

SUPREME COURT OF YUKON

Citation: *R v Wuor*,
2023 YKSC 31

Date: 20230519
S.C. No. 21-01503
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

JOSEPH WUOR

Before Chief Justice S.M. Duncan

Counsel for the Crown

Leo Lane

Counsel for the Defence

Lynn MacDiarmid

This decision was delivered in the form of Oral Reasons on May 19, 2023. The Reasons has since been edited for publication without changing the substance.

REASONS FOR SENTENCE

[1] DUNCAN C.J. (Oral): Joseph Wuor was convicted of an offence under s. 94(1) of the *Criminal Code*, RSC 1985, c C-46 (“*Criminal Code*”) on February 17, 2023, after a trial was held with a co-accused, Malakal Tuel, from May 30 to June 9, 2022, with closing submissions provided on October 3, 2022. He was convicted of an offence under s. 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (“*CDSA*”) on May 17, 2023, on the basis of his admission at trial and the offence’s character as a

lesser included offence of possession for the purpose of trafficking under s. 5(1) of the CDSA with which he was charged and acquitted.

Facts

Circumstances of the offences

[2] The backdrop to this offence is a shooting of JT Papequash that occurred outside the entrance to the 202 bar in downtown Whitehorse on December 1, 2019. Joseph Wuor was at the scene at the time of the shooting with the co-accused, Malakal Tuel. They had been seen together all evening long at two bars; later on the trails near the clay cliffs in downtown Whitehorse, at the airport parking lot, and then in a truck together in downtown Whitehorse.

[3] The following evening, Joseph Wuor and Malakal Tuel were found together outside Malakal Tuel's residence on the outskirts of Whitehorse. They were arrested while leaving the residence in a Toyota Tacoma truck owned and driven by Malakal Tuel. Joseph Wuor was in the front passenger seat. A loaded Taurus PT 709 semi-automatic handgun was found on the floor of the front passenger seat. It is a prohibited weapon within the meaning of the *Criminal Code*.

[4] After the shooting of JT Papequash, a 9 mm shell casing was found at the entrance of the 202 bar and was admitted to have come from a shot fired by the Taurus PT 709 handgun by Malakal Tuel.

[5] The Tacoma was packed with bags and bedding. Joseph Wuor admitted that one of the black suitcases in the Tacoma belonged to him. Inside that suitcase was 8.28 grams of crack cocaine. He admitted it was for his personal use.

[6] The search of the Tacoma and Malakal Tuel's residence revealed more crack cocaine and phenacetin, an adulterant, in magnetic keyholders. Seven thousand, four hundred and eighty dollars (\$7,480) in cash was found in a bag in the truck with Malakal 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.

Circumstances of Offender

[7] Mr. Wuor was born in Kenya on April 2, 1993, to parents from the South Sudan. The family fled South Sudan in 1992 and came to Canada when Mr. Wuor was three months old. His father was violent within the family, and he left the family when Mr. Wuor was approximately nine years old. They have no relationship. His mother settled in Medicine Hat, Alberta, where Mr. Wuor has spent most of his life. Mr. Wuor has seven brothers and sisters: two older siblings, who were separated from the mother when they were leaving Africa and for whom she spent much money to locate and bring to Canada; and five other siblings who are younger. His mother worked very hard for long hours at minimum wage to support the family and Mr. Wuor assisted her in looking after the family home. His mother also sent money to other family members in Africa. The family in Medicine Hat did not have much money. They were one of three black families in the early days of Mr. Wuor growing up in Medicine Hat, and Mr. Wuor experienced racism frequently during that time.

[8] Mr. Wuor's counsel stated that his mother described him as quiet, respectful, polite, and a hard worker. He did quite well in school and was a good athlete. The family did not have enough money for him to pursue sports.

[9] Joseph Wuor's resume was provided, showing his work history up to 2019. Over the last approximately 10 years, he has worked as a dishwasher, cook, and labourer — at a greenhouse, at two different concrete companies and for a roofing contractor, all in Medicine Hat, Alberta.

[10] He is 30 years old and was 26 years old at the time of the offences.

[11] Joseph Wuor's criminal record contains nine convictions between 2012 and 2019. There are four convictions for failure to comply with court orders, one assault, one conviction of trafficking in a scheduled substance combined with a conviction of possession of a scheduled substance for the purpose of trafficking, another possession of a scheduled substance, and finally, a conviction of possession of property obtained by crime over \$5,000. His longest sentence was for the two trafficking convictions in December 2015, for which he spent two years concurrent on each charge in a federal penitentiary and received a 10-year weapons prohibition under s. 109 of the *Code*.

[12] Defence counsel in submissions, spoke about Mr. Wuor's reasons for coming to the Yukon in 2019; his work here; and the extent of his relationship with Malakal Tuel. The Crown objected to this evidence as there was no information about its source, and in the absence of a pre-sentence report, no advance notice to the Crown or ability of the Crown to independently attempt to verify this information.

[13] Information in sentencing hearings about the offender is usually provided by way of submissions from defence counsel. Often there are also pre-sentence reports, *Gladue* reports in the appropriate cases, support letters from family and/or friends, or verification/confirmatory letters from past or prospective employers to assist the Crown in preparing its own submissions on the appropriate sentence. Here, other than the

resume of Joseph Wuor, there were only the submissions of defence counsel, the content and details of which the Crown heard for the first time at the hearing.

[14] The Crown did not object to defence counsel's submissions about the family history and the systemic issues affecting Mr. Wuor's life, including racism, poverty, trauma, and family violence — most of which came from defence counsel's interview with Mr. Wuor's mother.

[15] Joseph Wuor did not testify at trial. The information about his reasons for coming to the Yukon and his relationship with Malakal Tuel are not in evidence and are related more closely to the circumstances of the offences rather than constituting information about his own circumstances to be taken into account for the purposes of sentencing. As a result, I will not consider those submissions.

[16] It also would have been helpful to have had some written confirmation of his employment since 2019 as well as his future employment prospects, which were referred to in general, such as, "he can go back to other jobs". However, I will consider defence counsel's submissions that, in general, he has been working since the summer of 2021 for a construction company in Fort McMurray and on and off until the last few months, when he was laid off.

Positions of Crown and Defence

[17] On the s. 94(1) conviction, the Crown seeks a sentence of one-year custodial time, less time spent in pre-trial custody calculated at 1.5 days credit for each day spent in custody. Mr. Wuor spent 118 days in custody, amounting to 176 days with the credit. Counsel agree that this can be rounded up to six months. The Crown argues no credit

should be given for his time spent under house arrest. The Crown seeks 30 days concurrent on the possession charge.

[18] The Crown emphasizes the objectives of denunciation and deterrence, and the importance of protecting public safety that Parliament has intended with firearms offences.

[19] The defence argues the sentence should be limited to time served, amounting to six months. The defence says not only should Mr. Wuor be given credit for his pre-trial custodial time, but also for the strict conditions of house arrest. Although there was no evidence provided other than submissions, she says the strict conditions (which included not being able to leave his mother's house in Medicine Hat unless in the company of his mother or with permission of his bail supervisor) had a negative impact on his employment options and his relationships. She submits he was under strict conditions of house arrest for 793 days (26 months). These conditions were somewhat relaxed from house arrest to a curfew from 8 p.m. to 6 a.m. since May 29, 2022.

[20] In total, defence counsel submits that Joseph Wuor was on release conditions for 1,146 days. She does not suggest a specific credit formula be applied in this circumstance, acknowledging that the jurisprudence supports a flexible approach. She offers options such as one day's credit for every eight days (which would be 5 months for the full 1,146 days or 3.3 months for the time he spent in house arrest) or one day's credit for every four days (which would be 6.6 months for the time spent under house arrest).

[21] Defence also says that while she is not making a s. 11(b) argument at this stage, the Court should recognize the length of time it has taken for this case to be completed.

She notes the serious charges Joseph Wuor was facing (and ultimately acquitted of) took a toll on him and this was made worse by the lengthy delay.

[22] Finally, she says that if further custodial time is ordered, it should be served by way of conditional sentence in the community. His full compliance with even very strict conditions while on release pending and after trial supports this approach.

[23] In sum, she argues Joseph Wuor's moral culpability is at the lower end of the spectrum, given his circumstances and the circumstances of the offence. Recognizing the importance and applicability of denunciation and deterrence, she says the sentence she proposes is proportional and appropriate.

Principles of Sentencing

[24] The *Criminal Code* sets out the purposes and principles of sentencing that must be applied by sentencing judges. The objectives of sentencing are one or more of the following:

- 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.

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

[26] 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.

[27] 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. ...

[28] This means that courts must strive to ensure that 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", promotes justice for victims, and seeks to ensure public confidence in the justice system (see *R v Blagdon*, 2013 NSPC 93, at para. 10).

[29] The principle of restraint must also be considered. Section 718(c) states that separation 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 (s. 718.2(d)); and all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders (s. 718.2(e)).

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

Aggravating factors

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

- Mr. Wuor's criminal record
- Mr. Wuor's commission of these offences while subject to a weapons prohibition order under s. 109
- The fact that the offences were committed in the context of a shooting using the same weapon the day before, of drug trafficking by Malakal Tuel, and of possession of crack cocaine for Joseph Wuor's personal use.

Mitigating factors

[32] The following are mitigating factors:

- Mr. Wuor's young age at the time of the offences (26 years old)
- The strict conditions of his release (house arrest).

Parity/Range of sentences from other cases

[33] 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. But by situating a case within the range of sentences for that same offence, some rationality, fairness, and even consistency can be achieved. (see *R v Laing*, 2021 NSPC 14, ("*Laing*") at para. 66 - paraphrased).

[34] Both counsel provided case law on sentences for firearms offences. Many of the cases sentence the offender globally to more than one firearms offence. Very few of the

cases are similar to this one, to the extent that the offender is charged with only one offence — in this case, s. 94(1), occupying a motor vehicle where there is a prohibited weapon.

[35] As a result, although the cases may provide some guidance, especially for a consideration of Parliament's intention with respect to firearms' offences, their usefulness is limited. However, I will review the relevant ones. Both counsel have provided helpful tables summarizing their most relevant authorities.

[36] In *R v Anderson*, 2020 NSPC 10, the offender received a conditional sentence of two years less a day plus two years' probation after being found guilty after trial of multiple firearms offences, including s. 94(1). He was 23 years old and was African-Nova Scotian. He was pulled over at a check stop and found to have a loaded handgun in his waistband in the vehicle, where he was alone. He had a dated criminal record and the impact of race and culture assessment (IRCA) called for a restorative approach. There was some positive evidence about rehabilitation.

[37] In *R v Hill*, 2011 NSPC 28 ("*Hill*"), the 43-year-old offender was sentenced to 12 months' jail on each count of firearms offences, concurrent, after pleading guilty. He was found in possession of an unloaded handgun in a cargo toolbox in his truck. He had a significant criminal record, including drug trafficking, property offences, and a lifetime firearms prohibition. He was on parole at the time of the offences. He had a good employment history and a positive pre-sentence report.

[38] In *R v Jarsch*, 2007 BCCA 189, a 33-year-old offender was driving at night with four passengers and three loaded firearms in the car. He was sentenced globally to 21 months after being found guilty after trial under s. 94(1), as well as possession under

s. 95(1), and careless transport under s. 86(1) — all of which were related to a single loaded handgun found at the foot of the front passenger seat. He had one prior dated conviction for theft for which he received a fine of \$200.

[39] In *Laing*, a 30-year-old offender committed multiple firearms offences over a two-week time period. He was convicted under s. 94(1) (four counts) and received a sentence of 12 months for one count and 18 months for the three other counts, concurrent. His global sentence was 18 months' jail, including the offences of 3 counts of careless use of firearm under s. 86(1). He discharged the firearms near residences, sometimes while driving. His criminal record was dated and unrelated, except for one conviction of possessing bear spray for a dangerous purpose. He had family support, an uneventful upbringing, and steady employment.

[40] In *R v Phinn*, 2015 NSCA 27, the offender received 6 years' jail for the offence under s. 94(1) and 25 months concurrent for the offence under s. 90(1) - carrying a concealed weapon. There was reasonable doubt about whether he knew the gun was loaded. He walked away from a group of people fighting, got into a vehicle which was later pulled over. Police saw the butt end of a loaded gun under the offender's seat. He had two previous convictions within the past five years of possession of a loaded prohibited firearm and was bound by two orders prohibiting possession of firearms. His pre-sentence report was poor and there was little rehabilitation since the last sentence.

[41] In *R v Yusuf*, 2020 ONSC 5524, there were two co-accused. Yusuf was convicted after trial of multiple firearms offences, including s. 94(1) and unlawful possession of a loaded restricted firearm and received 40 months jail less credit for pre-trial custody. He was 21 years old, had no criminal record but was on a no-firearms

bail condition for a *CDSA* charge. The vehicle in which he was a passenger was involved in a gunfire exchange with another vehicle on a residential street with bystanders close by. Mr. Ahmed, who was driving, was convicted of two offences under s. 94(1) — both for the firearm and the magazine — and received 18 months' jail less remand credit. He was 22 years old, had no criminal record, came from a good family and had a good upbringing, and was attending university at the time of the sentence.

[42] Turning to the cases defence provided; the first one was *R v Budden*, 2005 ABQB 859. The offender received a suspended sentence and 18 months' probation after being found guilty of offences under 94(1), 91(1) - possession of a handgun, and s. 86(1) careless storage. He was 40 years old, with a minimal record that included a recent conviction for possession of methamphetamine.

[43] The final case I will refer to is *R v Blagdon*, 2013 NSPC 93 ("*Blagdon*") where a 29-year-old offender received an 18-month conditional sentence for convictions under s. 94(1), 86(2), and 92(1). He was a passenger in a car where a loaded revolver was found in the glove box. The driver had fired three times in the direction of another person in downtown Halifax while the offender was a passenger. The offender had three prior offences of impaired driving, driving while disqualified, and break and enter — and a positive pre-sentence report.

Reasons

[44] The range of sentences for firearms offences is broad, from conditional sentence to penitentiary time. This results from the courts' assessment of the seriousness of the offence, after a consideration of the context, as well as the courts' assessment of the

offender's moral culpability, that is, the proportionality analysis. The actual range is narrowed by the context of the offence and the circumstances of the offender.

[45] As was stated by the in *R v Jarsch*, 2007 BCCA 189 at para. 18, the primary sentencing objectives for firearms offences are public safety, deterrence, and denunciation. Similar comments have been made by other courts.

[46] In *Laing*, at para. 42:

[42] ... Emphasizing these objectives [of protection of the public, denunciation, and general deterrence] recognizes the reality that misuse of firearms, whether with ulterior criminal intent, negligence or carelessness, has potentially lethal consequences. It also reflects society's condemnation of such conduct and the strong need to deter others from committing similar offences.

[47] And in *Blagdon*, at para. 25:

[25] ... Illegal firearms are a clear and present danger in our communities and, in sentencing for offences in relation to them, denunciation operates as a powerful expression of a "symbolic, collective statement" rejecting an offender's conduct. Offences involving loaded, illegal handguns will attract stern condemnation by the courts. [Citations omitted]

[48] The court in *Laing* commented specifically about the broad spectrum of conduct captured by s. 94(1). After observing that the combination of a firearm in a vehicle is recognized as particularly serious, the court noted it applies to anyone who is in a motor vehicle knowing there is a firearm and includes loaded prohibited firearms such as a handgun as well as unloaded, unrestricted long guns, and a variety of circumstances (at para. 53 - paraphrased). The maximum sentence for this offence when punishable on indictment, as in this case, is 10 years.

[49] I have assessed the comparative gravity of the offence under s. 94(1) against the other cases involving the same section.

[50] The following factors suggest the gravity of the behaviour in this case is on the lower end:

- Mr. Wuor was not convicted of possessing or using the gun;
- the vehicle was not in an urban or high density residential area; and
- there was insufficient evidence to prove beyond a reasonable doubt that Mr. Wuor knew the gun was loaded.

[51] The following factors suggest the gravity of the conduct is higher because:

- the gun was a handgun which is small and therefore easily transported, hidden and accessed, increasing the risk to public safety;
- the gun had been used as an instrument of criminality the day before in the shooting of JT Papequash; Joseph Wuor was at the scene of the shooting so knew of this use; and
- there were drugs seized from the same vehicle as the gun, including 8.28 grams of crack cocaine possessed by Joseph Wuor; Malakal Tuel, the driver of the vehicle, was convicted of possession of cocaine for the purposes of trafficking. As noted by the Court in *Hill*, at para. 63:

[63] ... it appears that the proliferation of handguns within the criminal subculture is often connected with the illicit drug trade, which imbues violence and threats of violence against not only those individuals immersed in the criminal sub-culture, but also the law abiding citizenry. ...

[52] Mr. Wuor's weapons' prohibition is relevant, even though he was not convicted of possessing the gun, because of the general seriousness of all firearms offences and the risk to public safety of the presence of a gun in a vehicle. His prior criminal record,

including drug trafficking and possession offences is also relevant to the proportionality analysis.

[53] Mr. Wuor’s youth, his challenging upbringing, especially the experiences of racism, poverty, family violence, and trauma are circumstances that reduce his moral culpability.

[54] The Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15, in the context of s. 95(1) - possession of a restricted firearm, observed that conduct captured in that offence can range from “truly criminal conduct” that “poses a real and immediate danger to the public” to a regulatory or licensing type of infraction, owing to a mistake or carelessness in complying with storage or handling requirements. (para. 82)

[55] Applying this analysis to s. 94(1), I find that the conduct in this case lies in the middle of these two types of conduct. The context of this case as described above — the prohibited weapon’s connection to a near fatal shooting and being found in a vehicle with illegal drugs — brings it closer to the “truly criminal conduct” end of the range. However, as noted, Joseph Wuor did not own or possess the gun, and there was no real and immediate danger to the public, given their location at the time of the arrest. Yet, the context demonstrates that this is more than a regulatory or licensing offence.

[56] The circumstances here are closer to the case of Mr. Ahmed, in *R v Yusuf*, 2020 ONSC 5524, who was one of two accused, and was sentenced to 12 months’ custody on a count of s. 94(1). The most significant distinguishing factor between the *Yusuf* case and this one is the involvement of the vehicle Mr. Ahmed was driving in an exchange of gunfire with another vehicle, making that case a higher risk and danger to public safety.

[57] Considering all of the factors that I have listed above, I find the appropriate sentence in this case is 9 months' custody, with credit of six months for time served.

[58] I agree with the court's statement in *Hill*, at para. 59, that given the seriousness with which Parliament has treated firearms offences, and the context of the offence in this case, a conditional sentence order is insufficient to express society's condemnation of conduct and to deter future offending. The concern for public safety created by the existence of a handgun in a vehicle, its use in a shooting and being found in a vehicle also containing drugs possessed by Joseph Wuor and the driver, who was convicted of possession for the purposes of trafficking, mean that denunciation and deterrence must be emphasized. A custodial sentence is warranted.

[59] I will not give Mr. Wuor specific pre-sentence credit for house arrest. No evidence was provided by him of the impact of the strict release conditions on him. As noted in *R v Downes*, [2006] 79 OR (3d) 321 (ONCA) ("*Downes*"):

[37] ...

- - Where the offender asks the trial judge to take pre-sentence bail conditions into account, the offender should supply the judge with information as to the impact of the conditions. If there is a dispute as to the impact of the conditions, the onus is on the offender to establish those facts on a balance of probabilities in accordance with s. 724(3) of the *Criminal Code*.

[60] Defence counsel submitted that naturally there were significant effects on his relationships and employment opportunities over a long period of time, given the delays in completing the trial, for various reasons. However, defence counsel also submitted that Mr. Wuor was working in construction in Fort McMurray in the oil sands, off and on, starting in the summer of 2021, until recently when he was laid off. This was with the

permission of his bail supervisor. This undercuts the impact of the house arrest on his employment opportunities as well as the isolation that house arrest can create.

[61] I note as well that since the trial started in May 2022, Mr. Wuor has been subject to a curfew only and not house arrest as originally imposed. It is to Mr. Wuor's credit that he complied with these strict conditions consistently throughout this period and it demonstrates his rehabilitative potential.

[62] The ability of house arrest to provide pre-sentence credit to reduce a period of sentence varies widely. As Rosenberg JA stated in *Downes*:

[33] Accordingly, I conclude that time spent under stringent bail conditions, especially under house arrest, must be taken into account as a relevant mitigating circumstance. However, like any potential mitigating circumstance, there will be variations in its potential impact on the sentence and the circumstances may dictate that little or no credit should be given for pre-sentence house arrest. ...

[63] In *Hill*, the court said, at para. 25:

[25] Obviously, a fixed formula cannot be applied because of the wide range of factors that must be considered, including the number and nature of the conditions of release and the length of the time that the accused was subject to the conditions. Thus, a flexible approach is necessary in addressing the extent to which restrictive bail conditions is considered a mitigating factor.

[64] Here, while the conditions were strict and the length of time significant, they were not so strict that Mr. Wuor was completely isolated throughout that time and unable to work. He lived with his family when not working in Fort McMurray. I have taken his conditions into account as a mitigating factor in determining Mr. Wuor's overall sentence, but without evidence of the specific impacts on Mr. Wuor, I will not reduce his sentence further on this basis.

[65] Finally, I agree with the Crown that a sentence of 30 days for possession of cocaine in this case, to be served concurrently, is appropriate. It is appropriate given Mr. Wuor's previous criminal record with two counts of possession of illegal drugs (and one count of trafficking) within the last 7½ years, the serious nature of the drug involved (crack cocaine), and the amount of 8.28 grams found in his suitcase.

[66] I commend Mr. Wuor for his compliance with all the conditions, including abstaining from non-prescription drugs and alcohol, and hope that he continues on this path.

Conclusion

[67] Mr. Wuor, please stand.

[68] I sentence you as follows:

- On the s. 94(1) conviction: 9 months in custody, less credit at 1.5:1 for pre-sentence time in custody for a total of 6 months.
- On the s. 4(1) of the *CDSA* (possession of crack cocaine): 30 days to be served concurrently.

[69] There will also be an order under s. 109(1)(d) prohibiting Mr. Wuor from possessing firearms as set out in s. 109(2) for a period of 20 years.

DUNCAN C.J.