92)

[42] It is, of course, impossible to locate two sets of such circumstances that are mirror images. Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion (see *R. v. L.M.*, [2008] 2 S.C.R. 163, at para. 15). "There is no such thing as a uniform sentence for a particular crime." (see *R. v. M. (C.A.)*, para. 92)

Aggravating Factors

[43] The circumstances of these offences of violence are very serious. Aside from the inherent violence of sexual assaults, Mr. Haggard used additional physical violence to effect his crimes. He repeatedly violated T.L.'s physical and psychological integrity. As a result of his ongoing relationship with T.L., he was in a position of trust with respect to her. She was a young teenager who had no experience with sexual relations. It is no wonder that she has been severely traumatized by these crimes.

[44] The Crown argues that the offender and victim were in a spousal relationship, which is statutorily aggravating. I cannot accept this submission. The relationship was one of boyfriend and girlfriend, not a spousal relationship. (see *R. v. J.W.S.*, 2013 NSPC 7, at para. 23.)

Mitigating Factors

[45] Mr. Haggard was a very young adult when committing these offences. He had no prior criminal record.

[46] He took responsibility for these offences and spared a fragile victim from having to testify in court thereby reliving these events. Although he appears to lack a certain amount of insight, he has expressed his remorse for his actions. Despite the Crown's concerns with respect to the genuineness of his remorse, I accept that Mr. Haggard is sorry for the significant harm he has caused to the victim.

[47] He has had little support in his life, although his older brother, Anthony Pouce Coupe, indicated to the author of the PSR that he is willing to assist Mr. Haggard. Since his conviction for a serious sexual assault, Mr. Pouce Coupe has taken steps to deal with his past trauma. He has been sober for six years and wishes for Mr. Haggard to achieve the same state.

Case Law

[48] Published sentencing cases of more than one sexual assault perpetrated on the same victim, in the context of an ongoing relationship, appear relatively rare.

[49] In *R. v. N.T.*, 2011 ONCA 114, the offender and victim were in a spousal relationship. He was convicted of two counts of assault causing bodily harm and one count of sexual assault. The sexual assault offence covered an eight-year period during which there were times of consensual sexual relations but "many occasions over the eight years where she refused, but he violently forced himself on her." The offender

had been found guilty after trial. He had no criminal record. The Court of Appeal upheld the sentence of four years' imprisonment.

[50] In *R. v. H.(R.)*, 2012 ONCJ 674, the 36-year-old offender was convicted after trial for sexually assaulting his spouse on a number of occasions over a four-month period, for assaulting her on a separate occasion, and for an assault which caused her bodily harm on yet another location. The offender had no prior record. The Court sentenced him to three years' imprisonment for the sexual assault, one year consecutive for the assault causing bodily harm, and six months concurrent for the assault.

[51] In *R. v. G.M.*, 2015 BCCA 165, the offender sexually assaulted his former partner after they had had consensual sexual relations. The sexual assault entailed anal penetration for a 10- to 15-minute period, during which the victim cried and protested. The offender had earlier assaulted the victim by striking him across the face four times. The offender had been convicted after trial. In overturning a sentence of 90 days' imprisonment and 18 months' probation, the Court cited the paramount sentencing objectives of denunciation and deterrence. The Court of Appeal replaced the sentence with one of 18 months' incarceration, followed by 18 months of probation, based on the Crown's initial position on sentencing. The Court noted that the normal range of sentence in British Columbia for offences of sexual assault is between two to six years.

Sentence

[52] I must consider the principle of totality for the five offences to which Mr. Haggard has pleaded guilty.

[53] The proper approach, with respect to this principle, was discussed in *R. v. G.W.G.*, [2008] O.J. No. 5914, a 2008 decision of the Ontario Superior Court:

> 56 I also have to take into consideration totality, since I am sentencing him for three offences. The approach to totality is indicated by the Court of Appeal in *R. v. Jewell*; and *R. v. Gramlick*, [1995] O.J. No. 2213.
>
> > [27] First, identify the gravamen of the conduct giving rise to all of the criminal offenses. The trial judge should next determine the total sentence to be imposed. Having determined the appropriate total sentence, the trial judge should impose sentences with respect to each offence which result in that total sentence and which appropriately reflect the gravamen of the overall criminal conduct. In performing this function, the trial judge will have to consider not only the appropriate sentence for each offence, but whether in light of totality concerns, a particular sentence should be consecutive or concurrent to the other sentences imposed.
>
> 57 Those comments are consistent with the subsequent judgments of the Supreme Court of Canada in *R. v. C.A.M.* [1996] S.C.J. No. 28, where the Court said that the proper approach was to determine whether or not the total sentence was just and appropriate.

[54] I also consider the youth of this offender and the principle of rehabilitation in crafting an appropriate sentence. Although the principles of denunciation and deterrence are paramount, I must show as much restraint as possible for an offender of this age.

[55] As stated by the Ontario Court of Appeal in *R. v. Q.B.*, [2003] O.J. No. 354:

> 36 Aside from the gravity of the appellant's crimes, the overwhelming factor is his youth. In my view, the trial judge erred in principle in focusing almost exclusively on the objectives of denunciation and general deterrence, given the appellant's age and that this was his first adult prison sentence and his first penitentiary sentence. The length of a first penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and general deterrence. Where,

> as here, the offender has not previously been to penitentiary or served a long adult sentence, the courts ought to proceed on the basis that the shortest possible sentence will achieve the relevant objectives.
>
> ...

[56] Although the offences committed by Mr. Haggard are very serious, the sentence must fulfil the principle of proportionality and not lose sight of his level of moral blameworthiness.

[57] Having considered the circumstances of the offences and the offender, in concert with the appropriate principles of sentencing, I find the total sentence in this case should be one of 30 months' imprisonment.

[58] I sentence Mr. Haggard to 18 months' imprisonment for the first sexual assault offence in time, which consisted of three separate incidents, less 15 months of pre-sentence custody. Additionally, he will be subject to a two-year probationary term.

[59] I sentence him to 12 months consecutive for the second sexual assault.

[60] I sentence him to 6 months concurrent for the assault and 15 days concurrent on each of the failure to report charges.

[61] Accordingly, Mr. Haggard shall serve a further period of incarceration of 15 months.

[62] The terms of the two-year probation order are:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify your Probation Officer in advance of any change of name or address, and promptly of any change of employment or occupation;

4. Have no contact directly or indirectly or communication in any way with T.L.;

5. Do not go Watson Lake, Yukon. Remain 100 metres away from any known place of residence, employment, or education of T.L.;

6. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the court;

7. Report to a probation officer immediately upon your release from custody and thereafter, when and in the manner directed by the Probation Officer;

8. Reside as approved by your probation officer, abide by the rules of the residence, and not change that residence without the prior written permission of your Probation Officer;

9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your probation officer, for the following issues:

    - substance abuse,
    - alcohol abuse,
    - spousal violence,
    - anger management,
    - psychological issues,

- sexual offender programming, and
- any other issues identified by your probation officer,

and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

10. Participate in such educational or life skills programming as directed by your probation officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you may have been directed to do pursuant to this condition;

[63] There will also be ancillary orders as follows:

1. A mandatory DNA order, pursuant to s. 47.051(1) of the *Criminal Code* authorizing the taking of a DNA sample for DNA analysis and recording.

2. A mandatory weapons prohibition for 10 years pursuant to s. 109(1)(a) of the *Code*.

3. An order that Mr. Haggard's name be added to the Sex Offender Registry and that he comply with the *Sex Offender Information Registration Act* for life, due to the fact that he has been convicted of two separate offences of sexual assault, pursuant to s. 490.012(1) and s. 490.013(2.1) of the *Criminal Code*.

4. You are to have no communication directly or indirectly with T.L. during your period of custody pursuant to s. 743.21 of the *Criminal Code*.

[64] I have considered the issue but I decline to make any order pursuant to s. 161 of the *Criminal Code*.

[65] The victim surcharges are $200 for each of the two indictable offences and $100 for each of the three summary conviction offences for a total of $700. These are payable forthwith.

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CHISHOLM T.C.J.