2002 NWT CA 44

Date: 2002 02 21
AP 2001 000005

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

THE COURT:

THE HONOURABLE MR. JUSTICE R. HUDSON
THE HONOURABLE MADAM JUSTICE C. HUNT
THE HONOURABLE MADAM JUSTICE V.A. SCHULER

BETWEEN:

LARRY WANAZAH

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

APPEAL FROM THE SENTENCE OF
THE HONOURABLE JUSTICE J.E. RICHARD

UNANIMOUS DECISION
DELIVERED ORALLY FROM THE BENCH

Counsel for the Appellant: H. Latimer
Counsel for the Respondent: B. Schmaltz

HUNT, J.A. (for the Court):

[1] This is the appeal of Mr. Larry Wanazah, appeal #2001 000005. We begin by observing that this is a very unusual sentence appeal. The appellant was convicted by a jury of two counts of sexual assault, one with a weapon, and one count of uttering a threat to cause death. The two sexual assault charges involved separate incidents of anal intercourse inflicted on children of the approximate ages of 10 and 11.

[2] Counsel for the Crown concedes that, according to the dates in the amended indictments, the appellant may very well have been a young offender at the time of all of the offences. In regard to one of the sexual assault charges, the appellant consented to the matter being tried in adult court. In regard to the other two counts, the charges were always dealt with in adult court without objection by the appellant, although the appellant's counsel now points out that it may be that those matters ought properly to have been dealt with in youth court and that this is a matter that should be taken into account in considering the appropriate sentence.

[3] The case is further complicated by the fact that a previous panel of this Court determined that there was a need for a pre-sentence report, and took the unusual step of so ordering. Having read that report, in light of submissions on sentence that were made to the sentencing judge, it is our view that this Court has considerably more information about the appellant than was available to the sentencing judge. Further, that that information gives us a picture of the appellant that is considerably different than that painted of him in front of the sentencing judge. To give just one example, it is apparent from the record that the trial judge understood that the appellant had completed high school, but the pre-sentence report suggests that while he quit school in grade 11, his reading and writing skills are nevertheless extremely limited. Given this enhanced level of information which has resulted from the fact that the Court itself requested the pre-sentence report, we have somewhat greater flexibility in assessing the fitness of the appellant's sentence than would normally be the case in an ordinary sentence appeal.

[4] In addition to the fact that we have substantially more information about this appellant than did the sentencing judge, we also take account of the following statement by the Supreme Court of Canada in the case of *R.* v. *Z(D.A.)* 1992, 76 C.C.C.(3d) 97, at pages 112-113:

> It would be unjust to subject a person to a higher standard of accountability merely because of his or her age at the time of the trial. The fact that an accused is now an adult cannot take away from the fact that he or she is being held accountable to society for the acts committed while still a youth.
>
> On this point, however, I wish to pause to express with respect my disagreement with the suggestion put forward by Kerans, J.A., that the older the accused the less persuasive is the claim to the special disposition set out in the act. It is the age of an accused at the time of the offence which must determine the appropriate measure of accountability and not his or her age at the time of being charged or tried.

[5] Notwithstanding that the sentencing judge stated that he was taking account of the age of the appellant at the time that he committed these offences, we are not satisfied that the sentencing judge gave this factor adequate weight. While he properly gave regard to the principles of denunciation and deterrence in light of the egregious nature of the offences, his under-emphasis on the appellant's age at the time of the offences (as opposed to his age at the time of the trial) resulted in sentences that were, in all the circumstances, excessive.

[6] Accordingly, we grant leave to appeal, allow the sentence appeal and substitute the following sentences for those imposed by the sentencing judge:

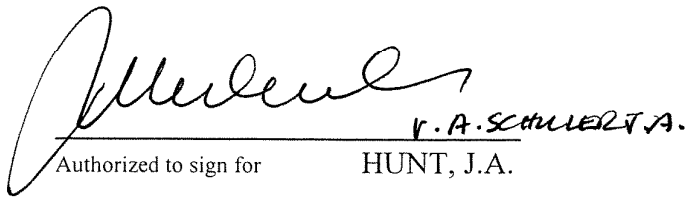
On Count 1: a sentence of 18 months
On Count 2: a sentence of 18 months to be served consecutively to count 1
On Count 3: a sentence of 6 months to be served concurrently to count 2

Just to be clear, that would result in a global sentence of 3 years.

[7] In substituting the above sentence for that imposed by the sentencing judge, we further direct that the formal order include our recommendation that the appellant be permitted to serve the remainder of his sentence in the Northwest Territories, and that he be given access, if at all possible, to the programs and resources that were discussed in the pre-sentence report.

APPEAL HEARD ON January 23, 2002

MEMORANDUM FILED at YELLOWKNIFE, NT
this 21st day of February 2002



Authorized to sign for HUNT, J.A.

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MEMORANDUM OF DECISION