Citation: *R.* v. *Nehass*, 2010 YKTC 64

Date: 20100611
Docket: 09-00556A
09-00665
Registry: Whitehorse

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

REGINA

v.

MICHAEL DAVID ARCHIE NEHASS

Appearances:
John Phelps and Noel Sinclair — Counsel for the Crown
Bibhas Vaze — Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Michael Nehass is a 26-year-old First Nations man with ties to the Teslin Tlingit Council through his mother and the Tahltan First Nation through his father. In his relatively short life, Mr. Nehass has managed to build a reputation in this community, particularly with law enforcement, for being an angry young man with a penchant for violence, who presents as a significant risk to the safety of both the general public and of staff and fellow inmates when housed within a correctional facility.

[2] Along the way, Mr. Nehass has managed to amass an unenviable criminal record, with numerous offences of violence, including an aggravated assault for which

he was sentenced to 33 months in 2003, and two prior assaults on peace officers. He is before me for sentencing on two new offences of violence, an aggravated assault and an assault on a peace officer engaged in the execution of his duties.

[3] In his past dealings with the justice system, Mr. Nehass has demonstrated little to no interest in addressing his behaviour. With such a history, one would expect this to be a relatively straightforward sentencing decision, focused on calculating the appropriate length of time in custody to meet the principles of denunciation, deterrence and protection of the public. However, representations made by the members of the community of Teslin, and by Mr. Nehass himself, persuaded me that it was necessary to take additional time to consider what impact, if any, the principle of rehabilitation ought to have on Mr. Nehass's sentence.

[4] The facts of the offences before me have been presented by way of an agreed statement of facts. In summary, the aggravated assault committed on October 10, 2009 at the Whitehorse Correctional Centre involved Mr. Nehass and three fellow inmates, Kevin Pahtayken, Vernon Capot-Blanc and Liam Leslie consuming smuggled alcohol. This was followed by an altercation in which Mr. Pahtayken began punching Mr. Capot-Blanc, who had been sleeping. When Correctional Officers Jennings and Van de Mortel entered the cell to intervene, Mr. Pahtayken and Mr. Nehass were fighting each other. Mr. Nehass shoved Officer Jennings and began punching Mr. Capot-Blanc, who was attempting to get up.

[5] During the course of the ongoing fray, Mr. Nehass jumped on Officer Jennings and began to choke him until stopped and thrown to the floor by Officer Van de Mortel.

Van de Mortel then turned his attention to removing Mr. Capot-Blanc from the cell. Mr. Nehass punched Officer Van de Mortel in the face, breaking his nose and causing a bone to poke through the skin. Officer Jennings tackled Mr. Nehass to prevent further assault and he and Officer Van de Mortel were able to remove Mr. Capot-Blanc and force the cell door shut.

[6] Officer Van de Mortel required surgery to repair the open fracture and extensive damage to his face caused by Mr. Nehass. In addition, he suffered a tibial plateau fracture to his right leg, requiring a cast. The specific cause of the leg injury is unclear from the agreed statement of facts.

[7] A victim impact statement filed by Officer Van de Mortel details the pain he suffered as a result of his injuries, his lengthy recovery process and the long-term impact of his injuries, but, as is not uncommon with offences of violence, the impact of this offence went well beyond the physical. Officer Van de Mortel notes the devastating impact on his family, with his wife having to assume many of his responsibilities on top of her fears and worries about the impact of his injuries, and his special needs child refusing to come close to him, finding the alteration in his appearance during his initial recovery period to be too frightening.

[8] The assault peace officer offence occurred again in the Whitehorse Correctional Centre on November 26, 2009. Mr. Nehass and Mr. Geoghegan, housed in neighbouring segregation cells, both covered their cell cameras with wet toilet paper to obstruct the view. Mr. Geoghegan tied a bed sheet to his door to prevent entry and lit his bed on fire. The resulting smoke led Correctional Officers Sheepway, Cosco,

Claggett and Amos to enter the cell area to investigate. Mr. Nehass threw urine-contaminated water from his cell toilet at the officers, hitting one in the face. The officers were forced to retreat to obtain shields before re-entering. As they attempted to open Mr. Geoghegan's cell door, Mr. Nehass continued to throw toilet water at them. After removing Mr. Geoghegan, the officers attempted to remove Mr. Nehass for his own protection. They were met with resistance, but were able to handcuff and remove Mr. Nehass and take him to the medical unit. Once there, Mr. Nehass, while seated, lifted both feet and kicked Officer Cosco in the leg. As the officers attempted to subdue him, he actively resisted, including spitting at the officers, striking Officer Amos in the face.

[9] The offences committed by Mr. Nehass are further aggravated by the facts of yet another offence of violence occurring within the Whitehorse Correctional facility. While Mr. Nehass has not entered a guilty plea to that offence and is not being sentenced for it, counsel have agreed that the facts of the offence are admitted pursuant to s. 725 to be considered as aggravating factors on sentence.

[10] This third incident of violence, occurring on December 19, 2008, involved Mr. Nehass and Christopher Quash, another inmate, making a plan to attack yet another inmate, Gordon Bill, who had apparently made threats towards their family members. After exercising in the gym, Mr. Nehass and Mr. Quash broke away from their escort, kicked in a locked door, located Mr. Bill on a lower bunk, and proceeded to assault him. Mr. Quash punched and kicked him from the front while Mr. Nehass stabbed him with a small, pointy object, later identified as a pen wrapped in tin foil, from behind, resulting in several puncture wounds to Mr. Bill's forehead, left side, back and shoulder.

[11] The Crown suggests that Mr. Nehass's behaviour should attract a sentence in the range of three to four years, less credit for remand. Defence counsel suggests a 17 month sentence, less remand credit, is appropriate.

[12] Mr. Nehass has now spent eight months in pre-trial custody, most of it pre-dating the recent amendments. Crown takes the position that the standard one and a half to one credit would be appropriate, resulting in a reduction of 12 months. Defence notes that as Mr. Nehass spent much of his time in segregation, I may want to consider increased credit. I am of the view that one and a half to one credit is appropriate in this case. While time served in segregation may well be more difficult than regular remand, the fact that such segregation has been required to manage Mr. Nehass's oppositional behaviour while in custody ought not to entitle him to enhanced credit. I conclude that Mr. Nehass's sentence should be reduced by credit for 12 months in pre-trial custody.

[13] The more difficult question for me in this case is the determination of the appropriate sentence length. Counsel have filed a number of cases for my consideration. As is not uncommon, none of these cases is so strikingly similar as to provide clear direction on appropriate sentence length, but all provide some guidance with respect to the applicable sentencing principles and the range of sentences, generally, for like behaviour. In terms of principles, I would adopt the following summary, included by Dunnigan J. in *R.* v. *Daviau and Flores*, [2008] A.J. No. 426, a case in which the two defendants were charged with assault causing bodily harm on a prison guard and received sentences of two years. A number of valuable principles emerged from these decisions, instructive to sentencing courts:

(a) Assaults committed while incarcerated, whether against fellow inmates or guards, are to be viewed more sternly and should attract longer sentences; and

(b) Deterrence of other inmates from engaging in such behaviour is the paramount consideration in assaults on prison guards; and

(c) The overriding impetus in sentencing is the maintenance of order in penal institutions. (paragraph 7)

[14] In terms of general sentencing range, I note the comments of Lilles J. of our court in *R.* v. *McGinty*, [2002] YKTC 81 (CanLII).

> A review of the case law and sentencing principles establishes a wide range of sentences for the offence of aggravated assault. These authorities were reviewed at length in *R.* v. *D.L.*, [2002] B.C.J. No. 1987. I am satisfied that the range of sentence for aggravated assault generally is between 6 months and 6 years imprisonment. Sentences in the lower range tend to be imposed in situations lacking aggravating factors: for example, two adults, not in a position of trust, engaging in a consensual fight, which escalates and results in injuries to the victim. At the higher end of the range, the victim is usually attacked by a weapon, the injuries are life-threatening or result in permanent injury, and other aggravating factors are present such as a position of trust and the presence of children. (paragraph 19)

[15] Defence counsel argues that a review of the filed cases would suggest that 25 months would be the maximum sentence on more aggravating circumstances, arguing that consideration for rehabilitation and Mr. Nehass's Aboriginal heritage, pursuant to s. 718.2(e), should reduce the applicable sentence to 17 months. In my review of the cases filed by defence counsel, I noted that many of them dealt with sentences for the objectively less serious offences of assault causing bodily harm and assault with a

weapon, rather than aggravated assault. Furthermore, the majority dealt with a single incident of violence, albeit some factually more serious, some less so; whereas, in this case, there is a pattern of behaviour, including two separate offences of violence before me for sentencing, with the facts of yet a third read into the record for consideration on sentencing.

[16] In view of the numerous aggravating factors in this case, including the nature, number and location of the offences, the serious injuries and the related criminal history, I find the three to four year range presented by the Crown to be a more accurate starting point in reflecting the serious circumstances of the offences and in meeting the principles of denunciation, deterrence and protection of the public.

[17] Crown urges me to sentence Mr. Nehass at the higher end of that range. That is certainly a supportable and, some would say, obvious position for me to take in this case. However, there are a number of factors which have given me pause in reaching that conclusion. First and foremost is the support of the Teslin Tlingit Council (TTC). This is particularly notable when one considers the fact that some 18 months ago TTC informed the Court, by way of a letter, that Mr. Nehass was no longer welcome in their community. That position appears to have changed dramatically.

[18] A number of community and family members travelled from Teslin to address the Court in support of Mr. Nehass. These included executive Elder John Peters Sr., his son, John Peters Jr., Nora Peters, Lorraine Wolfe, Willy Smarch, and Sarah Wolfe, Mr.Nehass's grandmother. In addition, letters were provided by John Peters Sr., and Chief Peter Johnston. Mr. Peters indicates his willingness to actively assist Mr. Nehass

in obtaining employment, residence and treatment upon his release and describes a period of some five weeks last August in which he and his son, John Peters Jr., acted as sureties for Mr. Nehass. He notes that during that period, Mr. Nehass was fully compliant with his numerous conditions and created no difficulties in the community. I understand, however, that Mr. Nehass then travelled to a residential treatment facility in Alberta, where issues with his behaviour led to his being asked to leave the facility.

[19] Chief Johnston notes Mr. Nehass's history and the extensive work he will have to undertake on his rehabilitation, but indicates the community's willingness to support Mr. Nehass in this process. Chief Johnston also notes the cycle Mr. Nehass has found himself in, mirroring that of countless other First Nations and Aboriginal youth, and asks that I not write him off, but give him the chance to re-build trust within the criminal justice system.

[20] Mr. Nehass, for his part, appears to have finally recognized that he needs help to address the underlying issues which continue to bring him into conflict with the law. I understand this to be the first time that he has ever reached out for help. He acknowledged his failed attempt at residential treatment, but noted that it was his very first attempt, and he remains committed to working with his community and returning to treatment, regardless of the outcome of this sentencing. He has taken some positive steps. He has entered guilty pleas. Upon being removed from treatment, he did return to the Yukon and turn himself in. In April of this year, he met personally with Officer Van de Mortel and apologized for his behaviour. He has recognized the need to repair his relationship with the RCMP. I would also note that Mr. Nehass's demeanour and conduct at this sentencing hearing were markedly different than in previous

appearances before me. He was calm and respectful rather than visibly angry and combative, a welcome improvement.

[21] But what then is the impact of this information on the appropriate sentence? On the one hand, there appears to be at least a glimmer of hope that Mr. Nehass may finally be prepared to actively pursue his rehabilitation and address his behaviour, a positive step which I certainly would want to encourage. On the other hand, there is very little before me in terms of a track record which speaks to Mr. Nehass's sincerity and likelihood of success. Furthermore, the plan for his return to Teslin has not yet been fully realized in any meaningful way that would allow me to assess its impact on the protection of the public.

[22] In my view, Mr. Nehass has opened the door. He has yet to walk through it. However, in light of this information and in consideration of Mr. Nehass's Aboriginal heritage, I am satisfied that the principle of rehabilitation must be a factor in determining the appropriate sentence, but I am not persuaded that it should be the predominant factor.

[23] At the end of the day, I simply cannot reduce what I believe would otherwise be an appropriate sentence of four years to that suggested by defence counsel. However, I am satisfied that there is sufficient justification to reduce the sentence to one of three years, which, after credit for time spent in pre-trial custody, would allow Mr. Nehass to remain within the Yukon.

[24] A territorial term will allow him to continue to work with TTC and his family to develop a comprehensive plan for his eventual return to the community, while a

penitentiary term may well shut the door on any possibility of Mr. Nehass's future rehabilitation.

[25] Accordingly, there will be a sentence of two years less a day on the aggravated assault, and a concurrent sentence of six months on the assault peace officer. This will be followed by a probationary term of two years to support and encourage Mr. Nehass's rehabilitation. The terms and conditions, Mr. Nehass, will be as follows:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you 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;
4. That you report to a Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;
5. That you reside as approved by your Probation Officer; abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer;

[26] Because the probation order is intended largely to support you with treatment, I am not going to include abstain clauses or curfews. I do not want it to be so onerous that it sets you up to return again. The primary focus of it will be on rehabilitation. So I am going to include the condition:

6. That you take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
7. That you take such other assessment, counselling or programming as directed by your Probation Officer;
8. That you provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this order;
9. That you make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

As I think that would assist you in your rehabilitation as well.

[27] So the focus is primarily on rehabilitation, after the remainder of your jail sentence. It is my hope that that gives you time to do some serious work and planning with TTC for your return to the community.

[28] Yes?

[29] THE ACCUSED: I just want to say thank you.

[30] MR. VAZE: Thank you, Your Honour.

[31] THE COURT: Okay. I am actually not quite finished but Mr. Nehass was just going to say something. Go ahead.

[32] THE ACCUSED: I wanted to say thank you because I found myself in a situation where the -- I ended up like a noose that just kept getting tighter and tighter

and I just want to move on with my life now and I have a chance with my community to prove myself. And you know, I've been to the end of this road, I've been in a max prison and there's nothing there. And I would like to see what's on the other road now.

[33] THE COURT: Well, you are very fortunate to have a lot of people that are prepared to put the time and effort into helping you. So you have your chance. You have to do some more time in custody, your offences are just too serious and your history is just too serious.

[34] THE ACCUSED: I'm fine with that.

[35] THE COURT: But you have your chance to prove to them and to me and to everyone else that you can do this when you get out.

[36] There are a couple of things I do need to add. Given the nature of the offences, I am required to make certain mandatory ancillary orders concerning DNA and firearms. So there is going to be an order requiring you, Mr. Nehass, to provide such samples of your blood as are necessary for DNA testing and banking.

[37] There will be an order prohibiting you from having in your possession any firearms, ammunition, or explosive substances for a period of ten years. Those orders are required because of the offences that you are being sentenced on.

[38] THE ACCUSED: They have my DNA.

[39] THE COURT: If they look it up and they determine they do not need it, then that is okay. But I am required to make the order.

[40] The last thing that I will do is waive the victim fine surcharges, given your custodial status.

[41] Counsel, any issues or concerns in terms of conditions or anything else at this point in time?

[42] MR. VAZE: No, I think everything's been stated, thank you.

[43] THE COURT: Mr. Phelps?

[44] MR. PHELPS: Nothing.

[45] THE COURT: Okay, Mr. Nehass. Good luck. And the very last thing, my thanks to everyone from Teslin for taking the time to be involved in this and taking the time to come here not once, but twice. I appreciate it. Thank you.

_____

RUDDY C.J.T.C.