COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Papequash aka Graham***, 2003 YKCA 13

Date: 20030714
Docket: Yu00498

Between:

Regina

Respondent

And

John Thomas Papequash also known as John Thomas Graham

Appellant

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

N. Somji	Counsel for the Appellant
E. Horembala, Q.C. J. Reid	Counsel for the (Crown) Respondent
Place and Date:	Vancouver, British Columbia July 14, 2003

[1] **RYAN, J.A.**: The appellant was sentenced in Whitehorse on 16 May of this year to a total of three years incarceration for a number of ***Criminal Code*** offences. Leave to appeal sentence was granted by a division of this Court on May 30.

[2] On November 12, 2002 the appellant was convicted in the Territorial Court of Yukon of one count of breaking and entering; one count of resisting a police officer engaged in the execution of his duties; possession of stolen property (an all-terrain vehicle); and breach of a probation order. All of the charges arose out of an incident which occurred on the 28 June 2002. On that date the appellant and another young man broke into the Porter Creek Video Store at about 5:15 a.m. by smashing a window. They stole a VCR and some videotapes and left the scene in a stolen vehicle. A person who lived nearby called the police. The police caught up with the appellant after he had abandoned the ATV near Kwanlin Dun village. When ordered to stop by the police the appellant tried to flee. He was chased by a police officer who subdued him after a short chase.

[3] After the appellant was found guilty of these four offences, he pleaded guilty to a robbery he had committed on June 27, 2002. On that day the complainant, a young woman, encountered the appellant with a number of his friends in a

local park. The complainant had a confrontation with one of the members of the group. She quickly left the area, but was followed by the appellant and a young offender. When the appellant and the young person caught up with the complainant they reassured her that they were only there to walk her home. When the three of them cut through a bush area the young person threw the complainant to the ground and both he and the appellant pinned her down on the ground. The young person did all the talking. He told the appellant to search the complainant's pockets and purse. The appellant found the complainant's bank card. The young person threatened to hurt the complainant if she did not reveal her PIN number. She did so and the young person and the appellant left. The complainant contacted the police. The appellant was arrested two days later after his involvement in the video store break-in.

[4] After the trial of the June 28th matters, and the plea to the June 27th robbery, sentencing was put over for preparation of a pre-sentence report. The appellant was released on bail, a term of which required him to reside at the Yukon Adult Resource Centre. He walked away from the centre and was not apprehended until 30 March 2003 when he was arrested for possession of a stolen truck.

[5] On May 9, 2003 the appellant appeared in court for sentencing on the June 2002 offences. On May 9th he also pleaded guilty to two counts of failure to abide by the conditions of his release. He also pleaded guilty to one count of possession of housebreaking instruments. In that case he had been found in an unoccupied home in October of 2002 in possession of a screwdriver. Finally, the appellant pleaded guilty to another count of breaking and entering a residential premise of January 22, 2003. Mr. Pappequash was found that day, with three others, loading up a stolen truck with audio, stereo and telephone equipment from the break-in.

[6] On sentence the trial judge was advised of the appellant's youth court record. He was convicted when he was 12 years old of one count of robbery and one count of possession of stolen property. As an adult the appellant was convicted in 2001 of theft over $5,000, failing to comply with an undertaking and failing to comply with a probation order. He was sentenced to 30 days in jail for those offences.

[7] The pre-sentence report revealed that the appellant had admitted his guilt to the probation officer. He expressed remorse for what he had done to his victims, in particular the young woman whom he robbed. The report noted that the appellant had the support of his family, in particular one of

his sisters, who is employed and has a young daughter, offered to provide the appellant with a home and support him and help him address his alcohol and drug problems. The probation officer who prepared the report noted that the appellant had not been hardened by the system and that there still seemed to be a possibility for him to turn his life around.

[8] In fixing the quantum of sentence the trial judge thoroughly reviewed many of the proper principles and facts both in the appellant's favour and against him. He took into account the fact that the appellant had been in custody for 52 days prior to sentence.

[9] The judge sentenced in this way:

> [28] The sentences will be structured as follows:
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> 1. On the charge of robbery, 18 months;
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> 2. On the charge of breaking and entering a dwelling house, six months to be served consecutively;
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> 3. On the charge of breaking and entering the video store, three months consecutive;
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> 4. On the charge of possession of housebreaking tools, three months consecutive;
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> 5. On the charge of possession of stolen property over $5,000, two months consecutive;
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> 6. On the charge of possession of stolen property under $5,000, two months consecutive;

> 7. On the charge of resisting arrest, two months consecutive.
>
> [29] With respect to the other matters, having regard to totality and time served, amongst other things, the sentences will be as follows:
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> 1. On each of the three charges of breach of recognizance, two months concurrent.
>
> 2. On the charge of breach of probation, two months concurrent.

[10] Counsel for the appellant, Mr. Horembala, submits that the sentencing judge erred in two ways. He says that the sentencing judge did not pay sufficient attention to the operation of s. 718(2)(e) of the ***Code***, and that when looked at as a whole the sentence offends the totality principle.

[11] The appellant is a 20-year-old aboriginal offender. As I have mentioned, he has a youth record acquired when he was just 12 years of age. He also has a short adult record but had only served a 30 day sentence in jail prior to committing the offences with which we are dealing today. In the first offence, the robbery on June 27, the appellant did not take the leading role. He followed the instructions of the young person whose plan it was to rob the complainant. The appellant has family support. He has expressed remorse. The probation officer who prepared the pre-sentence report, as I have said, said that rehabilitation is possible for this young

man. Given the age of this offender, his aboriginal status, the support of his family, his guilty pleas, his expression of remorse, and the fact that with the exception of the robbery the majority of his offences were non-violent, I am of the view that rehabilitation ought to have been considered the significant factor in this case. Having served only one month in a territorial institution, the sentencing judge ought to have given serious thought to keeping this young man in that system before sending him to a federal institution.

[12] Rather than do that, the trial judge said this:

> It is quite clear that there is little prospect that the accused can conform to the expectations of any community supervision order. I am, therefore, of the view that a significant custodial sentence is the one remaining option in this case.

[13] The sentence must, of course, fit the crime. The sentencing judge considered that the seriousness of the offences along with the appellant’s poor response to bail conditions and probation orders outweighed the rehabilitative advantages of a shorter sentence followed by a probation order.

[14] Counsel for the Crown, Ms. Somji, has emphasized the position of the sentencing judge in understanding the needs of his community. She has pointed out the seriousness of these

offences which occurred over the course of a nine month period. While we must pay considerable deference to the sentencing judge, I am nonetheless persuaded that he erred in failing to properly take into account rehabilitative and restorative principles in fashioning the appropriate total sentence. I am of the view that he erred in sending this young man to a federal penitentiary without first attempting his rehabilitation in the territorial system followed by a probation order designed both to protect the public and to encourage the appellant's rehabilitation.

[15] I would allow the appeal and provide for a sentence of two years less a day in total to be followed by a probation order for two years. To achieve that end I would leave the sentence of 18 months for the robbery; reduce the sentence for breaking and entering a dwelling house to three months less one day consecutive, reduce the sentence on the charge of "breaking and entering" the video store to three months concurrent; reduce the sentence of possession of housebreaking instruments to two months consecutive; reduce the sentence of possession of stolen property over $5,000 to one month consecutive; reduce the sentence for possession of stolen property under $5,000 and for the charge of resisting arrest to two months concurrent. I would also order, as I have said,

that the appellant be placed on probation for two years following his release from prison.

[16] At this point I would ask counsel to confer and to consider what terms of probation we ought to impose in this case. I will deal later with the terms of probation.

[17] These are the reasons that I have given for allowing the appeal.

[18] **SAUNDERS, J.A.**: I agree with the reasons thus far expressed by my colleague and, of course, I have to come back to the terms of the probation order. I agree with the disposition she proposes.

[19] **LOWRY, J.A.**: I agree.

(submissions re. probation order)

[20] **RYAN, J.A.**: Counsel have returned now and have discussed the terms of the probation order which ought to be made. The usual statutory conditions will be imposed. My colleagues agree. The terms set out in the pre-sentence report (a) through (g) should be incorporated into the order:

> (a) The appellant will report to a probation officer within 48 hours of his release and thereafter as when directed by a probation officer, which for the first six months must not be less than twice per week.

(b) Participate in such substance abuse assessment, counselling and treatment including attendance at a residential alcohol program as directed by a Probation Officer.
(c) Participate in such other assessment, counselling and programs as directed by the Probation Officer.

(d) Attend school to continue with upgrading when available or participate in the programs offered through Yukon Learn as directed by the Probation Officer.

(e) Reside in a residence as approved by the Probation Officer.

(f) Abide by a curfew between the hours of 9:00 p.m. and 7:00 a.m. for the first six months of your probation order.

(g) Abstain absolutely from the consumption, possession, and/or purchase of alcohol and non-prescription drugs and submit to a breath or bodily fluids test on demand from a peace officer who has reason to believe that you have failed to comply with this condition.

"The Honourable Madam Justice Ryan"

CORRECTION: August 29, 2003

Counsel for the Appellant should be "E. Horembala, Q.C." and "J. Reid"

Counsel for the Respondent should be "N. Somji".