

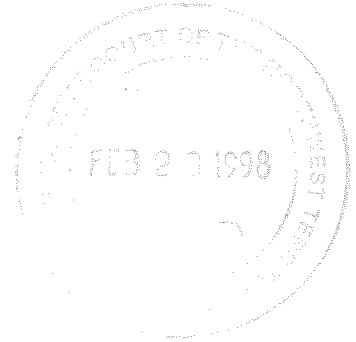
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

LESLIE FREE RABESCA



Transcript of the Reasons for Sentence before Justice
V.A. Schuler, in Yellowknife, in the Northwest Territories,
on Monday, the 16th day of February, A.D. 1998.

APPEARANCES:

MS. D. SYLVAIN:	On behalf of the Crown
MR. B. ENGE:	On behalf of the Defence

Charge under s. 271 C.C.

1 THE COURT: Mr. Rabesca has been convicted after
2 a trial was held before me on a charge of sexual
3 assault.

4 The facts of the case as I found them, and I'll
5 just refer to them briefly, were that he had met up
6 with the victim and her sister. They were drinking
7 together and at one point went to a party in a motel
8 room. This is where the evidence of Mr. Arrowmaker
9 comes in to play. There was a discrepancy between his
10 evidence and the evidence of both the victim and her
11 sister about which motel they were at. This causes me
12 some concern about Mr. Arrowmaker's evidence as a
13 whole, but at its highest, as I indicated when I
14 convicted Mr. Rabesca, Mr. Arrowmaker's evidence showed
15 that there was some contact between Mr. Rabesca and the
16 victim, that she was trying to tease him and kiss him,
17 and that at one point she took hold of his arm to get
18 him to go with her and her sister when they left. His
19 evidence was not evidence that could be taken as
20 indicating that the victim was consenting to have sex
21 with the accused. There was no evidence that the
22 accused honestly believed that she was consenting.

23 In any event, the evidence was very clear that the
24 victim eventually went home with her sister and the
25 accused, the victim passing out on the couch in the
26 living room. When her sisters left the apartment with
27 the accused, the victim did not respond when they spoke

1 to her. The accused then went back into the
2 apartment. Shortly thereafter the sisters returned and
3 saw him standing naked beside the victim whose pants
4 and panties had been pulled down. At that point the
5 victim was still passed out. When the police officer
6 attended at the apartment and tried to wake her up, it
7 was his evidence that it took him approximately 20
8 minutes to do so.

9 In my view this is a clear case of a victim who
10 was passed out or asleep. It was apparent to her
11 sisters what her condition was and it must have been
12 apparent to Mr. Rabesca.

13 Mr. Rabesca's counsel referred to what he called
14 "high risk behaviour" on the victim's part. But it
15 has to be kept in mind and it should be very clear to
16 Mr. Rabesca and anyone else that is in a similar
17 situation that the victim in this case was not doing
18 anything wrong, she was not doing anything illegal by
19 drinking. She came home and passed out in her own
20 home. She's entitled to feel that she is safe in her
21 own home and that she will not be bothered or touched
22 by anyone else. It was clearly illegal for Mr. Rabesca
23 to take advantage of her, which he did by pulling down
24 her pants and panties. The circumstances show that he
25 was preparing to engage in some sort of sexual activity
26 with her despite her condition and that he was only
27 interrupted by the sisters coming back to the

1 apartment.

2 I have said in other cases and it has been said by
3 many other judges and courts that in cases of this
4 nature denunciation and deterrence are the primary
5 objectives of sentencing; denunciation being the
6 principle that society frowns on conduct of this
7 nature, and deterrence being the objective of
8 preventing or discouraging other persons from engaging
9 in this kind of activity that Mr. Rabesca engaged in.

10 This is a serious offence; it is the taking of
11 advantage of the victim's vulnerability for
12 Mr. Rabesca's own sexual gratification. It's a
13 violation of the victim's sexual integrity of her right
14 to have control over when and with whom she has sex or
15 by whom she's touched.

16 For those reasons the circumstances in this case
17 cannot be characterized as de minimis. In other words,
18 this is not a technical violation of the law or a very
19 minimal violation of the law. In my view it is a
20 serious violation of the law.

21 I have looked at the cases that counsel presented
22 and some of the cases make a distinction or appear to
23 make a distinction of sexual assault where a victim is
24 asleep or passed out as opposed to a sexual assault
25 where a victim is fully conscious. I don't see that
26 one is any less serious than the other. The point in
27 this case is that the victim was passed out or asleep

1 on the couch. She was in a state of extreme
2 vulnerability. That in itself is an aggravating
3 factor.

4 I take into account that Mr. Rabesca has no
5 criminal record and that is to his credit. He is a
6 young man with a family. He is looking after a young
7 son while his common-law wife receives job training.

8 This appears to have been clearly a crime of
9 opportunity. Apparently, from what his counsel has
10 said, it is out of character for Mr. Rabesca, who I'm
11 told does not have an alcohol problem but on this
12 occasion happened to be partying with some others when
13 he was in Yellowknife applying for a job.

14 In all the circumstances of this case a sentence
15 of something less than two years would be appropriate.

16 The issue then becomes whether a conditional
17 sentence should be imposed. Because this is a case
18 which courts have always said that deterrence and
19 denunciation are important, I think the main issue is
20 the conditional sentence issue itself.

21 I have looked at the Wismayer case from the
22 Ontario Court of Appeal which indicated that a
23 conditional sentence can serve the principles of
24 deterrence and denunciation. I have also looked at the
25 Brady case from the Alberta Court of Appeal in which
26 the court indicated that generally it would not be
27 appropriate to impose a conditional sentence in a case

1 where the main principles are deterrence and
2 denunciation because a conditional sentence would not
3 serve those principles.

4 I think one has to be very careful in saying that
5 a conditional sentence will never be appropriate in
6 certain types of cases or in cases which involve
7 certain principles of sentencing. Every case is going
8 to depend largely on its own facts. In a case where
9 deterrence and denunciation are important, there would
10 probably have to be some unusual or significant
11 considerations to justify the imposition of a
12 conditional sentence.

13 This issue was, to some extent, considered by
14 Mr. Justice Vertes in the case of Joseph John Louie
15 Comeau heard in this court on February 5th, 1998. He
16 quoted from the Brady case and indicated that the
17 comments from the Alberta Court of Appeal, which I will
18 read in a moment, were apt to the case he was
19 considering, which was one of sexual assault by
20 fondling children who were in a residential school by
21 an individual who was a supervisor at that school.

22 The comments from the Alberta Court of Appeal in
23 Brady with which Mr. Justice Vertes agreed were as
24 follows:

25
26 It has also been argued that the
27 conditional sentence usually
expresses society's denunciation of
an offence. Denunciation continues
to be a legitimate aim of

1 sentencing. A conviction by itself
2 does not entail the same degree of
3 denunciation as does jailing the
4 offender. Of course, conviction
5 carries with it some element of
6 denunciation because of the stigma
7 attached to a criminal conviction.
8 But for many crimes, a conviction
9 without any meaningful consequence
10 would not sufficiently reflect
11 society's repudiation of the crime.
12 A sentence must be proportional to
13 the harm done as well as to the moral
14 blameworthiness of the offender.
15 This is society's way of affirming
16 fundamental values protecting the
17 public, and making it clear to those
18 who transgress these values that they
19 are accountable for their actions.

20
21 Nor can one equate the denunciation
22 implied by actual imprisonment with
23 probation, a suspended sentence or
24 even an ordinary conditional
25 sentence. It is true that the
26 deterrent and denunciatory purposes
27 which led to the original sentence
remain in force even when the parole
authorities allow early release. But
there is vastly more denunciation in
being jailed originally and then
later paroled than never being
jailed.

So we conclude that a conditional
sentence would not ordinarily be
available for those offences where
the paramount consideration is
denunciation and deterrence.

21
22 Now, I think that the quote reflects what I have
23 just said. That a conditional sentence would not
24 ordinarily be available does not mean that it will
25 never be available, but each case will depend on its
26 own facts.

27 In this case there is certainly no evidence that

1 the accused Mr. Rabesca is a danger or will be a danger
2 to the community. There is, however and unfortunately,
3 nothing unusual about this case. There is nothing
4 unusual about this offender. He is in a situation that
5 is similar to that of many other young men of his age
6 group and background.

7 The conditions for a conditional sentence that
8 were suggested by defence counsel are not very
9 restrictive. In my view they are not the type of
10 conditions that Chief Justice Fraser (who is the Chief
11 Justice of both Alberta and the Northwest Territories)
12 suggested would be necessary to make a conditional
13 sentence capable of being truly a deterrent.

14 Having considered the matter and the offence
15 itself and Mr. Rabesca's background, I conclude that a
16 conditional sentence is not appropriate in this case.
17 I have considered Section 718.2(e) which was referred
18 to by Mr. Enge that all available sanctions other than
19 imprisonment that are reasonable in the circumstances
20 should be considered for all offenders with particular
21 attention to circumstances of aboriginal offenders. In
22 my view a sanction other than imprisonment would not be
23 reasonable in the circumstances of this case.

24 I reiterate that this type of behaviour - taking
25 sexual advantage of a woman who is passed out or who is
26 sleeping - is a significant problem in this
27 jurisdiction and no doubt elsewhere. Many, many times

1 I have sat in this courtroom and listened to very
2 similar circumstances. Any sentence that is imposed
3 must show that this behaviour is completely
4 unacceptable on the part of Mr. Rabesca and other young
5 men, and I say that because, by and large, the
6 offenders in these types of cases are young men.

7 Stand up, please, Mr. Rabesca.

8 Taking into account all of the circumstances and
9 what you have said on your own behalf, I sentence you
10 to serve a term of imprisonment of 18 months. There
11 will be no victims of crime surcharge. In my view,
12 Section 100 is not applicable in this case.

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16 Certified pursuant to Practice
17 Direction #20 dated December 28,
18 1987.

19 
20 _____
21 Annette Wright
22 Court Reporter
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