

TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

TYLER TOM TOM

Appearances:
Keith D. Parkkari
David J. Christie

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

OVERVIEW

[1] CHISHOLM T.C.J. (Oral): On September 21, 2012, after drinking alcohol through the course of the day, Mr. Tom Tom began operating an all-terrain vehicle in and around the McIntyre subdivision of Whitehorse. He had two passengers on the vehicle, both of whom had also consumed alcohol.

[2] Late that evening, Mr. Tom Tom and his two friends came across Brandon Webb who had blood on his face, apparently as the result of a fight. They spoke briefly to him. Based on the conversation, Mr. Tom Tom believed that George Stewart, who was nearby, had been the other combatant. Mr. Tom Tom accelerated the ATV towards Mr. Stewart and struck him. The victim ended up on the ground. He was noted to be conscious. However, the actions of Mr. Tom Tom not only injured Mr. Stewart, but

made him vulnerable to Mr. Webb who viciously attacked him, kicking and stomping on his head area.

[3] Mr. Tom Tom told Mr. Webb to desist from the attack, but he did not do so. Neither Mr. Tom Tom nor his friends intervened to prevent continuation of the attack. They left the scene.

[4] Mr. Stewart suffered severe injuries, including trauma to the brain, fractured ribs, and a broken jaw. It is impossible to determine the extent of the injuries caused by Mr. Tom Tom.

[5] Mr. Tom Tom has pleaded guilty to two *Criminal Code* offences: dangerous driving causing bodily harm, contrary to section 249(3); and failing to stop at the scene of an accident where bodily harm had resulted, section 252(1.2). Both offences are indictable by law.

GRAVITY OF THE OFFENCE

[6] Mr. Stewart was flown by plane to Vancouver where he underwent significant medical procedures which saved his life. However, he had many months of rehabilitation in the hospital and a year and a half later, he has still not fully recovered. Victim impact statements, which were filed on the sentencing hearing, demonstrate the serious repercussions for Mr. Stewart and his family of these senseless acts.

[7] Crown and defence agree that a period of incarceration is warranted with respect to the two offences, although there is no agreement on quantum. Crown seeks a six-month incarceration, plus a lengthy period of probation; whereas the defence

submits a period of incarceration in the intermittent range, plus probation is more appropriate.

[8] The fundamental principle of sentencing requires me to impose a sentence which is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[9] This is clearly a very serious set of offences. The unprovoked actions of Mr. Tom Tom injured the victim and rendered him vulnerable. Mr. Tom Tom then compounded his wrongs by doing virtually nothing when Mr. Webb commenced his vicious attack on the victim.

[10] The victim and his family were significantly impacted by this incident. It has affected Mr. Stewart's quality of life, as well as his abilities as a carver. The negative health effects are an aggravating factor. However, I must be mindful that although Mr. Tom Tom injured the victim and left him vulnerable, he did not cause all of the injuries. The attack by Mr. Webb after the victim had been knocked down by the offender was sustained and vicious. It involved repeated kicks to the head and this logically led to significant trauma.

[11] Mr. Tom Tom's actions, which encompass failing to remain at the scene of the accident, are also troubling. Not only did he not remain at the scene, but he fled knowing full well that the victim was being assaulted by Mr. Webb.

[12] Due to the seriousness of these matters, the sentence imposed must focus on denouncing this behaviour and deterring Mr. Tom Tom and others from this type of

conduct. As stated by the British Columbia Court of Appeal in *R. v. Bhalru*, 2003 BCCA 645, at paragraph 47:

... Courts have repeatedly recognized that general deterrence and denunciation will be "paramount objectives" in sentencing for impaired or dangerous driving offences: ...

[13] The Court later states:

... Indeed, in Proulx, *supra* [paragraph] 129, the Supreme Court singled out dangerous driving and impaired driving as types of offences where the inference that harsher sentences effect greater general deterrence may hold true.
...

DEGREE OF RESPONSIBILITY

[14] In assessing the moral culpability of Mr. Tom Tom, I consider the words of Finch C.J. in the *Bhalru* decision:

[28] The level of moral culpability is determined in part by considering the intentional risks taken by the offenders, the degree of harm that they have caused, and the extent to which their conduct deviates from the acceptable standard of behaviour: ...

[15] In my view, Mr. Tom Tom's degree of responsibility for these offences is high. He had been consuming alcohol prior to deciding to drive. Although he made a split-second decision to use his all-terrain vehicle to strike the victim, the chances his action would cause bodily harm to the victim were high. His subsequent failure to interrupt the third party attack heightens his level of responsibility. As indicated, the harm suffered by the victim was considerable. Finally, Mr. Tom Tom's conduct deviates substantially from the acceptable standard of behaviour.

[16] As was noted in *Bhalru*, there are other factors to consider when assessing the degree of responsibility of the offender. In *R. v. Casselman*, 2014 ONCJ 198,

Justice Paciocco outlines such considerations:

[13] Factors relating to the degree of responsibility of the offender – the offender-based considerations – tend to focus on other objectives of sentencing, most commonly specific deterrence and rehabilitation, and at times the need for incapacitation by locking the offender up to protect the public. They inform whether prominence should be given to intimidating the offender to discourage future crimes, or whether the focus should be on rehabilitating the offender by addressing the conditions that cause him to offend. ...

[17] In Mr. Tom Tom's situation, the following factors are important:

- He is 21 years of age and is single with no dependants.
- He is a member of the Kwanlin Dün First Nation and has a supportive family.
- The *Gladue* report describes Mr. Tom Tom as a quiet individual who is not prone to this type of behaviour.
- I take into account the *Gladue* factors that are apparent, including the fact that Mr. Tom Tom's father attended three different residential schools when he was a teenager.
- Mr. Tom Tom has a good work history, most recently having worked in a local mine.

- He has a limited criminal history, although both convictions are for driving-related offences: driving while impaired in 2011 and driving while disqualified in 2012. He has never spent time in jail prior to this incident. After his arrest, he spent four days in custody before his release on strict conditions. He has been on those conditions for over a year and a half, without any difficulties.
- Although initially denying his involvement to police, he did confess soon thereafter. He wrote a letter of apology to his victim and entered guilty pleas. He accepted full responsibility and has exhibited significant remorse.
- He entered guilty pleas and although it has taken a long time to bring this matter to resolution, it is not suggested that the delay had anything to do with Mr. Tom Tom.
- The death of his younger brother years ago still affects him and he would benefit from counselling in this regard.

SENTENCE

[18] The circumstances of the dangerous driving offence are uncommon and, as a result, I have considered both impaired and dangerous driving causing bodily harm sentencing decisions.

[19] In *R. v. Sidney* [1999] Y.J. No. 12, the offender had a much more serious record than Mr. Tom Tom. Although there were injuries to his passenger, Mr. Sidney was

charged with dangerous driving and not dangerous driving causing bodily harm. He received a six-month period of imprisonment.

[20] In *R. v. Campen* [1998] Y.J. No. 15, the accused was sentenced to four months imprisonment for impaired driving causing bodily harm and an 18-month driving prohibition. The injuries suffered by the victim were serious. The accused had no related prior record.

[21] In *R. v. Marshall*, 2010 YKTC 81, the offender pleaded guilty to the offence of impaired driving causing bodily harm. One of her victims had suffered severe injuries. Ms. Marshall, who had no prior criminal record, was sentenced to a period of incarceration of five months and a two-year driving prohibition.

[22] In *R. v. Lommerse*, 2013 YKCA 13, the Yukon Court of Appeal imposed a four-month jail sentence where the offender had caused bodily harm to his passenger when driving while impaired. The offender was youthful and had no prior criminal record. The victim was hospitalized for less than a week.

[23] The defence relies on the Alberta Provincial Court decision in *R. v. Dustyhorn*, 2014 ABPC 47, in which the offender was sentenced to 90 days jail to be served intermittently, plus 18 months probation and a one-year driving prohibition for the offence of dangerous driving causing bodily harm. The offender had a prior criminal record.

[24] What distinguishes all of these cases from the case at bar is that none of them include a fail to remain at the scene of the accident charge. It is a serious charge and

the facts with respect to this incident are troubling. The range of sentence for this offence is wide, but there are two recent decisions that are of assistance.

[25] In *R. v. Peebles*, 2013 MBQB 234, after an unfortunate accident where the offender struck a pedestrian, he failed to remain at the scene knowing the victim had suffered bodily harm. The victim died. The offender was sentenced to five months imprisonment, one year probation, and a one-year driving prohibition.

[26] In *R v. Cook*, 2013 SKPC 161, the 22-year-old offender had been drinking alcohol with friends. She retrieved her vehicle and on her way home drove over the victim, who was passed out in the middle of the road. She fled the scene. After an extensive investigation, the police determined her to be a suspect. She initially denied responsibility but later confessed. She had no prior criminal antecedents. She received a 90-day jail sentence to be served intermittently, plus 18 months of probation and a two-year driving prohibition.

[27] The ultimate sentence for Mr. Tom Tom for these offences must balance the need for denunciation and deterrence, while at the same time focusing on his rehabilitation.

[28] The sentencing process is not an exact science and it is important to remember it is an individual process. As outlined, Mr. Tom Tom has a lot going in his favour. He is youthful; he has good support, both family and community; and has a good work record. He has taken responsibility for the offences and has expressed his remorse. I am of the view that the sentence sought by the Crown for these offences is appropriate.

[29] Having considered all factors of the offence and the offender, and taking into account his short period of time on remand, I find the appropriate period of imprisonment on the dangerous driving causing bodily harm offence is that of six months, plus an 18-month driving prohibition. The appropriate sentence for the offence of leaving the scene of an accident is four months imprisonment. In the normal course, this sentence would be served consecutively; however, I must consider the principle of totality. The imposition of an overall sentence of 10 months would not be just and appropriate. The four-month sentence will therefore be concurrent to the six-month sentence for dangerous driving causing bodily harm.

[30] This will be followed by an 18-month probation order, the terms of which will be:

1. You will keep the peace and be of good behaviour; and appear before the Court when required to do so;
2. You will notify the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;
3. You will report to a Probation Officer within two working days of your release from custody;
4. You will take such alcohol and drug assessment counselling or programming as directed by your Probation Officer;
5. You will take such other assessment counselling and programming, including grief counselling, as directed by your Probation Officer;

6. You will have no contact directly or indirectly with the victim in this matter, Mr. Stewart, except with the prior written permission of your Probation Officer in consultation with Victim Services.

[31] The Crown seeks a DNA order with respect to Mr. Tom Tom. This is a secondary designated offence under section 487.04 of the *Criminal Code* and is therefore discretionary. I have considered the Supreme Court decision in *R. v. Rodgers*, 2006 SCC 15, where the Court held that collecting a DNA sample from a person who has been convicted of an offence has minimal impact on the offender's physical integrity. In my view, in all the circumstances, a DNA order is in the best interests of the administration of justice. Mr. Tom Tom, you are ordered to provide a sample of your blood for the purposes of DNA analysis and recording.

[32] The Victim Fine Surcharges with respect to these matters are waived.

[33] Madame Clerk, the Probation Order will attach to both convictions.

CHISHOLM T.C.J.