
CANADA / JUDGMENT

R. v. Gagnon

2021 BCSC 784

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2021 BCSC 784 R. v. Gagnon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gagnon,

2021 BCSC 784

Date: 20210416

Docket: 28711

Registry: Vancouver

Regina

v.

Tyler Emerson Gagnon

Before: The Honourable Mr. Justice Mayer

Oral Reasons for Sentence

Counsel for the Crown:

L. Krivel

Counsel for the Accused:

M. Longay

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 30 and April 16, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2021

Table of Contents

Introduction. 3

Circumstances of the Offences. 3

Agreed Facts. 3

Victim Impact 5

Circumstances of Mr. Gagnon. 6

Personal Background and Current Circumstances. 6

Efforts Towards Rehabilitation. 7

Criminal Record. 8

Crown and Defence Positions on Sentence. 9

Crown Position. 9

Defence Position. 13

Credit for Time Served. 14

Discussion and Conclusion. 15

Related Orders. 17

Introduction

- [1] On July 29, 2020, Tyler Emerson Gagnon pleaded guilty to Counts 2 and 3 under a four count indictment (Court File No. 28711-1) dated August 2, 2019 (the "Indictment").
- [2] Under Count 2 of the Indictment, Mr. Gagnon stood charged that on November 17, 2018, in Vancouver, British Columbia he confined the victim, A.J., without lawful authority contrary to s. 279(2) of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] Under Count 3 of the Indictment, Mr. Gagnon stood charged that on November 17, 2018, in Vancouver, British Columbia he robbed A.J. contrary to s. 344(1)(b) of the Criminal Code.
- [4] The Crown has entered a stay of Counts 1 and 4 of the Indictment.
- [5] Mr. Gagnon appeared before me for sentencing on Counts 2 and 3 on March 30, 2021, and today, April 16, 2021. These are my reasons for sentence.

Circumstances of the Offences

Agreed Facts

- [6] Pursuant to s. 655 of the Criminal Code, Mr. Gagnon admitted to facts alleged against him in respect of the Indictment. An "Admissions of Fact" signed by Mr. Gagnon's counsel and dated July 29, 2020, was entered as an exhibit at the sentencing hearing. Following is my summary of relevant admissions:
- a. On November 17, 2018, the victim A.J., a Korean national, was residing at an apartment building in the west-end of Vancouver. At approximately 2:45 a.m. that morning she returned home from a nightclub by taxi and entered her apartment building lobby.
 - b. Mr. Gagnon entered the building behind A.J., using his hand to grab the door just before it closed behind her. He then stood behind A.J. in the lobby as she waited for the elevator, and when the elevator door opened he followed her inside. As they entered the elevator Mr. Gagnon grabbed A.J. from behind, pulled her towards him and forcefully pushed her into the corner of the elevator.
 - c. When inside the elevator Mr. Gagnon held A.J. in the corner and told her he would kill her if she looked at his face. He placed his hand over her mouth which made it difficult for her to breathe and later put his toque over her eyes to prevent her from looking at him. He held a pen against A.J.'s neck, struck her and pulled her hair.
 - d. At one point the elevator door opened and Mr. Gagnon prevented A.J. from exiting. He pressed buttons for multiple floors and while the elevator was moving between floors he searched through A.J.'s purse, taking her cell phone, her Chanel necklace, her Chanel wallet and her keys.
 - e. Mr. Gagnon and A.J. remained in the elevator for approximately seven minutes until an unidentified woman entered and A.J. was able to exit. Mr. Gagnon also exited the elevator and left the apartment building.
 - f. After A.J. left the elevator, she first went to her apartment and after realizing she no longer had her keys tried unsuccessfully to get help by knocking on neighbours' doors. She returned to the lobby where she was found and comforted by another resident. The police were called. After the police arrived and took an initial statement from A.J., they transported her to the hospital.
 - g. A.J. sustained injuries including abrasions to her neck and bruising on her left inner arm and knee. She experienced pain in her neck and shoulder area.

- h. The police commenced an investigation and Mr. Gagnon became a person of interest as he had failed to return to his half-way house after signing out to go to a convenience store on November 16, 2018. During the police investigation the police showed video stills of video taken at A.J.'s apartment building on the morning of the incident to third parties, who identified Mr. Gagnon. Mr. Gagnon was arrested in Kitsilano, on November 18, 2018.
- i. In a statement given to police on November 19, 2018, Mr. Gagnon stated that he was high on speed during the time frame of the incident. In a subsequent interview on January 25, 2019, Mr. Gagnon told police that his goal on November 17, 2018, was to get money for "dope and cigarettes". He was shown the video footage taken at A.J.'s apartment building, and admitted that he was the person in the video. He also admitted to the robbery and to using a pen to make A.J. think that he had a weapon. He recalled having a wallet and phone and throwing them away and admitted to keeping the money taken from A.J.'s wallet.

Victim Impact

- [7] The Crown advised during submissions on sentence that shortly after the incident on November 17, 2018, A.J. returned to Korea and has been reluctant to cooperate with this proceeding.
- [8] The Crown provided a copy of A.J.'s victim impact statement prepared on December 10, 2018 (the "Victim Impact Statement"). In the Victim Impact Statement A.J. described how she was impacted by the offences in question including, for example, feeling sad, lonely, anxious, nervous, scared and embarrassed (as a result of cultural factors). In addition, A.J. described experiencing physical symptoms after the incident including shoulder tightness and suffering from diarrhea for three weeks. A.J. described her economic impacts as including loss of work and the cost of replacing her cell phone. Finally, A.J. described feelings of fear when she met any "white man near [her] house", was no longer able to work early in the morning when it was dark and was afraid to get onto elevators with others.
- [9] There can be little doubt that the circumstances of A.J.'s unlawful confinement and robbery were traumatic and had a significant impact on her. The events took place early in the morning over several minutes and involved the use of physical force and threats to A.J.'s life. The fact that A.J. was alone in the lobby of her apartment building and in the elevator with Mr. Gagnon would likely have made the experience more traumatic than if they had taken place in a public location with others in the vicinity. As I have already said, after the incident A.J. returned to Korea.

Circumstances of Mr. Gagnon

Personal Background and Current Circumstances

- [10] Information regarding Mr. Gagnon's personal circumstances was provided by his counsel and are contained within a pre-sentence report completed on December 18, 2020.

- [11] Mr. Gagnon is currently 37 years old. He was born in Ontario and has one sister and six half siblings. His childhood was unsettled. When he was nine years old his family relocated to Manitoba and he lived with his family in a campground prior to moving into a home. His mother left during this period and moved to British Columbia to be with another man. Mr. Gagnon, his father and his sister later reunited with his mother in British Columbia until Mr. Gagnon's mother chose to leave the family again. Mr. Gagnon's father then returned to Manitoba and Mr. Gagnon and his sister returned to Ontario where they lived with extended family for a time, before eventually reuniting with their father in Manitoba.
- [12] When he was in his mid-teens Mr. Gagnon and his sister moved to British Columbia to reside with their mother. Reports of neglect by Mr. Gagnon's mother were made to the Ministry of Children and Family Development and ultimately, Mr. Gagnon and his sister were abandoned by their mother when they were teenagers.
- [13] At this time Mr. Gagnon has no relationship with his mother who has told both him and his sister that she wishes to have no relationship with them. Mr. Gagnon reported that he was physically abused by his father and had conflicts with his father's new wife. Mr. Gagnon has not spoken with his father for approximately four years. Although he was close to his sister, at this time he has no support from any members of his family.
- [14] Mr. Gagnon was diagnosed with "Attention Hyperactive Attentive Disorder" when he was approximately fourteen years old and has been prescribed medication for this condition. In addition, he takes a prescription sleep aid.
- [15] Mr. Gagnon left high school in grade nine due to a combination of drug use and difficulties dealing with authority figures. Mr. Gagnon obtained his General Education Diploma while incarcerated on other charges but has expressed no desire to pursue further education.
- [16] Mr. Gagnon has a limited employment history and has no current sources of income or assets. He has been on social assistance sporadically over the years. He does not possess a driver's license.
- [17] Mr. Gagnon admitted that substance abuse is the primary issue in his life and the cause of his offending. He began using marihuana and crystal meth at the age of fourteen and progressed in his later teens to using heroine and crack cocaine. He also admitted that while he is under the influence of drugs he will do anything to fuel his addiction. He is currently participating in a methadone treatment program.
- [18] Although Mr. Gagnon self-identifies as Métis he provided little information about his cultural heritage and it appears was not exposed to his heritage growing up. No relevant information regarding difficulties experienced as a result of his Métis heritage was available from members of Mr. Gagnon's family. Mr. Gagnon does express some pride in his cultural heritage and a desire to explore his ancestry.

Efforts Towards Rehabilitation

- [19] During his most recent incarceration, in March 2021, Mr. Gagnon completed the Relapse Prevention Workbook provided by PHSA Correctional Health Services.

Criminal Record

- [20] Mr. Gagnon has a significant criminal record dating back to 1998 when he was approximately 14 years old. The Crown provided a CPIC printout and JUSTIN Conviction List. In summary, Mr. Gagnon has been sentenced by the court on 28 separate occasions in respect of 45 criminal offences, which includes serving four Federal sentences. He has been previously convicted for theft, break and enter and related offences, violent offences including assault with intent to steal, attempted armed robbery, robbery with violence and robbery. In addition, he has been convicted for escaping lawful custody, being unlawfully at large, resisting a peace officer, obstructing a peace officer and dangerous driving.
- [21] In June 2013, Mr. Gagnon was sentenced to a three and one-half year sentence for a bank robbery committed in Alberta, which was ordered to be served consecutive to a two year and three-month sentence imposed in 2012, which he was serving for attempted break and enter, with intent, of a private residence in Coquitlam. On July 17, 2016, after his statutory release on June 4, 2016, Mr. Gagnon was stopped by Kelowna RCMP during a traffic stop. It was determined that he had tested positive for drugs and a warrant for his arrest was issued, although he remained at large for 239 days. He was again stopped while driving an uninsured vehicle on March 8, 2017, at an RCMP traffic stop, but fled, driving down a crosswalk before crashing. He sought to avoid capture on foot but was arrested and subsequently convicted of dangerous driving. He was sentenced to four months to be served concurrently with another sentence. After his second statutory release on June 7, 2018, Mr. Gagnon breached the conditions of his release by failing to return for his curfew and removing his monitoring bracelet. He was arrested on June 18, 2018, while under the influence of alcohol and possibly drugs, when a Langley RCMP member responded to a complaint of a male checking car door handles.
- [22] On November 8, 2018, Mr. Gagnon was granted his third statutory release subject to various National Parole Board conditions, including not to consume non-prescription drugs. He was released to a halfway house in Vancouver and was to report to his parole officer eight times per month - which the Crown submits is the most extensive reporting provision typically ordered. As set out above, Mr. Gagnon committed the offences set out under Counts 2 and 3 of the indictment within nine days of his statutory release.

Crown and Defence Positions on Sentence

Crown Position

[23] The Crown submits that the principles of denunciation and deterrence are the primary considerations in this case. In addition, the Crown submits that the court should consider protection of the public and the necessity for continued rehabilitation in determining a fit sentence.

[24] The Crown submits that the aggravating factors in this case include the following:

- a. The acts were extremely violent, in particular for a small and vulnerable victim such as A.J., who was followed into her home at night (early in the morning).
- b. The acts were opportunistic and driven by Mr. Gagnon's addiction.
- c. The acts took place in an enclosed space over a significant period of time and Mr. Gagnon showed a careless disregard for A.J.
- d. A.J. sustained physical injuries.
- e. Mr. Gagnon's actions were extremely frightening for A.J. He used force to confine her in an elevator over an extended period of time, while using a weapon and covering her face, and threatened to kill her.
- f. Mr. Gagnon has an extensive criminal record.
- g. The offences took place within nine days of Mr. Gagnon's statutory release from previous convictions.

[25] The Crown submits that the only mitigating factors in this case are Mr. Gagnon's guilty plea and that Mr. Gagnon has completed some rehabilitative counselling while in custody.

[26] In addition to the circumstances of the offences, the Crown submits, referring to the pre-sentence report, that Mr. Gagnon has no support in, or connections to, the community. Further, the Crown submits that Mr. Gagnon has issues with authority, difficulty managing his emotions and behaviour, has long term unresolved addiction issues and related to that, a poor record of complying with conditions when released from jail. For these reasons the Crown submits that Mr. Gagnon remains a risk to the public and that a significant period of incarceration is required in a Federal institution where he can receive intensive treatment geared towards Indigenous offenders for his addiction and anger management issues.

[27] The Crown submits that an appropriate range of sentence for the conviction for robbery is between two and nine years and refers to the following cases:

R. v. King, [1986] B.C.J. No. 717 (C.A.)

A three-year sentence for robbery upheld for purse snatching. The 21-year-old offender had prior convictions for property-related offences, several of which were committed while he was on probation or bail.

R. v. Gillis, [1994] B.C.J. No. 53 (C.A)

A three-year sentence for robbery upheld for attempting to grab a man's wallet. The 29-year-old offender had been previously convicted for armed robbery and was on mandatory supervision at the time of the offence.

R. v. Bush, 2006 BCCA 350

A two-year sentence for robbery upheld (in addition to a one-year credit for time served) for purse snatching. The 39-year-old offender had a number of prior convictions including assault and robbery. The victim was a vulnerable person and suffered cuts during a struggle with the offender.

R. v. Klapcic, 2001 BCCA 487

A ten-year sentence upheld for a violent robbery (in addition to a fourteen-month credit for time served). The 34-year-old offender robbed and beat a 65-year-old man who had just taken money from a bank machine. The offender had prior convictions including convictions for robbery.

R. v. Rogers, 2011 BCCA 156

A five and one-half year sentence upheld for a 34-year-old female accomplice, with no previous record, for robbery. The offender and her accomplice had tied up the owner of a lingerie store. The male accomplice placed a bag over the owner's head, they both wrapped a cord around her neck, and the male then stabbed the owner.

R. v. Nilsson, 2012 BCCA 498

An eight-year sentence upheld for two counts of robbery of two banks in a two-week period. The 29-year-old offender had a history of re-offending on release and was unlawfully at large from a halfway house when the robberies occurred.

R. v. Gwyn, 2013 BCCA 51

A six-year sentence upheld for robbery of a bank. During the robbery the 26-year-old offender pretended he had a gun. The offender was under the influence of drugs at the time of the offence, was a heroin addict and had previous convictions, including for theft, fraud, and assault.

R. v. MacIsaac, 2014 BCSC 2548 (aff'd 2016 BCCA 13)

A Global sentence of seven years (subject to time served) imposed for a violent robbery and other offences. The 39-year-old offender robbed the victim while he was using an automated teller machine. The offender used an imitation firearm and punched the victim. The sentence imposed for the robbery count was five and one-half years. The offender had a significant criminal record and was on probation at the time of the offence.

[28] The Crown submits that an appropriate range of sentence for the conviction for unlawful confinement is three to four years to be served concurrently with the sentence for robbery. The Crown refers to the following cases:

R. v. Bobbitt, 2015 BCSC 745

A five-year sentence imposed for unlawful confinement, in the context of a sexual assault. The 39-year-old accused was declared a dangerous offender.

R. v. Anderson, 2014 BCSC 1519

A three-year sentence imposed for unlawful confinement during a home invasion. The 25-year-old offender was on probation at the time of the offence. He had a significant criminal record.

R. v. Doyle, 2014 BCSC 1369

A five-year sentence imposed for unlawful confinement of a victim in her apartment. The offender threatened the victim with a sawed-off shotgun. The 25-year-old offender had an extensive criminal record.

[29] In total the Crown seeks a jail sentence of between six and seven years along with ancillary orders including the following:

- a. A mandatory DNA order pursuant to s. 487.051(1) of the Criminal Code - given that robbery is a primary designated offence pursuant to s. 487.04(a);
- b. A mandatory s. 109 firearms prohibition for 10 years - mandatory because violence was used or threatened during the offence of robbery; and
- c. An order that Mr. Gagnon not communicate with A.J. pursuant to s. 743.21.

[30] The Crown waives a victim fine surcharge on the basis that Mr. Gagnon has no means to pay such a fine.

Defence Position

[31] The defence concedes that the range of sentence for a violent robbery committed by a young offender, as set out in the decision in R. v. Brogan, 1999 BCCA 278 at para. 10, is between two and nine years.

[32] The defence submits that the court should consider Mr. Gagnon's completion of the Relapse Prevention Workbook program as a mitigating factor along with, as the Crown concedes, the fact that Mr. Gagnon has pleaded guilty.

[33] The defence submits that in this case a total sentence of four and one-half years is appropriate for both Counts 2 and 3, and refers to the following cases:

R. v. Leaney, 2002 BCCA 67

On appeal, a sentence of four years and three months was substituted for the offences of robbery and aggravated assault (sentence reduced from five years because the trial judge did not take into account time served in pre-trial custody). The 39-year-old Indigenous offender had a significant criminal record and a history of substance abuse. There were two incidents at issue, which included a vicious attack of an acquaintance with a table leg and a later robbery and assault of a hotel clerk.

R. v. Aikman, 2020 BCSC 2086

A 23 and one-half months' sentence was imposed for robbery. (Note: The court stated that absent consideration for time served, the sentence for the robbery and other charges would have been between four and four and one-half years.) The 33-year-old offender had previous convictions for, amongst others, robbery, theft, possession of stolen property and possession of house-breaking tools and a subsequent conviction for breaking and entering. He also had 20 convictions for breaching orders including conditional sentences.

R. v. Al-Isawi, 2017 BCCA 163

A seven-year global sentence was upheld for ten counts of robbery, one count of attempted robbery and three counts of using an imitation firearm in the commission of a robbery. The offences were found to be violent in nature. The trial judge's determination that a sentence of four years concurrent for each of the robbery charges was not disturbed. The 49-year-old offender had an insignificant criminal record.

[34] The defence contends that the cases relied upon by the Crown, in particular those in which banks were robbed, are not helpful as in counsel's submission, robbery of a bank is a more serious crime than the robbery admitted to in this case. The defence contends that the top end of the range set out in Aikman, being four and one-half years, is more appropriate and would represent an adequate "step-up" from the previous three and one-half years sentence imposed on Mr. Gagnon for the 2013 robbery in Alberta.

[35] The defence does not disagree with the appropriateness of the ancillary orders sought by the Crown.

Credit for Time Served

[36] Both the Crown and defence agree that in total Mr. Gagnon should receive 1,196 days' credit for the 797 days he has spent in custody since his detention on these charges - calculated from January 25, 2019, to March 30, 2021.

[37] I calculate that with the additional 16 days in custody since March 30, 2021, Mr. Gagnon has spent a total of 813 days in custody which results in credit for time served of 1,220 days (or three years, four months and two days).

Discussion and Conclusion

- [38] I have reviewed the authorities referred to by the Crown and defence and have considered the most relevant principles of sentencing including ss. 718 and 718.1 of the Criminal Code. I agree with the submission of the Crown that in this case the principles of denunciation and deterrence set out at s. 718(a) and (b) are paramount.
- [39] I adopt the aggravating factors set out by the Crown. I also accept as mitigating factors the fact that Mr. Gagnon has pleaded guilty to Counts 2 and 3 and has made some efforts towards rehabilitation. I am unable to conclude on the available evidence that Mr. Gagnon has experienced difficulties related to his Métis background which explain these offences - but I have considered his submission that he wishes to investigate his cultural heritage.
- [40] Based on the Crown's description of the offences leading to Mr. Gagnon's previous convictions, the circumstances of the offence in this case, involving the confinement of A.J., during which Mr. Gagnon held a pen to her neck and threatened to kill her, suggests an escalation of his violent behaviour.
- [41] As was set out at para. 43 of the reasons at trial in *R. v. Nilsson*, 2012 BCSC 320:
- [43] Robberies are an intolerable invasion of an individual's sense of security and often result in ongoing fear and anxiety suffered by victims.
- [42] Contrary to the submissions of defence counsel, in my view the offences at issue, which targeted a vulnerable victim who was alone and were committed early in the morning in the victim's home, are more serious than a robbery involving similar violence and threats, committed in a public place during the day. Of course, the level of seriousness of a robbery depends on the facts.
- [43] In this case, the unlawful confinement and robbery of A.J. were likely traumatic and had a significant impact on her. I consider this to be the most significant aggravating factor.
- [44] In addition, Mr. Gagnon has a lengthy criminal history and repeated failures to comply with the conditions of his release. It is apparent that Mr. Gagnon is still within a cycle of substance abuse, leading to the commission of offences to fuel his drug use, followed by periods of incarceration. As stated above he committed the offences at issue within nine days of his most recent statutory release.
- [45] In this case, as was submitted by the defence, the step-up principle should be applied. I disagree that a one-year step-up, resulting in a global sentence of four and one-half years, is sufficient to address the principles of denunciation and deterrence and the need to ensure the safety of the public. In my view, a period of incarceration at a Federal institution is necessary and will afford Mr. Gagnon with further opportunities to receive treatment and counselling for his addiction and to investigate his Métis background in a controlled environment.

- [46] The higher end of the range of sentence for young persons who have committed a violent robbery set out in Brogan is nine years. Mr. Brogan was 30 years old at the time the offence at issue in that case was committed. He was sentenced to a total of eight years in prison. I do not consider that the circumstances in this case justify a sentence at the higher range of the spectrum of eight or nine years. Brogan can be differentiated on its facts.
- [47] No case was put before me which is on all fours with the circumstances of Mr. Gagnon's offences. With respect to the robbery charge, I find that the circumstances of this case are factually similar to those in MacIsaac, where the robbery was premeditated, took place in a somewhat isolated location and involved violence and threats of violence. In that case the offender used an imitation firearm. In addition, the offender in MacIsaac was a drug addict with a significant record and was on probation at the time of the offence.
- [48] Taking into account the circumstances of the offences, Mr. Gagnon's criminal record and history of offending, the submissions of Crown and defence counsel and the relevant case authorities, I impose a sentence of five years and six months for robbery under Count 3.
- [49] With respect to the unlawful confinement charge under Count 2, I impose a sentence of three years - consistent with the sentence imposed in Anderson - to be served concurrent to the sentence for robbery.
- [50] Mr. Gagnon is entitled to credit for time served of three years, four months and two days to today. Deducting this amount from the global sentence of five years and six months will result in Mr. Gagnon serving a sentence, rounded down, of two years, one month and 28 days, starting today.
- [51] A stay will be entered in respect of Count's 1 and 4 of the Indictment.

Related Orders

[52] In addition, I order as follows:

- a. A mandatory DNA order pursuant to s. 487.051(1) of the Criminal Code - given that robbery is a primary designated offence pursuant to s. 487.04(a);
- b. A mandatory s. 109 firearms prohibition for 10 years - mandatory because violence was used or threatened during the offence of robbery; and
- c. An order that Mr. Gagnon not communicate with A.J. pursuant to s. 743.21.

"Mayer J."

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