SUPREME COURT OF YUKON

Citation: *R v Tuel*, 2023 YKSC 73

Date: 20231129
S.C. No. 21-01503
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

MALAKAL KWONY TUEL

Before Chief Justice S.M. Duncan

Counsel for the Crown — Leo Lane

Counsel for the Defence — Dale Fedorchuk (by videoconference)

This decision was delivered in the form of Oral Reasons on November 29, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR SENTENCE

[1] DUNCAN C.J. (Oral): I found Mr. Tuel guilty of aggravated assault, discharging a prohibited firearm with intent to wound, possession of cocaine for the purpose of trafficking, possession of cash exceeding $5,000 knowing it was obtained by crime, occupying a vehicle in which he knew there was a prohibited firearm, possession of a loaded prohibited firearm without authorization or licence, being at large on a recognisance and failing to comply with a no weapons condition, possession of a

firearm while prohibited, and possession of cash not exceeding $5,000 knowing it was obtained by crime.

[2] It is now time to determine the appropriate sentences.

[3] Sentencing is an individualized process. A judge takes into account the case-specific facts of the offence and the offender to determine a just and fit sentence. I will discuss briefly the facts of this case, then I will review the information about Mr. Tuel's life circumstances. Next, I will discuss the impact of this offence on the victims, the positions of Crown and defence, and then I will review the law and apply it to the facts of this case.

Circumstances of the offences

[4] The circumstances of the offences were reviewed in detail in my previous judgment, so I will only summarize them here.

[5] At approximately 2 a.m., on December 1, 2019, John Thomas Papequash was shot once in the head at close range outside the entrance to the 202 bar at closing time in downtown Whitehorse. The bullet entered his right eyebrow and exited at his right ear. It caused a massive trauma to his brain with hemorrhage and fragmented skull on the right side. Bullet fragments were found in his brain. Remarkably, Mr. Papequash survived but he has permanent injuries. He has no memory of what happened that night.

[6] No one who testified at trial saw who shot Mr. Papequash. There were a number of witnesses who testified about what they saw during the evening when Mr. Tuel and his co-accused, Mr. Wuor, as well as Mr. Papequash and his friends were in the bar over several hours, as well as what they saw immediately before and after the shooting.

In addition, there was video evidence from several angles. There were several altercations in the bar that evening between Mr. Papequash and Mr. Tuel and Mr. Wuor of short duration and unknown cause.

[7] Mr. Tuel and Mr. Wuor left the 202 bar together near closing time approximately five minutes before Mr. Papequash. When Mr. Papequash walked out of the bar, he was seen speaking with Mr. Tuel. Eight seconds later, a shot was fired and Mr. Papequash was on the ground.

[8] An empty shell casing was found the night of the shooting in the same location as the shooting. Mr. Tuel admitted it came from a cartridge ejected from a loaded Taurus PT 709 semi-automatic handgun seized later that day by police from the front passenger seat floor of the Toyota Tacoma owned by Mr. Tuel. It is a prohibited weapon within the meaning of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*" or "*Code*"). An unfired cartridge of the same kind as in the loaded Taurus PT 709 handgun was found at one end of the 202 building. Witnesses had seen a man run east from the entrance of the 202 with a gun, stop at the corner of the 202 building, point the gun towards the 202 entrance without firing, and then continue to run.

[9] Later, on December 1, 2019, police took into custody Mr. Tuel and Mr. Wuor as they were leaving Mr. Tuel's residence in the Toyota Tacoma. The truck was packed with bags and bedding. Mr. Tuel was driving, with Mr. Wuor in the passenger seat. On the search of the Tacoma incidental to arrest, crack cocaine and phenacetin, an adulterant, were found in magnetic keyholders in some of the bags in the truck. The amount of cocaine had a street value estimated at $11,500 and was in individual packages for consumer end-use. Cash in the amount of $7,480 was found in a bag

containing Mr. Tuel's wallet. Eight cell phones were also found in the truck. In the residence, there were five cell phones, one tablet, two SIM cards, more magnetic key holders, baking soda, and plastic sandwich bags.

[10] Mr. Tuel had $1,505 in cash on his person on arrest. He stated in the admissions of fact that he was at large on a recognizance dated August 21, 2019, that, among other things, prohibited him from owning, possessing, or carrying any firearms. As well, he admitted he was prohibited from possessing firearms under a lifetime order made under s. 109 of the *Criminal Code* on February 2, 2006.

[11] After reviewing and considering all of the evidence and the absence of evidence in this case, I concluded it established beyond a reasonable doubt that Mr. Tuel shot Mr. Papequash on December 1, 2019. I also found him guilty of the other charges I have noted.

Circumstances of the Offender

[12] Mr. Tuel provided a sworn affidavit and also testified under oath at his sentencing hearing about his background, experiences, family, education, employment, and other life circumstances before and after he came to Canada. I will summarize that evidence now. I will not repeat all of it, but I have listened to it carefully and reviewed it for the purposes of this sentence.

[13] Mr. Tuel was born on October 17, 1984, in Malakal, (now) South Sudan, during the Sudanese civil war.

[14] When he was eight years old, he said the government took him and other children from their parents and put them into military training camps. Mr. Tuel was sent to a camp in Pinyudo, Ethiopia, run by the Sudanese military. His father was in the

military. On arrival at the camp, Mr. Tuel and other young children collected firewood and gathered water.

[15] At age nine, Mr. Tuel began to take part in training drills, including learning to shoot at targets with handguns and then with TEC-9 semi-automatic pistols. As he grew and gained strength, he began to use larger guns, including AK-47s. He was trained for short-range and long-distance combat.

[16] At age 10, he was transferred to another city, Pagak, in South Sudan. There, the military began to prepare him for the battlefield. He said what they were doing was not identified as killing people, but instead as "chasing away the enemy", recapturing towns and cities, and saving their country.

[17] He began combat at age 11, describing his uniform as made of black cotton with military boots. He said in combat his experiences were terrifying and chaotic. He shot at people who fell and did not get up; he had to shoot friends who were close to death to alleviate their pain; he saw severely wounded people, including friends. He was part of combat missions in at least 8 to 10 different cities until he was about 13 or 13½. He learned how to load, strip, clean, and shoot handguns. He said he became a very good shot. He was not allowed to leave the military. He never saw his mother during this time and he never had a break.

[18] Finally, he was allowed to leave on a break for 60 days. He went to visit his grandmother and talked to her about what he was doing. He decided to desert the military, even though he had heard rumours it was punishable by firing squad or hanging. He escaped to Ethiopia, was arrested there, and was in prison for six months. Someone told Amnesty International his story and through their efforts he became

registered as a refugee. After waiting and “lying low” in a refugee camp in Ethiopia for a few months, he came to Canada with his sister and brother-in-law, who included him on their immigration application. His mother, in the meantime, tried unsuccessfully to obtain a pardon for him in Sudan on the charge of desertion. She now lives in Ethiopia.

[19] Mr. Tuel arrived in Canada when he was 15 years old. He landed with his sister and brother-in-law in London, Ontario, and they all immediately moved to Calgary, Alberta. He soon left his sister’s home because of a strained situation involving unwanted sexual relations. He lived at a group home where he was the only Black child and then escaped from there and lived on the streets of Calgary under the bridge near the Cecil Hotel. He survived in part from others stealing food for him. He attended school as best as he could but with no home and not speaking English well, it was hard.

[20] When he was approximately 17 years old, in 2001, and on the street, he began drinking heavily. It started with coolers friends gave him. He eventually found homes with friends in Calgary and Edmonton, and also spent time in prison in Alberta in 2004 because of an impaired driving conviction. He began to get counselling for alcohol use as a result. When he told the counsellor about his experiences as a child solider, the counsellor said it sounded far-fetched but recommended that he seek further counselling.

[21] When he was 21, in 2006, he moved to Winnipeg. He obtained his Grade 12 diploma, and studied carpentry, business, and mechanics at Red River College for four years. He and his girlfriend, whom he met in Winnipeg, had two children. She also attended Red River College for hospitality and tourism management. He worked while

attending school. He paid off his student loan within a year. He worked for construction companies while in Manitoba.

[22] Mr. Tuel began trading in stocks, bonds, options, and futures in or around 2009. He is self-taught and has continued to do this regularly. He wants to become certified as a securities trader.

[23] Mr. Tuel, while in Manitoba, continued to drink heavily and also became a closet user of cocaine. He called himself a “functioning cocaine head”. He described both activities as addictions that made him feel ashamed. He tried to get counselling in Alberta and Manitoba because of his trauma as a child soldier in South Sudan but says he was unsuccessful because the counsellors found his story unbelievable; said he did not look like someone who needed help; and at least one counsellor said, in any event, they knew nothing about child soldiers so were not equipped to provide counselling to someone with his experiences.

[24] During his time in Manitoba, Mr. Tuel checked himself in to the 28 day treatment program at Parkwood Treatment Centre for his issues with drinking, gambling, and domestic discord. For two years after that program, he abstained completely from drinking and has ceased gambling altogether.

[25] He and his girlfriend separated in 2013. He stayed in Winnipeg until 2017, when he moved to Whitehorse for work. He said it was a relief to get away from the custody battles he was having with the mother of his children.

[26] Throughout this time, in Alberta and Manitoba, he experienced racial slurs and loss of employment or denial of jobs that he attributes to racism. For example, in Manitoba, when he was working for a construction company, a young carpenter’s

apprentice did not want to work with Mr. Tuel because he did not think he could learn anything from a Black person.

[27] When he moved to the Yukon, Mr. Tuel initially worked for construction companies. He then became self-employed with his own carpentry business.

[28] He described racism he experienced in Whitehorse. This included random strangers asking him if he was selling drugs when they saw him on the street, assuming he was selling them because he was Black; customers and other people calling him the "N" word and making other racial slurs. Earlier in the night of the shooting, he and Mr. Wuor attended the Casa Loma bar, where he says they were called the "N" word and asked to leave. The bank denied him a loan initially to start his business, although he had good credit and was a long-time customer, and he attributed this to racism. When he first moved here, he was driving a Mercedes Benz and said the police were following him regularly until he began driving a less expensive vehicle. Since he has been in the Whitehorse Correctional Centre ("WCC") awaiting trial and sentencing as the only Black person for most of the time in prison, he has experienced racial comments and writing on the walls.

[29] Mr. Tuel explained his strategy for coping with racist comments was to walk away and not engage. He would also not attend certain places, like bars, where racial altercations may be more likely. At WCC, he complained to management rather than confront other inmates.

[30] While in WCC, he has attended a number of programs, including a five-week substance use intensive treatment program: Feelings and Behaviour; Alcohol, Drugs, Driving and You; Courage to Change; Communication Skills; and Preventing Violence.

He has also attended individual forensic counselling sessions regularly to discuss substance use issues, general self-regulation, quality of future plans, understanding risk factors, and adequate coping skills. One of the facilitators for the group counselling sessions wrote that Mr. Tuel was an active participant in the program, was open and shared from his personal experiences, and added positively to the group discussion. The counsellor wrote that Mr. Tuel has connected with treatment programs and intends to pursue treatment on his release.

[31] Mr. Tuel's criminal record dates to 2004 and contains 19 convictions. His most recent conviction was in 2015 on two charges of failure to comply with a recognizance. He has six other convictions for failure to comply with court orders. Other relevant convictions include assault with a weapon in 2007, possession of a weapon in 2005, possession of a scheduled substance in 2006, and a robbery conviction in 2010. He received the lifetime weapons prohibition order under s. 109 after a conviction on the assault with a weapon charge in Calgary. His longest prison sentence before these offences was for the robbery conviction, which was 27 months plus two years' probation.

[32] When asked about the offences for which he has been convicted in this case, Mr. Tuel acknowledged that what happened to Mr. Papequash was very traumatizing not only to him but to his family, the community and society, and it undermines the notion of public safety. He said he could not explain such a pain as Mr. Papequash's mother must have felt when she was told her son was shot. He did not think a mother should have to cry and acknowledges that her pain is continuing. As a dad himself, he

wondered what does a parent tell their children about this kind of incident. And today, in court, he repeated some of these sentiments and also apologized.

Victim Impact

[33] Mr. Papequash provided a victim impact statement, as did his mother, his sister, and the mother of his youngest daughter. Only his sister's statement was read in court. The mother and his sister described the immense stress and grief in the immediate aftermath of the shooting when it was thought that Mr. Papequash had died. The family made the difficult decision to donate his organs and when he was medivaced to Vancouver for this purpose, brain activity was detected. Surgery was performed and then Mr. Papequash entered a long recovery period in hospital during which he got pneumonia twice and had to relearn how to eat, swallow, talk, and walk. He had a second surgery approximately 9 to 10 months later to install a plate in his head. His head had changed shape due to the injury and the surgeries.

[34] Mr. Papequash is now 40 years old and lives with his mother. For many months, he was completely dependent upon her for everything. She took 14 months leave from work to care for him. He can no longer drive because he has lost sight in his right eye, so his mother drives him to medical appointments.

[35] Mr. Papequash has lost strength in his left side, although it is improving with physiotherapy. He gets tired very easily. His body is no longer well-regulated so he becomes cold easily. He has lost his short-term memory. He is unable to work, in part because many jobs require a driver's licence which he does not have. Before the shooting, he was attending school full-time for a land-based course so that he could

become a land-based guide for tourists and others. He is no longer able to pursue this goal. He is unable to go out on the land by himself.

[36] The mother of his youngest daughter, now age eight but age four at the time of the shooting, described his inability to co-parent with her. The increased time she must spend parenting has impacted her financially and required her and the daughter to move out of her traditional territory to be closer to town for the daughter's school and extra-curricular activities. She describes her daughter as suffering from anxiety with physical and emotional symptoms due to her inability to relate to her father in the same way as before the shooting, including having him pick her up at school and enjoy activities together, such as going out on the land. The mother and the daughter have both suffered not only from anxiety but also depression, fatigue, and Post Traumatic Stress Disorder ("PTSD") from the trauma of this event and the ongoing need to adjust to the new realities.

[37] Mr. Papequash has two other older children, now ages 9 and 16. They were 5 and 12 at the time of the shooting.

Principles of Sentencing

[38] The *Criminal Code* sets out the purposes and principles of sentencing that must be applied by sentencing judges. The fundamental principle of sentencing, as set out in s 718 of the *Code*, is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. A sentencing judge is required by the law to impose a just sanction that meets one or more of the following six objectives:

- denouncing unlawful conduct and the harm to victims or community caused by that unlawful conduct;

- deterring the offender and other persons from committing offences;
- separating the offender from society where necessary;
- assisting in rehabilitating offenders;
- providing reparations for harm done to victims or the community; and
- promoting a sense of responsibility in offenders and acknowledging the harm done to victims or the community.

[39] The judge must also consider any aggravating or mitigating circumstances as well as objective and subjective factors related to the offender's personal circumstances.

[40] No one objective is more important than the others and it is up to the judge in each case to determine which objectives merit the greatest weight in the circumstances of each case.

[41] As noted by the Supreme Court of Canada in the decision of *R v Parranto*, 2021 SCC 46:

> [10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. …

[42] Proportionality means that courts must strive to ensure the sentence imposed is proportionate to the gravity or seriousness of the offence and the degree of responsibility of the offender. Proportionality is "closely tied to the objective of denunciation". It promotes justice for victims and seeks to ensure public confidence in the justice system. The sentence should also have parity to other similar offences, offenders, and circumstances.

[43] The principle of restraint must also be considered. Section 718(c) of the *Criminal Code* states that separation of the offender from society is only to be ordered "where necessary". An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders.

[44] A fit sentence is always defined by the totality of the circumstances.

[45] As one judge described the process of sentencing in *R v Gabriel*, 2017 NSSC 90 ("*Gabriel*") at para. 92, sentencing is a synthesizing, more than a balancing.

> … It is not a matter of weighing one factor favouring a lighter sentence against another that favours a harsher one. It is a matter of bringing together a number of considerations some of which may compliment [as written] each other, some of which may militate toward different outcomes and some of which may help to inform and provide context for the others.

Maximum and Minimum Penalties

[46] The following sets out the maximum and minimum penalties for the offences for which Mr. Tuel was convicted. All of the offences proceeded by way of indictment.

[47] For aggravated assault, the maximum is 14 years with a mandatory firearms order and weapon forfeiture.

[48] For discharging a firearm with intent to wound there is a minimum penalty of five years for the first offence, applicable in this case. The maximum is 14 years. The same ancillary orders as for aggravated assault are mandatory.

[49] For possession of cocaine for the purpose of trafficking the maximum is life imprisonment.

[50] For each of possession of property obtained by crime of over $5,000, occupying a vehicle where there is a prohibited firearm, possessing a loaded firearm without authorization or licence, and possession of a firearm while prohibited, the maximum is 10 years.

[51] For possession of property obtained by crime in an amount less than $5,000, and for breach of recognizance, the maximum is two years.

Positions of Crown and Defence

[52] The Crown seeks a global sentence of 10½ years custodial time, less time spent in pre-trial custody calculated at 1.5 days credit for each day spent in custody. The Crown's position would leave approximately 4½ years of time to be served by Mr. Tuel.

[53] The Crown urged this Court to follow the approach taken by the court in *R v Larmond*, 2011 ONSC 7170 ("*Larmond*"), where the offender was convicted of many of the same offences as in this case, including discharge of a prohibited firearm with intent to wound, aggravated assault by wounding, possession of a loaded prohibited firearm, and possession of a firearm without authorization or licence. The court there found that these four counts were interrelated, arising out the shooting, so the sentence was a multi-year sentence on the most serious count and concurrent sentences on the other counts.

[54] Applying that same approach here, the Crown says that the most serious offence is the discharge of a firearm with intent to wound, for which there is a legislated mandatory minimum of five years. The Crown states that the five-year mandatory minimum is reserved for cases in which there was a discharge of a firearm with criminal intent, but no one was struck or hurt. For cases of increased severity, such as this one,

the sentences are increased. On review of those cases from other jurisdictions, because there are no factually similar Yukon cases, the Crown says that the gun-related charges merit a global sentence of nine years.

[55] There are Yukon authorities to give guidance to the drug offences. The range is from 6 to 18 months. In this case, the quantity of drugs is greater than in many cases and the Crown argues the higher end of the range is appropriate.

[56] The Crown states that the criminal acts of the shooting and the drug possession for the purpose of trafficking and related charges are different and thus the sentences should be consecutive. The fact that the drugs were discovered as part of the police investigation on a search incident to arrest for the shooting offences does not mean that these offences constitute part of the same event or series of events.

[57] The Crown also seeks ancillary orders of a lifetime weapons prohibition; provision of a DNA sample; and forfeiture of the firearm, ammunition, cash, and drugs.

[58] The Crown emphasized the objectives of denunciation and deterrence, and the importance of protecting public safety. The Crown argued that there is an insufficient link between the hardships Mr. Tuel has experienced in his life and the offences in this case to have a mitigating effect on his sentence.

[59] The defence argues that the sentence should be limited to two years' probation plus time served, amounting to just over six years when credit of 1.5:1 is provided. Mr. Tuel has been in prison since December 1, 2019, almost four years to the day. Defence counsel focuses on the conviction for aggravated assault with intent to wound, for which he says the range in the Yukon is between 16 months and 6 years, noting that in most of the cases the sentence was lower than six years. He noted he could not find

any cases of aggravated assault where a gun was used. He made no submissions on the conviction of discharge of a firearm with intent to wound or the other gun offences.

[60] On the drug offences, defence counsel says they should be treated concurrently as they arise out of the same series of events in time. The drugs were found on a search incident to arrest which would not have occurred unless they were looking for Mr. Tuel to arrest him for the shooting. He describes the evidence of the drugs as consistent with a dial-a-dope operation, with no evidence of actual dealing, which should result in a sentence at the lower end of the sentencing range of 6 to 18 months to be served concurrently.

[61] Defence counsel argued that Mr. Tuel's background and life experience as a child soldier in South Sudan, his homelessness as a youth, his addictions to alcohol and cocaine, and his subjection to racial discrimination in Canada must all be taken into account to lessen his moral culpability for these offences. He disputes the Crown's argument that there is an insufficient connection between Mr. Tuel's background and life experience and the offences. He argues the factors in many of the cases in which anti-Black racism was a factor reducing moral blameworthiness similarly exist here and should be considered.

[62] The defence emphasizes the objective of rehabilitation, noting that Mr. Tuel has contacted treatment programs, knowing he needs counselling for the undeniable psychological and emotional pain caused by his childhood and young adult experiences. Defence focuses on the fact that Mr. Tuel has needed help for a long time and has been denied that help.

Parity/Range of sentences from other cases

[63] Section 718.2 of the *Criminal Code* requires that I consider the principle of parity. This means that, within reason, similar offenders who commit similar offences should receive similar sentences. Sentencing is an inherently individualized and subjective process reflecting the unique circumstances of the specific offence and offender. Sentencing ranges are guidelines, not hard and fast rules. But by situating a case within the range of sentences for that same offence, some rationality, fairness, and even consistency can be achieved.

[64] Crown counsel provided case law covering most of the gun-related offences and the possession for the purpose of trafficking offence in this case. Most of the gun offence cases include both discharge firearm with intent and aggravated assault offences. As there were no such cases from the Yukon, of necessity these cases are from other jurisdictions. The similar cases for the drug offences relied on by the Crown are from the Yukon.

[65] In the absence of Yukon cases with both gun-related offences, defence counsel provided sentencing authorities from the Yukon for aggravated assault. He relied on these cases for his argument as stated above that, because the range for aggravated assault convictions in the Yukon is from 16 months to 6 years, Mr. Tuel has already served a sentence at the high end of this range.

[66] I accept defence counsel's argument that the range of sentence for aggravated assault offences in the Yukon is from 16 months to 6 years. However, there are many distinguishing factors between the Yukon aggravated assault cases and this one, including no use of a gun in the Yukon cases, injuries of the victim minor in comparison

to injuries in this case, and the presence of significant *Gladue* factors. Further, because none of the accused in those Yukon cases used a gun, the additional charge of discharge firearm with intent to wound was not considered. I do not find these Yukon cases helpful in determining an appropriate range of sentence in this case.

[67] The range of sentence for discharge of firearm with intent to wound, often combined with aggravated assault, is from 7 to 10 years.

[68] In *R v Hassan*, 2012 BCCA 201, the court upheld the offender's sentence of seven years after an early guilty plea to discharging prohibited firearm recklessly, which is a slightly different charge but within the same five-year minimum on a first offence and a 14-year maximum as the offence in this case. The offender in that case fired the gun seven times in a bar and struck the victim on the leg, leaving significant and long-lasting injuries. The offender was on bail and prohibited from possessing weapons. He had no criminal record and a supportive family.

[69] In *R v Fester*, 2008 BCCA 381, the court upheld the sentence of nine years on conviction after trial of discharge firearm with intent to wound, as well as other possession of weapons charges. The offender fired multiple shots at his former girlfriend's house and struck a male victim once in the ankle. He had a lengthy criminal record, including convictions for weapons offences, but expressed remorse and had good family support.

[70] In *R v Ali*, 2015 BCSC 2539 ("*Ali*"), the offender was convicted after trial of aggravated assault and discharge firearm with intent to wound and was sentenced to 8.5 years. He fired eight shots from a semi-automatic pistol at a vehicle with four people inside on a public street near a bar at closing time. He discarded the loaded gun in a

public place. He was on bail and prohibited from using a firearm. The victim had a grazed ear and shattered clavicle, and needed recovery time of two to three months. The offender had no criminal record; had been born into a Kurdish family in Iraq; escaped with his family when he was nine months old to a Syrian refugee camp, where he lived until he was 15. On arrival in Canada, he struggled to find employment, began selling drugs, and was hired to do the shooting. At sentencing, he was still young, productively employed, with strong family support.

[71] The court in *Ali* relied on *R v Swaby*, [2009] OJ No 1974 (ONSC), where the offender was convicted after trial of aggravated assault and discharge with intent as well as possession of a loaded handgun and received a nine-year sentence. He fired three or four shots from a semi-automatic handgun towards innocent teenage boys in broad daylight in front of their residence. The victim was 15 years old and would have died but for surgery and suffered long-lasting physical and psychological effects. Like the offender in *Ali*, this offender was young, had no criminal record, and came from a loving and supportive home.

[72] In *R v Anderson*, 2021 BCSC 528, the offender was convicted after trial of discharge firearm with intent to wound, aggravated assault, possession of unloaded restricted firearm, and received nine years. He fired 16 shots with a 9mm pistol on a residential street and the victim suffered eight bullet wounds in his lower extremities, with significant but not life-threatening injuries. He had previous convictions for violence and was on parole with a lifetime firearms prohibition at the time of the offence. His birth mother was Indigenous; his grandparents attended residential school; and he had a difficult childhood, including being adopted and in foster care, which the court found

explained his criminal history. He accepted responsibility and had the support of family and a successful business.

[73] The final case I will summarize is *Larmond*, which I referred to earlier, and in which the offender was convicted after trial of multiple offences, including aggravated assault and discharge firearm with intent to wound. He received a sentence of seven years. The victim was shot once in the abdomen over a minor drug debt. There was no lasting injury. He disposed of the loaded gun in a residential area. The offender had a minor criminal record with no violence, was born in Jamaica, and emigrated to Canada at age five. He would likely be deported after serving his sentence and would have to leave his fiancée and three-year-old child in Canada, a hardship that reduced the global sentence.

[74] For the drug offences, on review of the Yukon cases, the high end of the range is 18 months for possession for the purpose of trafficking charge, and that is often combined with convictions on firearms offences (see *R v Bourne, Auclair and Devellano*, 2007 YKTC 81; *R v Crompton*, 2009 YKSC 16; *R v Nipp*, 2011 YKTC 06), while the lower end is six to nine months (see *R v Hale*, 2007 YKTC 79; *R v Aguilera Jimenez*, 2020 YKCA 5 where the court referred to *R v Voong*, 2015 BCCA 285, a case of a dial-a-dope operation where the Court of Appeal said that absent exceptional circumstances the range for the trafficking offence is 6 to 18 months).

Aggravating factors

[75] The following are aggravating factors in this case:

- Mr. Tuel shot Mr. Papequash at close range, hitting his face and head. Without surgery, Mr. Papequash would have died and he will have long-lasting effects from the injuries.
- Mr. Tuel shot the gun in a public place outside a bar at closing time.
- Mr. Tuel committed these offences while subject to a lifetime firearms prohibition order under s 109.
- Mr. Tuel has a prior criminal record, with relevant convictions, in particular assault with a weapon in 2007, robbery in 2010, possessing weapon in 2006 and 2007, and possession of a Schedule 1 substance in 2006.

Mitigating factors

[76] The following are mitigating factors:

- Mr. Tuel's background as a child soldier and challenging circumstances as a teenager newly arrived in Canada, in addition to his subjection to racial discrimination.
- Mr. Tuel has seized opportunities while in prison to take many treatment programs and counselling.

The Appropriate Sentence

[77] As has been stated by many other judges, the main question in sentencing is: What should this offender receive for this offence, committed in the circumstances in which it was committed?

[78] I agree with the approach suggested by the Crown to impose a sentence for the most serious offence first, the discharge firearm with intent to wound, and for the related gun offences the sentences will be concurrent. By choosing to legislate a mandatory minimum sentence of five years for the discharge firearm with intent offence and not for the aggravated assault offence, Parliament has indicated the seriousness with which it wants firearms offences to be treated.

[79] Courts have consistently emphasized the primary sentencing objectives of denunciation and deterrence in the circumstances of firearms offences. Denunciation acts as a condemnation of certain conduct by punishing people who disobey or disregard society's basic values. Deterrence is important not only to deter the offender but also to deter others who may commit such offences.

[80] This next quote is from a case in British Columbia, but I believe it is equally applicable in the Yukon, especially in the context of this case. It explains the reasons why in shooting cases the objectives of denunciation and deterrence are emphasized. The quote is from *R v Frohock*, 2008 BCSC 735:

> [92] A fit sentence in this case must include a significant measure of general deterrence reflected in a lengthy sentence of imprisonment in order that society, through the courts is able to send a message that Canadians do not want their generally peaceful and safe communities to become battlegrounds for those who arm themselves with firearms for unlawful purposes, ready for use to settle the score with an opponent or a competitor, a score that has arisen most often from other criminal dealings, most often drugs. Unlawful loaded firearms carried in a concealed manner and possessed in public places for no conceivable legal or justifiable purpose pose such a great danger to our safety and quality of life in Canada that deterring others must be a paramount consideration in sentencing an offender for these types of offences.

[81] Although the motive for the shooting here is unknown from the evidence, so I cannot assume it was drug-related, the principle set out in the quote that I just read applies because no matter what the reason, possession and use of an unlawful loaded firearm in a public place is an activity that must be denounced and people who engage in it deterred.

[82] On review of the similar cases noted above, the serious nature and extent of Mr. Papequash's injuries, the occurrence of the shooting in a public place, the existence of Mr. Tuel's criminal record containing weapons charges and two convictions for violence, and the fact that this offence occurred when he was prohibited from possessing any weapons are factors that tend towards the high end of the range.

[83] The question is how the difficult personal circumstances of Mr. Tuel, especially in his early life, should be taken into account.

[84] Crown counsel said that Mr. Tuel is a "refugee success story"; that his education, his graduation from college without debt, his apprenticeship as a carpenter, his consistent employment, his ability to start a successful business, his self-taught stock trading activities, his ability to buy many expensive vehicles, and his measured decision to take a non-confrontational approach when faced with racism all indicate a positive, well-adjusted existence that belies his difficult past. In other words, Crown counsel says this is unlike one of the leading cases of how anti-Black racism is to be taken into account in sentencing (see *R v Anderson*, 2021 NSCA 62). In that case, the court accepted that the offender felt the need to carry a gun because of his ongoing sense of threat and personal vulnerability resulting from extreme proximity to violence in the African Nova Scotian community, and also from growing up in poverty; with housing

instability, family breakdown, a lack of culturally relevant educational opportunities, limited employment prospects, lack of positive role models, disrupted community attachments, transgenerational trauma, and loss of close friends to violence and hopelessness. All of these circumstances served as mitigating factors to the gun offences in that case.

[85] Defence counsel has argued that while Mr. Tuel's unfortunate background experiences and the systemic racism he has experienced are not an excuse or justification for the offences here, they reduce his moral blameworthiness. Essentially, defence counsel says no link to the offence is necessary and cases like *R v Abdul-Aziz*, 2023 ABCJ 98, are wrongly decided. In that case, the court recognized the existence of systemic racism in general, and that the offender had experienced racism but not enough to reduce his moral blameworthiness for the offence of possessing a loaded firearm. The judge in that case held:

> [89] … there [was] no obvious nexus between experiencing racial slurs and or tasteless jokes and needing to prove oneself by possessing a loaded firearm in a secret compartment in a vehicle.

[86] Sentencing judges always take into account an offender's background and life experience when assessing that offender's moral responsibility for the offences and determining a just sanction. This is because Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. If there are circumstances that are beyond the offender's control or responsibility that lead to the commission of the crime, then their moral culpability for that crime may be diminished.

[87] A consideration of background and systemic factors includes taking into account systemic discrimination, such as anti-Black racism in Canada. It is well-accepted now

that sentencing judges can and must take judicial notice of such matters as the history of colonialism in Canada and elsewhere, slavery, policies and practices of segregation, intergenerational trauma, and overt and systemic racism of African Canadians (see para. 82, *R v Jackson*, 2018 ONSC 2527 ("*Jackson*")). These societal realities have contributed to socio-economic disadvantages and high levels of incarceration. This does not in and of itself justify a different sentence, but it serves to provide a social context within which the specific case information must be understood.

[88] Judicial notice means that uncontroversial facts need not be proved in court. If a fact would be accepted by reasonable people who have informed themselves of the topic as not being the subject of reasonable dispute for the purpose for which it is being used, judicial notice must be taken of that fact (*R v Spence*, 2005 SCC 71 at para. 65). The test for judicial notice is less stringent for social context facts.

[89] Thus, "the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices is part of the offender's background and circumstances", (*R v Morris* 2021, ONCA 680 ("*Morris*") at para. 91) and it is essential to consider in determining a fit sentence.

[90] The social context evidence can provide a basis on which a sentencing judge can place more emphasis on the objective of rehabilitation for that offender, by addressing the social disadvantages caused by systemic racism, rather than emphasizing the objective of specific deterrence.

[91] It is important to understand that any evidence — social context or otherwise — that supports a finding that an offender's choices were affected or influenced by his

disadvantaged circumstances relates to the offender's moral responsibility for the offence and does not detract from the seriousness of the offence.

[92] As was stated by the court in *Morris* at para. 76:

> … Possession of a loaded, concealed handgun in public is made no less serious, dangerous, and harmful to the community by evidence that the offender's possession of the loaded handgun can be explained by factors, including systemic anti-Black racism, which will mitigate, to some extent, the offender's responsibility. …

The importance of separating the factors that go to moral responsibility and the factors that go to the seriousness of the offence is essential in order to preserve the proper approach to proportionality. Social context evidence is an aid that complements but does not supplant the traditional sentencing process that is focussed on proportionality.

[93] Social context evidence can be relevant on sentencing even if it does not serve to mitigate the offender's moral culpability. It can provide valuable insight with respect to the need to deter the offender from future conduct and the rehabilitative prospects of the offender. It allows a sentencing judge to assess how the competing objectives of sentencing, such as rehabilitation and denunciation, can be blended to achieve a sentence that best respects proportionality (*Morris* at para. 102).

[94] There is no requirement for the offender to show a direct causal link between the offence and the negative effects of anti-Black racism in order for those circumstances to affect moral blameworthiness. However, as stated by the Ontario Court of Appeal in *Morris*:

> [97] There must … be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other

> way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount:…

[95] The court in *Jackson*, stated something similar:

> [111] … I acknowledge that a connection must be demonstrated between the institutional racial inequality in general and the circumstances of the African Canadian person who is being sentenced. …

[96] Examples of this link or connection in other cases are: marginalization and exclusion from mainstream society through poverty, abuse, and housing instability that can be linked, for example, to the history of African Canadians in Nova Scotia (*R v Wournell*, 2023 NSCA 53); needing to carry a gun because of living in a climate of fear and personal vulnerability due to the high rates of gun violence in the African Canadian community in Nova Scotia (*R v Anderson* 2021 NSCA 62); or a diminishment of cognitive or intellectual deficit.

[97] I take judicial notice of the fact that systemic anti-Black racism exists in Canada, including in Whitehorse.

[98] I accept that Mr. Tuel has been and continues to be affected by anti-Black racism throughout his life in ways that he has described.

[99] I also accept that Mr. Tuel's experience as a child solider in Sudan, where he used guns in combat regularly for almost five years starting when he was eight years old; and his inability to obtain counselling for these experiences has affected his life.

[100] All of this is important social context — some Canadian and some Sudanese — that allows for a more informed assessment of Mr. Tuel's background and potential for rehabilitation.

[101] I agree with the comments of the judge in *R v Gabriel*, 2017 NSSC 90, a case in which the offender was an African Nova Scotian, and find that they apply here:

> [54] A person's racial background is also a part of his identity. It does not determine his actions. It does not establish a lower standard for assessing moral culpability. It does not justify or excuse criminal behaviour. It may however help in understanding the broader circumstances that acted upon the person.
>
> …
>
> [91] … The offender is an individual capable of exercising his free will in making decisions about his life. At the same time and like everyone else, his world view is shaped to some extent by his experiences in the community of which he is a part. …
>
> …
>
> [53] … A background of family dysfunction and childhood abuse may, in part, form the person who committed the crime and despite sometimes being less obviously related to the offence are widely considered as part of the relevant context in sentencing. What may be otherwise inexplicable may become understandable with the benefit of that contextual information.

[102] There are two aspects of Mr. Tuel's life I have considered as part of this sentencing. One is his experiences as a child solider in South Sudan, in jail in Ethiopia, and then in a refugee camp in Ethiopia waiting to come to Canada. The other is his early hardships of adjusting to life in Canada, as well as the anti-Black racism he has experienced throughout his time in Canada.

[103] There was no evidence from Mr. Tuel about current circumstances of poverty, homelessness, financial instability, lack of opportunity in employment, hopelessness, or living in a climate of fear or vulnerability. There is evidence of all of this in his past, however. His coping strategy of avoiding confrontation or removing himself from

situations where conflict attributable to racial discrimination could occur shows a maturity and self-restraint but, of course, it results in unnecessary and unjustified restrictions in his life.

[104] The fact that Mr. Tuel has been able to overcome many of his hardships by becoming educated, gainfully employed, financially stable, and no longer addicted to alcohol or cocaine, demonstrates his motivation, initiative, determination, and intelligence. This shows his capacity for rehabilitation. Yet, despite this admirable skill set he has developed despite many adversities, he has committed a horrific crime, which has shaken the community and caused immeasurable suffering to Mr. Papequash and his family.

[105] Mr. Tuel has made a series of choices throughout his life that have led to these offences. His background experiences, while not preventing him from achieving external successes as an adult, have contributed to these choices. The absence of moral guidance throughout his young life, through separation from his parents at a very young age, the normalization of violence and killing in his life that occurred while he was a child solider, the absence of role models, his separation from his older sister and subsequent homelessness soon after his arrival in Canada, and his inability to obtain counselling for his childhood trauma, as well as, to a lesser extent, the racism he has experienced, is all relevant context for me to consider in determining an appropriate sentence.

[106] Not only is it relevant context, but these experiences serve to reduce moral blameworthiness. Their connection to the offences does not have to be direct. It is enough that the evidence points to circumstances in his life that provide some sort of

explanation as to why Mr. Tuel made the choices that he did in this case. It is not difficult to understand that Mr. Tuel's experiences a child soldier in combat, where shooting guns at people was part of his normal life for five years, may have affected his choices. This does not excuse or justify his choices nor does it take away from the seriousness of the offences here. But it is background I must consider.

[107] The firearms-related offences in this case are very serious. The significant aggravating factors of shooting a loaded prohibited handgun in a public place outside a bar at closing time in downtown Whitehorse, at close range to the victim, causing near death and long-lasting physical, emotional, and psychological effects on Mr. Papequash are very serious. The impact on Mr. Papequash, who almost died and whose life circumstances are now severely restricted, and on his family, has been devastating. The community has been shaken by the incident. Innocent people were at risk. This was not the first weapons offence or offence of violence for Mr. Tuel, and he was prohibited by court order from having any kind of weapon at the time of the offence.

[108] Parliament has clearly stated its intent with the minimum sentence of five years for discharge firearm with intent to wound to ensure offences of this kind are denounced and deterred. Denunciation and deterrence are the primary sentencing objectives for this offence.

[109] I have considered the mitigating circumstances of Mr. Tuel's life experiences, and although I find they have influenced his choices, his moral culpability is still high. I have given weight to the objective of rehabilitation of Mr. Tuel, particularly as he has demonstrated success in overcoming personal challenges, has taken good advantage of programming at the Whitehorse Correctional Centre, and has indicated both in court

and to his counsellor a desire to seek treatment for his childhood trauma. I have also considered the restraint principle and, of course, overall proportionality.

[110] I find that a sentence of 8.5 years for discharge firearm with intent to wound is appropriate. The rest of the gun offences will be sentenced concurrently, and I will set those out at the end of my reasons.

[111] Turning to the drug offences, the most serious of these offences is possession for the purpose of trafficking. The others are related to this one, and so will be sentenced concurrently. I agree that the range in the Yukon for possession cases is 6 to 18 months and, in some exceptional cases, conditional sentences and probation in the community is awarded. I find in this case that, given the amount of cocaine and cash found in the truck, this was a significant dial-a-dope operation.

[112] I would like now to quote from an observation made by retired Judge Faulkner in *R v Holway*, 2003 YKTC 75, which has been repeated many times in more recent Yukon cases, and I believe an observation that is even more true today, 20 years later, as our territory continues to lose too many people to drug overdoses and to see the dire negative consequences on families and society of people who are drug addicted. Judge Faulkner wrote:

> [7] … northern communities are already struggling with disproportionally high rates of addiction, while scant resources are available to deal with the problem. The last thing we need is more drug traffickers. Courts in the North have quite properly held that they are entitled to take these local conditions into account and have consistently held that deterrent sentences are warranted and that, given our circumstances, the need to maintain a deterrent trumps other sentencing considerations in cases involving trafficking in hard drugs.

[113] The primary sentencing objectives for possession for the purpose of trafficking cases are denunciation and specific and general deterrence. With an emphasis on these objectives, I find that an appropriate sentence for possession of cocaine for the purpose of trafficking is 18 months.

[114] Whether this sentence is appropriate to be served consecutively or concurrently is determined by whether the acts constituting the offence were part of a linked series of acts within a single endeavour or not (*R v GPW*, (1998) 106 BCAC 239 at para. 35). It is a factual assessment within the discretion of the sentencing judge.

[115] In this case, the gun-related offences and the drug-related offences give rise to different legally protected interests. The interest of society in ensuring people do not possess and traffic in illegal substances is separate from the interest in ensuring people do not possess and use illegal firearms.

[116] The offences involving the gun related to the shooting outside the 202 bar on December 1, 2019. There was no evidence that this shooting was linked to the cocaine and cash found in Mr. Tuel's possession later that day. They cannot be treated as part of a single endeavour.

[117] Contrary to defence counsel's argument, the discovery of the drugs by police when they were apprehending Mr. Tuel and Mr. Wuor for the shooting and the gun offences is not sufficient to establish a link that makes the acts constituting the offences part of the same endeavour. The link is not through the timing and nature of what is discovered during the police investigation, it is through the evidence surrounding the acts themselves. In this case, there was no link, and the sentences will be consecutive. I have considered the principle of totality and do not find that it requires these sentences

to be served concurrently in these circumstances. The other two drug-related convictions will be concurrent to the possession charge.

Conclusion

[118] Mr. Tuel, please stand. I sentence you as follows:

- For discharge firearm with intent to wound: 8.5 years.
- For aggravated assault: 8 years concurrent.
- For occupying a vehicle in which you knew there was a prohibited firearm: 1 year concurrent.
- For possession of a loaded prohibited firearm without authorization or licence: 2 years concurrent.
- For being at large on a recognisance and failing to comply with a no weapons condition: 1 year concurrent.
- For possessing a firearm while prohibited from doing so: 3 years concurrent.
- For possession of cocaine for the purpose of trafficking: 18 months consecutive.
- For possession of property obtained by crime of over $5,000: 12 months concurrent to the possession of cocaine for the purpose of trafficking charge.
- For possession of property obtained by crime in an amount less than $5,000: 6 months concurrent to the possession of cocaine to the purpose of trafficking charge.

[119] In total, your sentence is 10 years.

[120] You have spent, as of this Friday, 48 months in custody. I will give you 1.5 days to 1 credit for that time served, which is 72 months or 6 years. This leaves 4 years of custodial time for you to serve.

[121] You may sit down.

[122] I also grant the ancillary orders of mandatory prohibition of firearms under s. 109 and the mandatory forfeiture of the gun, as well as forfeiture of the ammunition, cash, and drugs. I also grant the DNA order.

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DUNCAN C.J.