Citation: *R. v. Magun*, 2014 YKTC 14

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Docket: 12-10119A
12-10119B
12-10119C
Registry: Watson Lake
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

JAMES RUSSELL MAGUN JR.

Appearances:
Bonnie Macdonald — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): This is the matter of James Magun Junior. He is before the Court for sentencing on a charge under s. 268 and under s. 145(3) of the *Criminal Code*.

[2] This is a matter in which I could take some time and write a more cogent decision. I do not feel that is necessary in these circumstances, in part because of the fact that Judge Lilles has rendered a decision on an individual also having plead guilty to the same aggravated assault charge, and that I would add nothing to it that would in any meaningful way contribute to those that would be interested in what took place here

today.

[3] The facts as provided to me by counsel, as I note from Exhibit 1, as set out in the Agreed Statement of Facts that was filed in Mr. Charlie's sentencing. In brief, Mr. Magun and two youth and two other adults were drinking heavily in the skateboard park in Watson Lake. They decided to hitchhike. They were picked up by Nevada Vance hitchhiking and they decided, with no provocation and with no reason, to beat him up. They communicated in such a manner that Mr. Vance was concerned. He pulled over in front of the house of Gordon Dickson and got out of the vehicle. He was tripped by Mr. Charlie and the beating started.

[4] There is reference by Mr. Charlie in his statement, to Mr. Magun having been the one that first came up with the idea to beat Mr. Vance up by saying, "Let's gang him." Mr. Magun has no recollection of the events.

[5] The beating started in the yard and Mr. Vance was crawling towards Mr. Dickson's house. Mr. Dickson came out, brought Mr. Vance into his house and put him on the couch. However, the assault continued as the individuals, without Mr. Dickson's permission, entered into the house and continued to beat Mr. Vance.

[6] Mr. Dickson was able to call the police, and when he advised these individuals that the police were called, they left. While they were leaving, the two youth caused considerable damage to Mr. Vance's van. Mr. Vance was defenceless throughout this, as Mr. Dickson noted.

[7] The injuries were severe and significant to Mr. Vance. He recalls having to push

his eye back into the socket as it had partially come out, and that was while he was crawling to the house. That is supported by the medical evidence of the severe orbital fracture to his eye. He suffered a concussion, a hematoma, and a badly lacerated lip which required extensive medical intervention. His eye placement has never returned to normal. He may need surgery to repair a damaged tear duct. He suffers from chronic headaches and chronic pain.

[8] With respect to the breach charge, on February 21 of this year, Mr. Magun was intoxicated and trying to get into a fight with his father, who called the police. This was contrary to the terms of the recognizance that he abstain absolutely from the possession and consumption of alcohol. Read in pursuant to s. 725 were facts that on April 26, 2013, Mr. Magun was in a vehicle with one of the youth that had been charged in this offence, contrary to the terms of his recognizance that he have no contact with that youth.

[9] Crown is taking the position that a 12-month global sentence is appropriate; 11 months for the aggravated assault and one month consecutive for the breach charge, noting the sentence that was given to Mr. Charlie by Judge Lilles. On March 20, 2013, Mr. Charlie pled guilty to the s. 268(2). I know that at a very early stage he also pled guilty to having committed mischief with respect to the damage to the van, although it was as a party and not as an actual participant. Mr. Charlie also pled guilty to having breached the terms of his probation order by being intoxicated. His sentence was 10 months and one month consecutive on each of the breach charges, for a total sentence of 12 months. Mr. Charlie was a 21-year-old First Nations individual. Mr. Vance is his uncle. He did have recollection of what took place on that night and was able to provide

some of the information with respect to the involvement of others. He was cooperative with the Crown.

[10] Mr. Magun's age was 18 at the time these offences were committed. He had no prior criminal history. He is a young First Nations individual whose antecedents frankly provided a completely different picture of the young man who was involved in this absolutely horrific crime. He has numerous letters of support from his educators, his co-workers, those involved with him in the community, and his family. It is an absolutely inexplicable offence for this young man to have committed, with respect to the s. 268.

[11] The Crown has suggested that his sentence could be somewhat higher because of his role as an instigator based on the fact that Mr. Charlie says Mr. Magun was the one that said, "Let's gang him." When I compare him to Mr. Charlie, who had a prior, albeit limited, criminal history; who was on probation at the time, who kicked out Mr. Vance's feet from underneath him and who was clearly in a position to have stopped the assault from occurring, I cannot find that there is any particular aggravation in the words that were said that would cause me to differentiate from him as compared to Mr. Charlie as an offender. Mr. Vance, as I said earlier, is Mr. Charlie's uncle as well, but nor do I find Mr. Charlie's role to have been worse either. This was just an absolutely, as I said, horrific crime, and Mr. Magun will have to deal with this.

[12] As I said, I have reviewed the Gladue Report that is provided. I have reviewed the Pre-Sentence Report. They are all very positive with respect to Mr. Magun. He comes from a family that supports him. He does not come from the kind of dysfunctional home that we often see. I keep in mind the principles of sentencing and

the fact that I am dealing with an Aboriginal offender; I am dealing with a young Aboriginal offender, and all available sentences need to be considered. To the extent that incarceration is a factor, as to whether it is required and to the extent, if required, that it needs be imposed, I must keep in mind these considerations.

[13] This is a case, based on all the principles of sentencing and considering the principles of parity, that mandates that jail is necessary. I do not have the option before me of a conditional sentence that can be served in the community, due to the amendments to the *Criminal Code* that have removed that option from me. It may have been that a conditional sentence of a longer period with strict terms could have served the principles of denunciation, deterrence and rehabilitation, but, as I said, that is not an option that is before me. Therefore, the sentence with respect to the s. 268 charge will be the same as Mr. Charlie received, and that will be 10 months incarceration.

[14] With respect to the breach charge, the sentence will be 45 days consecutive. I am imposing this sentence by taking into account the aggravating factor of the circumstances of the offence which was put before me pursuant to s. 725. Mr. Magun did not plead guilty to the mischief that Mr. Charlie had. Had that charge been before me, on a guilty plea, Mr. Magun would have received the same 12 months as Mr. Charlie. He is getting between the two. That sentence will be reduced by 21 days credit that I am going to give him for pretrial custody. I am doing this on the basis of *R. v. Vittrekwa,* 2013 YKTC 78, and *R. v. Cardinal,* 2013 YKCA 14. Mr. Magun has been in custody for brief periods of time. Mr. Magun has not had time to participate in employment or counselling. He indicates that there have been no behavioural issues. I do not have a letter from Whitehorse Correctional Centre, but I have his circumstances

as an 18-year-old young Aboriginal offender who has never been custody before. This is going to be a difficult time for him, and I take those other circumstances into account as well in giving him one and a half to one credit for the 14 days. So 21 days time served, leaving a further 24 days custody on the breach, plus 10 months. There will be a period of probation, and Crown was seeking the three years, am I correct?

[15] MS. MACDONALD: Yes, Your Honour. But I know that on Joshua Charlie's probation order there was a curfew on it for the first six months, and having been in Watson Lake and seeing Mr. Charlie accumulate breaches as a result of that curfew, I am not asking for it for Mr. Magun. I do not think it is appropriate on a probation order. Well, no, I should restate that.

[16] THE COURT: You are saying it is not necessary in this case.

[17] MS. MACDONALD: It is not necessary in this case and it may lead to more criminal breaches, which everybody wants to avoid.

[18] THE COURT: I do not think it is necessary in this case. I think parity goes with respect to the period of incarceration. Probation is directed at the individual and their rehabilitative prospects to a large extent and not what I would have been inclined to put Mr. Magun on in any event. Otherwise, the terms will be the same, I take it?

[19] MS. MACDONALD: Yes, please.

[20] THE COURT: Judge Lilles did not review the terms in his decision. Here are the terms I am going to impose. These are the ones that I consider

necessary.

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. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
4. Report to a Probation Officer immediately upon your release from custody, and thereafter when and in the manner directed by the Probation Officer;
5. Reside as approved by your Probation Officer and do not change that residence without the prior written permission of your Probation Officer;

[21] THE COURT: Are counsel aware if there was an abstain clause for the entire three years?

[SUBMISSIONS ON ABSTAIN CLAUSE]

[22] THE COURT: Given the nature of the offence and given the circumstances of the other breach charge, which was concerning enough to have his father call the police, I am going to place him on an abstention clause until I know more. So for probation, you are to:

6. Abstain absolutely from the possession and consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;

Frankly, Mr. Magun, I should not even have to tell you to abstain. Given the fact that you are going to jail in large part because of the fact you started drinking yourself to oblivion one night you should not want to go near alcohol, not until you have a better understanding of what happened.

7. You do not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;
8. You are to take such assessment, counseling and programming as directed by your Probation Officer;

I am only going to put the general clause on, because it includes alcohol if you direct it; it includes anger management; it includes any assessment. I am actually going to include a clause that:

9. You are to take such psychological assessment counseling and programming as directed by your Probation Officer.

People who, by all accounts, seem to be positive members of the community but drink very heavily do not tend to commit these kinds of offences, and I am curious if there is anything in a psychological assessment, if you are directed to do it, that might shed some light on that.

10. You are to have no contact, directly or indirectly, or communication in any way with Nevada Vance, except with the prior written permission of your Probation Officer.

You may at some point in time wish to express to him your regret for what took place,

and you can do that through a probation officer if you wish to do so. I did hear, on the tape, “community work service hours”. Were you familiar with that? I think there was 100 community work service hours.

[23] MS. MACDONALD: It seems appropriate, Your Honour.

[24] THE COURT: I did not listen to all the terms, but I heard that term. I am going to make that order. If counsel discover that I misheard that and it should have been a lesser amount, we can fix that on a review. I intended to put the same amount that was on with respect to Mr. Charlie.

11. You are to perform 100 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. Any hours spent in assessment, counselling or programming may, at the discretion of your Probation Officer, be counted as hours towards your community work service;
12. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
13. You are to participate in such educational or life skills programming as directed by your Probation Officer;
14. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this Probation Order.

[25] Those are all the terms that I think are necessary. Any submissions on those terms?

[26] MS. MACDONALD: No, Your Honour.

[27] MR. COFFIN: No.

[28] THE COURT: There will be a DNA order. It is a primary designated offence. It is a mandatory firearms prohibition. Now, I note that in the information provided to me that this may be a case where at some point counsel would wish to seek an exemption?

[29] MR. COFFIN: Yes. I had not discussed it in any detail with Mr. Magun, but it is clear that shooting is something that he has done in the past and done well.

[30] THE COURT: Well, he provides food for some of the Elders in the community.

[31] MR. COFFIN: Yes, exactly.

[32] THE COURT: I do not have a lot information other than what is in the report here. What is the Crown's position on it now, or is this something that would be better put to a future date?

[DISCUSSION RE FIREARMS EXEMPTION]

[33] MS. MACDONALD: The Crown is content for the Court to make what order it wants to make today. I think Mr. Magun Junior would probably benefit from

having these things finally resolved today.

[34] THE COURT: Yes. I think I have enough of a basis with this young man and the information that I have to make a s. 113 order. If the Crown felt that it needed more time to consider that, I would certainly grant the Crown time to do that. The Crown is not opposing that application, based on the information as I see it, correct?

[35] MS. MACDONALD: The Crown takes no position.

[36] THE COURT: I am going to make an order, based on the information that is before me and Mr. Magun's prior good antecedents, and what I expect to be future non-appearance in this court, except for positive probation reviews. Given his role in providing food for Elders, and the importance of this in his First Nations ancestry, as demonstrated by his past performance, I will make an order under s. 113(1) that authorizes the Chief Firearms Officer or the Registrar or other competent authority to issue, as considered appropriate, an authorization licence or registration certificate for Mr. Magun to possess firearms for the purpose of sustenance hunting to support him, his family, or his First Nation. Does that wording seem to capture what needs to be made?

[37] MR. COFFIN: I would think so.

[38] THE COURT: If there are any concerns about that wording that need clarification, I am not sure who would deal with it, but I will make it clear on the record that my intent is that he be allowed to possess firearms and hunt in order to support himself, his family, and his First Nation, which would include, of course, the

Elders of the community. I believe that that is an important part of his rehabilitative process.

[39] With respect to victim fine surcharges.

[40] MS. MACDONALD: Your Honour, just to pre-empt the Court's concerns, the Crown is not opposed to a waiver of the s. 268, and it is mandatory on the s. 145(3).

[41] THE COURT: Well, I think that that is an easy way to deal with it, because I would have preferred not to impose it on the s. 145, but I would have imposed it on the s. 268 in the circumstances. So we will deal with it that way. I will waive it on the s. 268, because I am able to, but I will impose the mandatory $100 victim fine surcharge on the s. 145(3) charge. Given the time he is going to be in custody on this matter, I am going to give him 18 months time to pay the $100.

[42] I believe that covers all the orders. Remaining counts?

[43] MS. MACDONALD: Your Honour, the Crown enters a stay of proceedings on the remaining counts.

[44] THE COURT: All right. Stay of proceedings on remaining counts. Also, although I did not actually say it, the mandatory s. 109 order will go for the 10 years that is required. Thank you.

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COZENS C.J.T.C.