R. v. Papequash, 2003 YKTC 41

Date: 20030516
Docket No.: T.C. 02-00189, 02-00190, 02-00423A, 02-00688, 02-00754
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Judge Faulkner)

REGINA

v.

JOHN THOMAS PAPEQUASH
(aka JOHN THOMAS GRAHAM)

Ludovic Gouaillier — For the Crown

Gordon Coffin — For the Defence

REASONS FOR SENTENCING

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[1] FAULKNER T.C.J.(Oral): John Thomas Papequash, also known as John Thomas Graham, is before the court for disposition on 11 different offences.

[2] The first is a charge of breaking and entering at the business premises of Porter Creek Video. Entry was gained by smashing a window. Inside, a door was broken to gain entry into the office. Video tapes and a VCR were taken.

[3] The second and third charges arise from the same date as the video store breaking and entering. Mr. Papequash drove to the store and made his getaway on a stolen quad, which is a four-wheeled all-terrain vehicle. Mr. Papequash was

apprehended some miles away from the break-in but attempted to escape by trying to run away. These matters resulted in the convictions for possession of stolen property over $5,000, and one of resisting arrest.

[4] A fourth conviction for breach of probation was entered as the accused was on probation at the time. With respect to these offences, Mr. Papequash was convicted after trial.

[5] The fifth offence is a charge of robbery. The offender and his cohort, a young offender, lured a young woman into a secluded area. There she was attacked, thrown to the ground, and pinned down while her pockets and purse were rifled. One of the items taken was the victim's bank card. Under threats of harm she told the robbers her PIN number.

[6] The sixth offence is one of breach of recognizance. Mr. Papequash was released from custody with a condition that he reside at the Yukon Adult Resource Centre. On November 16, 2002, Mr. Papequash went AWOL and was not found until late March of this year.

[7] The seventh charge is one of possession of housebreaking tools. The accused was actually found inside of an unoccupied residence in the McIntryre subdivision, and was in possession of a screwdriver he had used to gain access to the premises.

[8] The eighth and ninth charges, both a breach of recognizance, arise from the same date as the conviction for the possession of housebreaking tools as the

offender was, on that date, in breach of conditions that he not consume alcohol and, as well, that he be subject to a curfew.

[9] The tenth conviction involves a charge of breaking and entering of a dwelling house. Mr. Papequash broke into the house and stole a considerable quantity of electronic equipment.

[10] The eleventh and final charge, one of possession of stolen property under $5,000, arises from the date that Mr. Papequash was finally re-arrested after leaving the ARC. On that date, Mr. Papequash was in possession of yet another stolen quad. As previously indicated, by the time of his re-arrest Mr. Papequash had been at large for four and a half months.

[11] Mr. Papequash has a significant and related prior record which is as follows: 1995, possession of stolen property; 1995, robbery with violence; 2001, possession of stolen property. These were all youth court matters.

[12] In 2001, as an adult, Mr. Papequash was convicted of theft over $5,000, failing to comply with an undertaking, and failing to comply with a probation order.

[13] I turn to look briefly at the circumstances of the offender. At the young age of 20, Mr. Papequash appears to be well embarked on a career in crime. In addition to the record of convictions, both present and in the past, it is significant that Mr. Papequash has never held a job. His predilection towards the commission of crimes is exacerbated by alcohol and drug abuse. Mr. Papequash has a very limited education, however, this does not appear to be through lack of ability. Somewhat

surprisingly, and unlike many offenders in this jurisdiction, there is no indication that Mr. Papequash suffers from cognitive or other defects. To the contrary, all indications are that he is bright and capable. He also has significant family supports, especially from his mother and sister.

[14] With respect to the circumstances of the present offences, it is obvious that there are a number of serious matters. The offences are serious both because of their sheer number and the persistence with which the accused commits them.

[15] The most serious of the crimes of which the accused stands convicted before me is, of course, the charge of robbery. The information conveyed to me was that Mr. Papequash's partner in crime took the leading role in the robbery. Nevertheless, Mr. Papequash was clearly a full participant, and it must always be remembered that strength in numbers is an important factor in the commission of robberies of this kind.

[16] Although some of the remaining offences are property offences and not crimes of violence, this does not mean that they are not serious. Breaking and enterings, particularly of dwelling houses, have a serious impact on those whose sense of security is violated.

[17] Breaking and enterings of businesses, as amply illustrated by the victim impact statement filed by the owners of the video store, can also have serious consequences. This is especially so where, as here, the business is a mom-and-pop-size operation whose owners are unable to afford the cost of damages and the ever-escalating rates they have to pay for insurance.

[18] Even the stolen quad incidents can be seen to have serious consequences. For example, one of the quads Mr. Papequash had in his possession was taken from a family of modest means who had scrimped, saved and sacrificed to purchase and maintain a recreational vehicle. All family members had contributed to this and all were very much affected by the loss of their machine.

[19] Most of the remaining offences relate to the administration of justice. They are significant in that they show the accused's persistent disregard for orders of the court. It should be noted that the accused was convicted of the offences relating to the video store break-in on November 12, 2002. Mr. Papequash was then at liberty on bail. The sentencing was adjourned to wait the preparation of a pre-sentence report. However, by the 16th of November, Mr. Papequash had disappeared and remained at large for four and a half months. During this time he committed additional offences including the residential breaking and entering.

[20] 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.

[21] The Crown's submission ended more with a question than a submission. Crown counsel asked the question what the next step was, whether it was two years less a day and a three-year probation order, or a penitentiary sentence.

[22] On behalf of the accused, Mr. Coffin submitted that the Court could adequately deal with the matter by imposing a six-month custodial sentence on the robbery to be followed by a one-year conditional sentence. In my view, it would be

impossible to say that this accused would not represent a danger to public safety, and, in fact, I would go so far as to say that I would be remiss in my duty were I to impose a conditional sentence in the present circumstances. Mr. Coffin suggested that a conditional sentence could keep a tight leash on Mr. Papequash, but it seems to me that this is unlikely for an offender who goes AWOL for four and a half months.

[23] In fixing the quantum sentence in this case I have considered many matters, including the following:

1. Mr. Papequash is a persistent offender undeterred by court orders;

2. There is no immediate prospect for change in those unhappy circumstances;

3. Although Mr. Papequash appears embarked on a life of crime, he is, nevertheless, a young man and, one must presume, not beyond hope of rehabilitation;

4. Mr. Papequash entered guilty pleas to seven of the 11 offences of which he stands convicted;

5. Although fit sentences must be imposed for each offence, where there are so many offences, the global effect of those sentences must be considered;

6. Sentences to co-conspirators are relevant. In this case, there was a co-accused on the robbery charge, however, that person was a young offender and different considerations apply to the sentencing of young offenders. I am told that the young offender received a sentence of six months closed custody on the robbery charge. However, I was not provided with any details of the record or other circumstances of that person, nor did that person find himself before the court convicted of ten additional offences;

7. The purposes and principles of sentencing, enumerated in ss. 718 through 718.2 of the *Criminal Code,* must be kept in mind;

8. Although the offender caused economic loss to a number of his victims and should be required to make restitution for these losses, there is no prospect whatsoever that he can do so within a reasonable period of time, given that he will be in custody for some time and has no work history when out of custody;

9. Although Mr. Papequash has an extensive record, he has, nevertheless, served little time in custody. His longest sentence to date, for breach of probation, was in the order of 30 days. Mr. Coffin argued that a lengthy period of custody would be too much of a jump. However, the jump principle applies to an offender who re-offends by committing much the same crime as

before. For example, it does not apply to a petty thief who next tries out bank robbery, nor does it apply to an offender who first commits one crime and next commits 11;

10. Mr. Papequash has spent 52 days in custody prior to sentencing and is entitled to credit for that time.

[24] The Crown referred to three sentencing precedents. In the case of *R. v. Joseph Sterriah*, (8 May 2003) Whitehorse T.C. 02-00049 (Y.Terr.Ct.) the accused was convicted of breaking and entering a dwelling house and committing therein the indictable offence of robbery. The victim was an elder in poor health. The sentence of two years less one day was imposed having regard to five months pre-trial custody. In my view, these circumstances are not on all fours with the present case.

[25] The second case referred to was that of *R. v. Moses* (1992), 71 C.C.C. (3d) 347. In that case, the offender was convicted of robbery and received three years. However, Mr. Moses was a mature offender and one who had inflicted serious and permanent injuries on his victim. Accordingly, the circumstances in *Moses*, *supra,* as in *Sterriah*, *supra,* are not terribly like the present case.

[26] The third case, *R. v. Linklater* (1983), 9 C.C.C. (3d) 217, however, is considerably closer to the present circumstances. In *Linklater*, *supra*, the accused was convicted of robbery of a bookstore employee, a charge of escaping lawful custody, and a charge of breaking and entering of a commercial premise. Mr. Linklater was also a young man, aged 19 in his case, and also had a significant prior

record. Mr. Linklater received a sentence of 30 months to be served consecutively to sentences he was already serving.

[27] At the end of the day, and having adjourned to consider the matter, I am of the view that a global sentence of three years in a federal penitentiary is fit.

[28] The sentences will be structured as follows:

1. On the charge of robbery, 18 months;
2. On the charge of breaking and entering a dwelling house, six months to be served consecutively;
3. On the charge of breaking and entering the video store, three months consecutive;
4. On the charge of possession of housebreaking tools, three months consecutive;
5. On the charge of possession of stolen property over $5,000, two months consecutive;
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:

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.

[30] In the circumstances, the fine surcharges are waived.

[31] The charge of robbery is a secondary designated offence for the purpose of making an order for DNA sampling from the accused. In my view, it is appropriate to make that order and I so order.

[32] As well, pursuant to the provisions of the *Criminal Code*, you are prohibited from having in your possession any firearm, ammunition or explosive substance, for a period of ten years following your release from imprisonment.

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FAULKNER T.C.J.