Citation: *R. v. Magill,* 2014 YKTC 7

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Docket: 12-00450A
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Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

DAVID SID MAGILL

Appearances:
Keith Parkkari — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): The case before me can only be described as tragic. On July 7, 2012, David Magill, made choices, foolish and thoughtless choices, which had devastating consequences for Katelyn Sterriah and for her family. Mr. Magill has entered pleas of guilty to dangerous driving causing death, obstruction of justice and breach of the abstain condition of his release order. The facts are set out in detail in the Agreed Statement of Facts filed as Exhibit 1.

[2] To summarize: On July 7, 2012, a number of youth and young adults, including Mr. Magill, were consuming alcohol at various locations around Ross River. In the early

morning hours, Mr. Magill got behind the wheel of his vehicle, along with a number of passengers, amongst them Katelyn Sterriah. The accident reconstruction and witness accounts indicate Mr. Magill was driving too fast for the essentially off-road conditions. As a result, he was unable to stop his vehicle in time when approaching the Pelly River. The vehicle went into the river, was caught in the current and ultimately submerged. Only four of the five individuals inside made it safely to shore. Katelyn Sterriah remained trapped in the vehicle and drowned. She was 16 years old.

[3] The devastating consequences of the accident were compounded when Mr. Magill and the surviving passengers agreed to lie to the police about the identity of the driver. It was agreed that they would say that 16-year-old K.A. was driving. She ultimately spent four days in custody for something she did not do. The truth did not come out until July 17, 2012.

[4] Mr. Magill was released on a recognizance, on more than one occasion, one which included a condition that he abstain from the possession or consumption of alcohol. On November 25, 2012, he was found to be in breach of that condition.

[5] He is before me now for sentencing on the three matters to which he has entered pleas of guilty. Mr. Magill is 25 years of age, with ties to the Ross River Dena First Nation. I have reviewed affidavits filed previously, along with letters filed today in a book marked as Exhibit 2 in these proceedings. The material that has been placed before me does speak to the impact, in particular, of the residential school system on Mr. Magill's family. The letter of Jack and Jenny Caesar, who are Mr. Magill's aunt and uncle, in particular, provides information about the family's experiences within that

residential school system and its impact on them, leading, as is altogether too common in this territory, to significant issues with substance abuse within the family. Mr. Magill is no exception. Clearly, he has a problem with alcohol, and that problem has resulted in the death of Katelyn Sterriah. While there is a plea before me to dangerous driving causing death, Mr. Magill has nonetheless admitted to consuming alcohol and that it was a factor which clearly impacted on his decision and his behaviour.

[6] Mr. Magill, as noted, is still a young man. He had not been in trouble with the law prior to the matters which bring him before the Court. He is clearly a young man with a problem. That is one side of this equation.

[7] The other side of the equation is what has happened to Katelyn Sterriah and to her family. The information that has been provided to me about Katelyn describes an intelligent and vibrant young woman who had a positive impact on those around her. Her loss is clearly keenly felt by the members of her family, three of whom provided Victim Impact Statements to the Court.

[8] Her sister, Victoria, writes of her heartache at Katelyn's death and her anger at Mr. Magill for not just the accident but for concealing his role in Katelyn's death. Katelyn's father speaks of the promise that Katelyn had and his dreams for her future, and he speaks of his immeasurable sadness at her life having ended so cruelly and so tragically early. He too expresses his deep anger at Mr. Magill's failure to tell the truth about what happened. Katelyn's aunt eloquently states that she felt as though Katelyn's death was almost her death, and she echoes the anger of her family at Mr. Magill's failure to come forward at the beginning with respect to his role in the events, calling it

both “a heartless act” and indicating that in many ways the family felt re-victimized by what had happened.

[9] It is not difficult to appreciate the devastation of Katelyn’s family. What could be worse than losing a sister, a daughter, a niece? But I would like to thank those members of Katelyn’s family for having the courage to come forward to address the Court. It is important for us to understand, in terms of what has happened, how this has impacted on all of you, and, as I said earlier, I think it is incredibly important that Mr. Magill hear that, and that he hear that from you. So I do thank you for being prepared to do so. I know it is not easy.

[10] The question for me is: What is the appropriate disposition?

[11] As the Crown has fairly pointed out, from a legal perspective, we look at aggravating and mitigating factors. The aggravating factors in this case, clearly the most aggravating, is the loss of Katelyn; in addition, the consumption of alcohol, the attempts to deflect responsibility by lying about who had been behind the wheel of the vehicle, the four days spent in custody by the young woman who came forward indicating she had been the driver when she had not been. As well, there is the breach that is before the Court.

[12] The mitigating circumstances that I am required to consider include Mr. Magill’s youth, his lack of a prior criminal record and the guilty pleas that he has entered indicating his acceptance of responsibility. I am also required to consider his aboriginal heritage. Counsel earlier referred to *Gladue* factors: *Gladue* is a case out of the Supreme Court of Canada that speaks to the requirement that we do consider an

offender's aboriginal heritage and the impact that historical systemic discrimination may have had on their being brought into conflict with the law. That is something that I am required to consider as well.

[13] Mr. Magill has also provided to the Court a letter, which I understand will be made available to those family members who wish to see it, expressing his remorse for what has happened.

[14] In light of the aggravating and mitigating factors, it is clear to me that counsel have spent considerable time in reaching an agreement as to what they believe is an appropriate disposition. This is a case in which a joint submission has been placed before me. That joint submission is one which suggests that a global sentence of 25 months, to be followed by a period of two years' probation, would be appropriate in all of the circumstances; that 25 month period to be reduced by credit for time that Mr. Magill has spent in remand to date.

[15] Now, the question for me in considering a joint submission is somewhat different than a case in which counsel might be before me with different positions. The question for me in determining whether or not to adopt a joint submission is not whether it would be the sentence that I would pass, but whether the joint submission is one which would bring the administration of justice into disrepute if I were to adopt it, and whether it would be contrary to the public interest. So it is a slightly different exercise for me in coming to the appropriate conclusion than in a case where there is a dispute as to what the appropriate result ought to be.

[16] With that in mind, I did want to read into the record a quote that relates to joint

submissions; what the test is for the judge when sitting, and why it is that we approach them somewhat differently, in the hopes of helping those of you here today to understand the role of the Court when there is a joint submission before it. It is a quote from a case called *R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445, out of the Ontario Court of Appeal, in which the Court stated, at paras. 8 and 9:

> This court has repeatedly held that trial judges should not reject joint submissions unless the joint submission is contrary to the public interest and the sentence would bring the administration of justice in disrepute: e.g. *R. v. Dorsey* (1999), 123 O.A.C. 342 at 345. This is a high threshold and is intended to foster confidence in an accused who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge.
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> The Crown and the defence bar have cooperated in fostering an atmosphere where the parties are encouraged to discuss the issues in a criminal trial with a view to shortening the trial process. This includes bringing issues to a final resolution through plea bargaining. This laudable initiative cannot succeed unless the accused has some assurance that the trial judge will in most instances honour agreements entered into by the Crown.

[17] In determining whether or not the sentence that is being proposed before me is one which would bring the administration of justice into disrepute or would be contrary to the public interest, one of the things that I look at is what has been done in cases that are similar. There is a book of authorities that has been filed before me, which includes seven different cases, either in the Yukon or in British Columbia. Most of them are very similar in nature; all of them dangerous driving causing death cases; many of them involving an element of alcohol, as this case does. Those cases demonstrate a range of sentence, starting at a low of a one year conditional sentence in one case, to a high

of two years and six months in another case. The case I think is closest factually, the case of *R. v. Charles,* 2011 BCCA 68, is a case that falls in the two-year range, very similar to what is being proposed here today. In such circumstances it would be difficult for me to conclude that what is being suggested by counsel is inappropriate. It falls in line with cases of a similar nature. For that reason, it is my view that it is appropriate for me to adopt the joint submission. But I did want to say, in doing so, I appreciate, from the family's perspective, that this does not necessarily reflect the outcome that the family might most like to see in all of the circumstances. It is a difficult, in fact impossible job for the Court to come up with a sentence that, in my view, would meet the needs of the family.

[18] That being said, from a legal perspective, in my view, it is appropriate for me to adopt the joint submission that has been put forward as appropriate in all of the circumstances.

[19] The sentence is going to be as follows: It is being suggested, and I accept, that an appropriate sentence for the dangerous driving causing death is 25 months. Mr. Magill has been in remand for a period of 396 days. Counsel have reached an agreement that appropriate credit for the time spent would be 14 months and 15 days. So the 25 months would be reduced by that amount, leaving a sentence of 10 months and 15 days still to be served in relation to that matter. There is often some confusion in terms of how sentences are to be calculated, so I am going to convert the sentence into days so that it is absolutely clear what I expect the sentence to be. Once credit for remand is applied, there is remaining 315 days to be served. On the obstruction of justice there will be a sentence of six months to be served concurrently. On the abstain

breach there will be 15 days, also to be served concurrently. So the global sentence is one of 25 months. The amount that remains to be served, once I reduce what he has already served, is another 315 days.

[20] That is to be followed by a period of probation. That probation will attach to both the dangerous driving causing death conviction and to the obstruction conviction. It will be on the following terms and conditions; that Mr. Magill:

1. Keep the peace and be of good behavior; appear before the Court when required to do so by the Court;
2. Notify the Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any change of employment or occupation;
3. Report to a Probation Officer immediately upon his release from custody, and thereafter when and in the manner directed by the Probation Officer;
4. Make reasonable efforts to find and maintain suitable employment, and provide his Probation Officer with all necessary details concerning his efforts;
5. Take such assessment, counselling and programming as directed by his Probation Officer;
6. Provide his Probation Officer with consents to release information with regard to his participation in any programming, counselling, employment or educational activities that he has been directed to do pursuant to this Order.

[21] That leaves me with the question of no contacts. The Crown has indicated that several members of the family would like me to place a condition on Mr. Magill's Probation Order that he have no contact with them. In the circumstances, I think it is entirely appropriate, based on what has happened, for them to be able to dictate when, how and if, at all, they want contact with Mr. Magill. So I am content to add that condition.

[22] There has been some concern expressed about this condition, given the fact that Ross River is a relatively small community. Counsel have expressed that it is not the intention that this condition operate effectively to banish Mr. Magill from the community. So they are suggesting that it perhaps would be appropriate to revisit the condition at the time of Mr. Magill's release, to see where everybody is at, at that point in time. I have no difficulty with the matter coming back before me to consider the circumstances at that point.

[23] In any event, I am satisfied that it is entirely appropriate that there be a condition:

> 7. That Mr. Magill have no contact directly or indirectly, or communication in any way, with Freda Sterriah, Victoria Medcalfe, Michael Medcalfe, Vera Sterriah, and Grady Sterriah.

[24] Was it intended that the exception condition be placed on there, or is that something you want to revisit?

[25] MR. PARKKARI: That's something it's probably best to revisit at a later date.

[26] THE COURT: All right. So it will be absolute at this point, subject to any change that may be agreeable to the family.

[27] In addition, there will be a driving prohibition of one year, to commence upon completion of the custodial portion of the sentence.

[28] Was there a discussion in the joint submission about the surcharge?

[29] MS. CUNNINGHAM: No.

[30] MR. PARKKARI: I note that it does precede the mandatory date. The Crown has no submission.

[31] THE COURT: I will waive it given his custodial status.

[32] So at this point in time, the 25 month global sentence will have Mr. Magill serving an additional 315 days, or 10 and a half months, and then will have him subject to a probation term for a period of two years.

[33] As I was saying earlier, however, I appreciate that this decision probably does very little to comfort the family in light of what has happened. In many ways it is beyond the power of the Court to make this better; I cannot go back and make this not have happened. I cannot bring Katelyn back. I can only hope that now that this part, the legal part of this, has finished, because I know the delay has been very difficult for the family, that this does offer you some ability to begin to come to terms with what has happened and move on from the very great loss that you have suffered.

[34] MR. PARKKARI: The Crown is not seeking the discretionary DNA

order, for the Court to just address that.

[35] THE COURT: Thank you. In the circumstances and given the lack of a criminal history, it does not appear to be an appropriate case in which to impose that particular order, so I would not. Is there anything else?

[36] MR. PARKKARI: Just a stay of proceedings on the outstanding charges, Your Honour.

[37] THE COURT: Okay, thank you.

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RUDDY T.C.J.