Graham James: Sending the Wrong Message?

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The question of sentencing is always a tough one. There is no doubt that the two year sentence handed down to former junior hockey coach Graham James on March 20, 2012 sparked further debate about the quality of criminal justice in this country. The victims in this case have already called this a "travesty"[1] (#_ftn1). Organizations representing victims throughout the country have vehemently agreed.[2] (#_ftn2) The criminal defence bar will likely point out that given the law that has developed over time, the sentencing judge's result is within a range of reasonable alternatives, and should not be disturbed. Given the speedy passage of the omnibus crime bill through the federal Parliament recently, there may even by politically based calls for even tougher sentencing rules.

I cannot respond to all of these points of view here, even if I wanted to. There is something to support each of them in the record. The question that I will try to answer is this: when you have a situation where all sides have a reasonable point of view, where does the fact of public outcry fit in?

For me, it would be surprising if Her Honour Judge Catherine Carlson of the Provincial Court of Manitoba, the woman left with the unenviable task of deciding the fate of the man referred to by his own lawyer as "the most hated man in hockey"[3] (#_ftn3), would not have been aware that this particular sentence would have provoked the swift and negative response that it did. Given that, the question remains: is that reaction a relevant factor in sentencing?

The Court's Answer

The Court seemed to answer this question in the negative. Judge Carlson wrote as follows:

[6] The Court is aware that this case has attracted significant public attention, and that there is a sense of outrage about these offences. That is understandable. Serious offences were committed against vulnerable victims, with devastating results for those victims. There is no sentence this Court can impose that will give back to Mr. Holt and Mr. Fleury that which was taken from them by Mr. James. The Court expects there is no sentence it can impose that the victims, and indeed many members of the public, will find satisfactory. But the Court is confident that the victims of Mr. James' offences, and the public, appreciate that what is a fit and appropriate sentence for Mr. James for these offences, must be determined based on the application of sentencing principles that have been set out by Parliament in the *Criminal Code*.

As far it goes, the statement is legally correct. But the problem is that the paragraph seems to make two assumptions. First, the paragraph seems to imply that "the application of sentencing principles that have been set out by Parliament in the *Criminal Code*" will deliver a legally "correct" answer. Second, it implies that public outcry is to be separated from the application of sentencing principles. In my view, neither is true.

(a) No Single Answer

Sentencing is a part of the criminal process in which a judge is invested with a good deal of discretion. It is virtually undebated that that discretion's importance arises in large part from the fact-specific nature of the application of the appropriate principles. At one level, this may be seen as justifying the end result reached by Judge Carlson,but I think that this is not the case. Instead, I would suggest that discretion mandates that all relevant factors must be considered when exercising it. If the Court does not consider relevant factors, or considers them in a way that is contrary to the Court's statutory mandate, this provides grounds for reconsideration.

(b) The Alleged Distinction Between the Principles of Sentencing and Public Outcry

Ultimately, Her Honour seems to believe that the outrage of reasonable people is to be divorced from the principles of sentencing. In my view, in a case with an offender such as Graham James, not only can public perception not be divorced from the principles, public outrage is highly relevant to the sentencing decision.

Criminal law sentencing, more than any other part of the criminal process, contains a message from the criminal justice system. It is the part of the trial where there is no longer any question of guilt or innocence. Therefore, there is less concern for the possibility of a miscarriage of justice, where one person is potentially asked to bear the failings of a system (especially where, as in the James case, there is a guilty plea from a repeat offender). Just as there should be a message to Graham James that his actions were criminal and absolutely unacceptable in any civilized society, there needs to be a statement from the Court to all of us that this is serious misconduct, over a period of years, which will not be tolerated.

The Graham James sentencing was sure to engage people's passions on a number of levels. James took advantage of children. That, in and of itself, is reprehensible. Sexual exploitation of anyone is a scourge that is equally intolerable. Moreover, these children who were trying to follow that most Canadian of dreams: hockey. Many young people of both sexes grow up in households that encourage participation in what is often referred in the media as "our game". Thousands of adults volunteer in an effort to make the participation of children in the game possible.

Legal matters involving hockey tend to attract much public attention in this country, whether it is the Marty McSorley stick-swinging incident from a few years ago, to Todd Bertuzzi's on-ice mugging of Steve Moore of the Colorado Avalanche of the same period, to the recent investigations into the deaths of a number of players who were better known for fisticuffs than for fancy goals. All have received significant attention from both traditional news outlets, as well as the sports media, because of their connection to this treasured Canadian game.

Put bluntly, the hockey angle of the proceedings adds "noise" to the entire atmosphere of the sentencing of Graham James. To be heard over the din, Judge Carlson had to speak loudly, but instead she chose to whisper. For me as a legally-trained person, Mr. James' sentence falls at the low end of the spectrum. I suspect even the defenders of the sentence would have to agree that a somewhat longer one would have still been legally acceptable. As if to prove how quiet a whisper Judge Carlson made, some media outlets have already reported that Mr. James may be paroled by the end of the summer of 2012[4](#_ftn4).

Some may argue that the publicity around the case is not of Mr. James' making, and that therefore he should not be held accountable for it. There are two answers to this contention. First, if the message of denunciation is not heard by all, then respect for the criminal law itself suffers. If that respect is lost, the danger to the social fabric increases. This is not to say that any one case will cause a collective descent into lawlessness. But, above all, the principles of sentencing demand denunciation. Denunciation cannot be accomplished without a message that is heard by those who need to hear it. Therefore, if that message is not heard, the criminal law itself has failed in one of its sentencing goals. Judge Carlson did not send that message as powerfully as it needed to be sent.

Second, as a hockey coach in Canada, Mr. James chose a profession that he knew or ought to have known was likely to attract public attention, both positive and negative. A head coach for any team playing hockey at its highest levels in Canada cannot be said to be trying to avoid publicity. All professional coaches know that their coaching decisions (successful or otherwise) will be scrutinized and debated by media and fans alike. Mr. James cannot now say that his choice of that profession and the attention it attracts should be ignored at his sentencing, especially since that profession was an integral part of the scheme that allowed him to commit the offences at issue.

The *Criminal Code* Sentencing Provisions

The *Criminal Code* demands the following:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) **to denounce unlawful conduct;**
(*b*) **to deter the offender and other persons from committing offences;**
(*c*) to separate offenders from society, where necessary;
(*d*) to assist in rehabilitating offenders;
(*e*) to provide reparations for harm done to victims or to the community; and
(*f*) to promote a sense of responsibility in offenders, and **acknowledgment of the harm done to victims and to the community.**

718.01 **When a court imposes a sentence for an offence that involved the abuse of a person under the age of**

eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(*b*), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

718.1 **A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.**

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) **where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;**

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The Legal Errors

The Crown has chosen to appeal the sentence of Graham James, yet there is still an uphill battle to be fought. Assuming that the members of the Court of Appeal would have imposed a different sentence than Judge Carlson, this is insufficient to allow the appeal. As mentioned earlier, sentencing is within the discretion of the Provincial Judge. Therefore, there must be a specific error of legal principle to which the Court of Appeal can point (beyond simple disagreement with the result) before overturning the decision. What follows are specific legal errors that were arguably committed by Judge Carlson.

(a) The Principle of Denunciation

As mentioned above, the need to denounce unlawful conduct is not restricted to the particular offender. If a sentence is close to what the defence thinks reasonable (the defence argued for between 12 and 18 months, the Crown wanted six years), and is not understood by the public as appropriate, there would seem to be a strong possibility that the behaviour is not being denounced appropriately. This is particularly important given the wording of section 718.01.

Does mob disgust with the sentence alone mean that it should be increased? Certainly not. If history has taught us anything, it is that public outrage is not an appropriate barometer for the proper dispensing of punishment, whether for criminal offences or otherwise.

But where a reasonable person, fully apprised of the facts and aware of the general contours of the legal issues and principles involved, does not see the sentencing of serious offences as much more than a slap on the wrist, there is a problem. I have nothing invested in the outcome of the sentencing of Mr. James. I am legally trained. I have read the full decision of Judge Carlson with respect to the sentencing of Mr. James. I would refer to myself as neither particularly liberal nor particularly conservative on criminal justice issues. Despite all of this, I cannot appreciate what led Her Honour to the conclusion she reached. It is not simply that I would have been inclined toward a longer period of incarceration for Mr. James (though I would have). It is that, given my understanding of the principles at issue, I cannot explain to someone without my training or appreciation of the legal system how this sentence is a just one. This

presents a problem for the criminal justice system and with the appropriateness of Judge Carlson's decision. In the end, the denunciation of Mr. James' offenses demands more than a few months of prison time prior to parole.

(b) The Case Law on "Major Sexual Assaults"

Judge Carlson takes the position that based on the case law, the acts of the defendant were "major sexual assaults". Second, the default starting point for such assaults where they involve a child victim and a perpetrator who has a position of authority over the victim, according to the Manitoba Court of Appeal, is four to five years. Third, although there was only a single charge with respect to each of the victims, the incidents of assault were repeated with respect to each. It is also telling that none of the "major sexual assault" offenders referred to by Judge Carlson in her decision were sentenced to less than 3 years. Where the sentencing judge categorizes an offence and cites significant authority with respect to the sentencing outcomes in cases in that category, a sentence that is fifty per cent lower than the lowest sentence in those authorities is, in my view, a possible legal error.

(c) The Totality Principle is Misapplied Here

The totality principle seems to be a large part of the Provincial Judge's ruling on sentence. There are three problems with this. First, not every group of offences prosecuted jointly is necessarily subject to the totality principle. This was neither a single offence against three different victims, nor a series of offences against a single victim, but rather was a series of offences against a series of victims, each covering different time periods. Where offences are really part of the same "criminal transaction", a "bulk" discount for offenders might make sense. Where, for instance, a person drives while intoxicated, exits the vehicle, makes contact with someone, and refuses to cooperate with the police during the arrest, there are three offences (driving while intoxicated, assault, and resisting arrest). Nonetheless, all are connected in time and space.

The offences of Mr. James, on the other hand, are connected by neither time nor space, in that the assaults for the victims covered different time periods, and occurred in at least two jurisdictions. It is difficult to understand a discount for a person who commits a series of offences in one time period, stops for some time, and then takes up a different series of offences in a different place. The sentencing judge points to other cases in which this approach was followed. However, in my view, where an offender behaves in this way, repeating a pattern of abuse on multiple victims with threats and planning in order to avoid detection by authorities, at the very least the totality principle should apply with significantly less force than it does it does in the case of a criminal transaction similar to that described above.

I cannot help but think that, if I had been counsel to Bernard Madoff, the architect of the most massive Ponzi scheme in US history, I would have wanted the sentencing judge to have been Judge Carlson. With Mr. Madoff, there were offences numbering in the hundreds or thousands, taking place over a long period of time, over numerous victims. The offences in each case took a massive toll on the victims. If anything, the offences of Mr. James are likely to cause effects that are deeper and more long-lasting for the victims. Financial regulation can provide more protection to investors in the future to prevent recurrence of Mr. Madoff's crimes by another greedy scam artist. But the trust that children place in their adult mentors cannot be displaced by regulation of the human psyche. Money and other material things can be replaced; the innocence of childhood and early adolescence cannot.

I do not mean to suggest that Mr. James and Mr. Madoff are the same. But the difference in the treatment of a pattern of criminal conduct by the sentencing judges is also striking, for all that they are from different jurisdictions. In one case, (that of Mr. Madoff) the size, complexity, and effect of the criminality led to one of the longest sentences in history. But, in the case of Mr. James, Judge Carlson placed heavy reliance on the totality principle. In effect, Mr. James got a discount for not getting caught earlier, and re-offending following an earlier prison sentence. Re-offending after a prior sentence would clearly negate an application of the totality principle, and prior criminality of the same sort would likely be used as an aggravating factor in sentencing. In my view, this again is a legal error. Second, the sentencing judge points out that Mr. James has not re-offended between the time of his sentencing for similar offences in 1997 and his sentencing for the current offences. As mentioned above, re-offending in similar circumstances for similar offences would be an aggravating factor on sentence. But it does not necessary follow that a lack of re-offending should be taken in mitigation. Some factors are one-way streets. For example, a guilty plea is a fact in mitigation, but insisting on the constitutional right to a trial is not an aggravating factor. Likewise, genuine remorse can mitigate, but the fact that the defendant sat stone-faced through the entire proceeding generally is not considered in aggravation. A lack of re-offending, particularly in cases of childhood sexual assault, may be a flawed indicator of remorse and reform. There were 15 years between his two sentencings, for offences that occurred much earlier. This is because the victims had been "groomed" by Mr. James to fear the repercussions of reporting the assaults. More assaults may come to light, thanks to the courage of these victims. Of course, we cannot presume that this will be the case. Mr. James is

constitutionally entitled to the presumption of innocence with respect to any other potential wrongdoing with which he has not yet even been charged, let alone convicted. But, just as it is impossible to ignore that there were no further convictions of Mr. James as part of the his current sentencing, it is equally impossible to ignore the unreliable reporting of these incidents in the past. The lack of reporting should not be relied on too heavily to show change in the offender.

Third, even assuming that the sentencing judge was correct to consider the totality principle in the way and to the extent that she did, the math is plainly wrong. At paragraph of her decision, Judge Carlson points out that Mr. James was sentenced to three-and-a-half years in prison and paroled in less than two years for prior assaults on two other victims. At paragraph 114, Judge Carlson indicates that if she were sentencing Mr. James for all of the assaults on all four victims (the two currently before the Court, as well as the two prior known victims), she would have imposed a sentence of six years[5](#_ftn5). With the three-and-a-half year prior sentence, this, by Judge Carlson's own account, would still leave an appropriate sentence of 30 months for the current assaults. Again, any discount received by Mr. James because the various victims did not come forward at the same time seems both counterintuitive and counter to the principles of sentencing, and therefore, a legal error.

(d) The Reliance on a Return to Canada As a Mitigating Factor on Sentence

At paragraph 79 of her decision on sentence, Her Honour wrote as follows:

When he [Mr. James] became aware that there were charges pending in or about 2010, he contacted his lawyer and made arrangements to return to Canada and turn himself in to police, knowing he would be taken into custody. He had been living and working in Mexico. He could have stayed in Mexico and fought extradition. This would have at best, delayed the proceedings, and at worst, entirely avoided their resolution. Although he could have tried to avoid dealing with the charges, he has dealt with them.

As a Canadian citizen Mr. James should be expected to respect its institutions. In fact, Mr. James has already acknowledged the legitimacy of the Canadian courts in accepting the conviction and sentence on his prior offences. The fact that he did not take the illegitimate position that he was not required to make a return to Canada is not, in my view, a mitigating factor at all. In other words, where the person is a Canadian national who has already accepted the legitimacy of the Canadian courts in adjudicating this type of offence in this geographic area, there is no reason for the Court to treat Mr. James' return as a magnanimous gesture on his part. In fact, in my view, the proper view of this factor is that it is one of the "one way streets" referred to be earlier. If the offender deliberately obstructs the authorities, this is an aggravating factor in sentencing. But doing what the law would require of a person should not be a mitigating factor.

(e) "Public Humiliation"

Interestingly, the Court uses the public nature of the "humiliation" of Graham James as a mitigating factor in sentencing. However, the reason that the sentencing of Mr. James was a matter of public interest was his position as a coach in Canadian major junior hockey, drawing sports and news media. Mr. James was the conduit to the National Hockey League for many players. The position that gave him the power to commit these offences was one of trust, not only with his victims, but also with their parents. According to the *Criminal Code* (subparagraph 718.2(a)(ii)), this is an aggravating factor in sentencing.

Yet, the public nature of the "humiliation" of Graham James is directly tied to the position of trust. Clearly, the common law of sentencing (relied on by Judge Carlson on this issue) with respect to the use of public humiliation as a mitigating factor cannot overwhelm the explicit statutory requirement. In other words, the position means that the sentence should be longer. The Court should not then say that the publicity attendant with this position should serve as a mitigating factor in sentencing. The applicable principles should not simultaneously "blow hot and cold" on the same facts.

Conclusion

In the end, I return to where this piece began. Pronouncing sentence is tough. One can have sympathy for the difficult position into which Her Honour Judge Carlson was placed in deciding this particular sentence. Nonetheless, in my view, a public outcry based, not on a mob mentality of punishment, but rather, on a reasoned understanding of the facts and the basics of the law, is a legitimate consideration in the sentencing process. On the particular facts of the sentencing of Graham James, in my view, there are a number of factors that could contribute to the Court of Appeal altering the sentence for Mr. James.

The Crown has recently filed a notice of appeal. Regardless of the decision on the appeal, hopefully, the Court of Appeal will choose take this opportunity to clarify the principles of sentencing. If not, the public outcry may continue. If it is sustained long enough, the legislators in Ottawa may choose to act. But, legislative rules may not have the same flexibility as do their judge-made counterparts. Therefore, I hope that sentencing principles will be tough enough to send the right message to offenders like Mr. James. The law and the public should want the same thing in this regard and, in my view, the law as it exists is broad enough to achieve this.

[1] (#_ftnref1) Chinta Puxley, "Graham James sentencing very tough for former NHLer Theo Fleury " *The Canadian Press* (6 April 2012), online: Winnipeg Free Press <http://www.winnipegfreepress.com/local/forced-to-see-face-of-his-rapist-... (http://www.winnipegfreepress.com/local/forced-to-see-face-of-his-rapist-everywhere-with-sentencing-of-ex-coach-fleury-146334775.html?device=mobile>)

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[2] (#_ftnref2) The Canadian Press, *Some Quotes from the Graham James sentencing and reaction to it,* online: Winnipeg Free Press < http://www.winnipegfreepress.com/canada/some-quotes-from-the-graham-jam... (http://www.winnipegfreepress.com/canada/some-quotes-from-the-graham-james-sentencing-and-reaction-to-it-143555396.html>) (Roz Prober, president of Beyond Borders an advocacy group for sexually abused children stated that "...we must sentence these offenders in a much more severe fashion".

[3] (#_ftnref3) Chinta Puxley, "'Predatory' behaviour: ex- hockey coach Graham James gets 2 years for sex abuse" *The Canadian Press* (20 March 2012), online: Winnipeg Free Press < http://www.winnipegfreepress.com/canada/graham-james-to-be-sentenced-in-... (http://www.winnipegfreepress.com/canada/graham-james-to-be-sentenced-in-winnipeg-for-molesting-two-of-his-players-143443826.html>) .

[4] (#_ftnref4) Global Winnipeg, *Graham James eligible for day parole Sept 20, 2012*, online: Global Winnipeg < http://www.globalwinnipeg.com/graham+james+eligible+for+day+parole+sept+... (http://www.globalwinnipeg.com/graham+james+eligible+for+day+parole+sept+20+2012/6442607030/story.html>;) Bruce Owen, "Graham James gets two years in prison" *The Star Phoenix* (21 March 2012), online: The Star Phoenix < http://www.thestarphoenix.com/sports/Graham+James+gets+years+prison/6333... (http://www.thestarphoenix.com/sports/Graham+James+gets+years+prison/6333940/story.html>)

[5] (#_ftnref5) *R v James*, 2012 MBPC 31, [2012] MJ No 89.

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