COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R.* v. *Haga***,
2004 YKCA 0008

Date: 20040526
Docket: CA03-YU515
Registry: Whitehorse
Heard in Whitehorse

BETWEEN:

Regina

Respondent
(Plaintiff)

AND:

Stephen Haga

Appellant
(Defendant)

CORAM: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Thackray

Appearances:
David A. McWhinnie — Appearing for the Crown/Respondent
James Van Wart — Appearing for the Appellant

REASONS FOR DECISION
DELIVERED FROM THE BENCH

[1] **LEVINE J.A.** (Oral): Stephen Haga appeals his sentence of nine months imprisonment following his plea of guilty to one count of escaping from lawful custody, contrary to s. 145(1)(a) of the *Criminal Code*. He argues that the trial judge erred in two ways: in imposing a sentence that is excessive and demonstrably unfit in comparison with sentences for similar crimes in the Yukon and in failing to allow any credit for pretrial custody.

[2] The circumstances of the offence may be summarized in brief terms. While in custody awaiting trial on a charge of robbery, the appellant escaped from the Whitehorse Correctional Centre by passing through a hole in a fence in the exercise yard and over three other fences. He was at large for two days before being apprehended by police at his girlfriend's home and returned to the Whitehorse Correctional Centre.

[3] The appellant's trial on the robbery charge proceeded on schedule. He was acquitted on that charge one day before he was sentenced on the escape charge. He spent 25 days in jail between the date of his recapture and sentencing. The appellant, who was 37 years old at the date of sentencing, has a very lengthy criminal record, comprising approximately 80 convictions, dating from 1982. Of particular relevance to the charge of escaping lawful custody are a conviction in 1991 for being unlawfully at large, for which he received one month in prison, and a conviction in 2002 for escaping lawful custody, for which he received a sentence of six months in custody. Both of these offences occurred and the appellant was sentenced in Edmonton, Alberta.

[4] On the issue of the fitness of the sentence, appellant's counsel brought to our attention several cases decided by the Yukon Territorial Court dealing with sentences for similar offences to that in issue here. Counsel pointed out that the range in those cases was one day to five months. He argues that the sentence of nine months is unfit, as it does not reflect the principle set out in s. 718.2(b) of the *Criminal Code* that:

> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[5] Counsel pointed to the comment made by Lamer, C.J.C., as he then was, in *R.* v. *C.A.M.*, [1996] 1 S.C.R. 500 at para. 92:

> As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

[6] Crown counsel relied on cases decided by courts of appeal in other Canadian jurisdictions, including the British Columbia Court of Appeal, in which ranges of three to eighteen months have been approved.

[7] That local conditions are relevant to sentences for similar offences is, as Lamer, C.J.C. said, a principle courts must consider. In this case, however, other factors relating to this particular offender were also important and are reflected in the trial judge's reasons. These are, in particular, his very lengthy criminal record and his prior convictions and sentences for similar offences. The sentence of six months in prison, imposed just 18 months earlier, apparently had no deterrent effect on the appellant. In addition, none of the mitigating factors, present in most cases cited by appellant's counsel, including relative youth, impulsive escape or voluntary return to custody, apply to the appellant. While the step up to nine months results in a sentence that is longer than most imposed by the Yukon Territorial Court, given the distinguishing features of this case, I cannot say was unfit.

[8] Appellant's counsel says that the trial judge erred in failing to give the appellant credit for pretrial custody because he gave "no good reason" for denying it: see

R. v. *Rezale* (1996), 31 O.R. (3d) 713 (Ont. C.A.), quoted in *R.* v. *Mills*, [1999] B.C.J. NO. 566 (C.A.) (Q.L.) at para. 28.

[9] The reason given by the trial judge was that the appellant was in custody on the robbery charge. Appellant's counsel says that the appellant was in custody, following his apprehension after his escape, on both charges. There was no good reason, he says, to give priority to the robbery charge and that is particularly so where the appellant received no credit against that charge because of his acquittal.

[10] In *R.* v. *Austin*, [1996] B.C.J. No. 1643 (C.A.) (Q.L.), the Court considered the failure of a trial judge to give credit for pretrial custody when the offender had been detained on other charges in addition to that on which he was sentenced. The court declined to interfere with the discretionary decision of the trial judge, finding no error of law or principle.

[11] In my opinion, the same reasoning applies here. After his escape, the appellant was returned to the same position he was in before, awaiting trial on a robbery charge, which proceeded as scheduled. The trial judge was alive to the issue and made no error in exercising his discretion in denying credit.

[12] In the result I would grant leave to appeal and dismiss the appeal.

[13] **SAUNDERS, J.A.**: I agree.

[14] **THACKRAY, J.A.**: I agree.

[15] **SAUNDERS, J.A.**: Leave to appeal is granted. The appeal is dismissed.

R. S. Levine J.A.

The Honourable Madam Justice Levine