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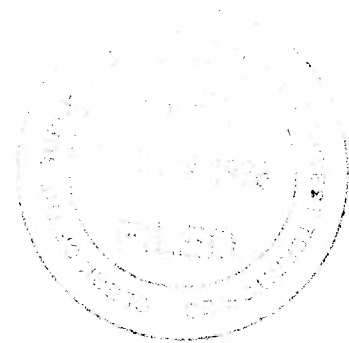
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

WING TOON LEE



Transcript of Reasons for Judgment delivered by The Honourable Justice J.Z. Vertes, sitting at Yellowknife, in the Northwest Territories, on Friday, July 17, A.D. 1998.

APPEARANCES:

Mr. M. Scrivens: On behalf of the Crown
Mr. A. Mahar: Acting as amicus curiae
(No Counsel): On behalf of the Accused

(Charges under ss. 271(x3), 151, 163.1(4)(x6), 163.1(2)(x3), 212(4)(x10) of the Criminal Code and s. 4(1) of the Narcotic Control Act)

1 THE COURT: The accused is charged with 23
2 offences, all of them relating in some way to alleged
3 sexual activity with underage girls. A twenty-fourth
4 charge was dismissed by me at the conclusion of the
5 Crown's case.

6 I want to say at the outset, and I want it to be
7 perfectly clear, that in a criminal case there is only
8 one guiding rule: Has the evidence proven the guilt of
9 the accused beyond a reasonable doubt? We do not
10 decide cases on the basis of generalizations, hearsay,
11 suspicion, characterization or stereotyping. We decide
12 them on facts proven according to the rules of
13 evidence. We do not judge people, whether they be
14 accused or witnesses, on the basis of their morals or
15 values; we judge them on their actions and according to
16 legal principles.

17 In a case like this, where there are numerous
18 charges, we must examine the evidence as it relates to
19 each charge independently.

20 There are three general categories of offences
21 with which the accused is charged.

22 One category is sexual assault. It is an offence
23 to have sexual contact with anyone against their
24 consent. It is an offence to have sexual contact with
25 a person under the age of 14 under any circumstances.
26 It does not matter if the young person consents. In
27 law, a person under 14 is incapable of consenting to

1 sexual relations.

2 The Criminal Code further stipulates that while
3 the accused may raise the defence that he honestly
4 believed the person was 14 or older, the defence will
5 fail unless the accused took all reasonable steps to
6 ascertain the person's age. It must be remembered,
7 however, that the accused need only raise a reasonable
8 doubt on this point.

9 Another category is procuring. Section 212(4) of
10 the Criminal Code makes it an offence to obtain, or
11 attempt to obtain, for consideration, the sexual
12 services of a person who is or is believed to be under
13 18 years of age. Again, however, the Code provides
14 that the accused may raise the defence that he believed
15 the person was 18 or older, but it will fail unless the
16 accused took all reasonable steps to ascertain the
17 person's age.

18 I have been unable to find much case law on
19 Section 212(4) and, in particular, whether one can have
20 an implicit understanding constitute consideration.
21 The editors of the 1998 Martin's Annotated Criminal
22 Code have the comment, at page 372, that "it must be
23 shown that consideration was offered for the services."
24 This suggests to me some express offer and arrangement
25 prior to the provision of the sexual services. There
26 is a case from England that considered the term
27 "consideration" in the context of a public officer

1 corruption offence. In that case, R. v. Braithwaite
2 (1983) 1 W.L.R. 385, the English Court of Appeal held
3 that the term "consideration" connotes the existence of
4 something in the nature of a contract or a bargain
5 between the parties. It is not a gift. It is an
6 explicit agreement to exchange a payment for a
7 service. It is in this context that I approach the
8 interpretation of Section 212(4).

9 A third category is the making or possession of
10 child pornography. "Child pornography" is defined in
11 Section 163.1 as a photograph or film that shows a
12 person who is or is depicted as being under the age of
13 18 engaging in sexual activity. In this trial, I
14 viewed several videotapes. In none of them were the
15 subjects depicted in anything other than normal sexual
16 activity. There was nothing age-specific about the way
17 they were depicted. In other words, if one did not
18 know that the subjects were under 18, one would not
19 necessarily conclude that simply from the activity
20 depicted. Here the Crown's case rests solely on the
21 age of the subjects. Again, however, the accused may
22 raise the defence of a mistaken belief that the person
23 was 18 or older, but the evidence must show that the
24 accused took all reasonable steps to ascertain the age
25 of the person.

26 The evidence presented on this trial revealed
27 that, over several years, teenage girls would visit the

1 accused; they would ask him for money; oftentimes he
2 gave it without making any demands in return; and
3 sometimes there was an exchange of sex and money. He
4 videotaped and photographed many of the sexual
5 encounters. There was no evidence that the accused
6 ever resorted to force or coercion. Indeed, the
7 evidence showed that the complainants often sought out
8 the accused. The reason was simple but tragic: They
9 needed money so as to feed their drug and alcohol
10 habits. With one exception, there was no suggestion in
11 the evidence I heard at this trial that the accused
12 either used or supplied drugs to anyone. He was merely
13 the source of cash.

14 The accused testified on his own behalf. His
15 testimony coincided with that of many of the
16 complainants. He admitted to engaging in sex for money
17 and to making videotapes. He thought, however, that
18 the young women were at least 18 or older. He kept
19 asking their ages not because he was concerned about
20 their ages for sexual purposes but because he wanted to
21 make sure there were no underage girls in his poker
22 club. Some of the complainants told him their true
23 age; some lied to him and pretended to be older than
24 what they really were.

25 It was obvious that the accused had no knowledge
26 about the legal requirements for people to be of a
27 certain age to do these things. But ignorance of the

1 law is no excuse. It was also obvious that he was not
2 particularly concerned about the fact that apparently
3 young people were involved in prostitution. None of
4 this speaks very well of the accused's character. But
5 we do not convict people on the basis of their
6 character. We convict only on the basis of evidence of
7 criminal acts.

8 Similarly, I recognize that young people are
9 particularly vulnerable to the sexual predations of
10 older men with money to spend. There is no moral
11 excuse for the accused's conduct. But, again, we do
12 not convict people on the basis of psychological
13 generalities. We convict only on the basis of evidence
14 of some specific conduct that amounts to a specific
15 crime.

16 Counts 1, 2, 3, 4, and 5 all relate to offences
17 involving the complainant S.T. She is currently 14
18 years old. She was 12 to 14 years old during their
19 sexual encounters, according to her. The accused at
20 one point asked her age. She told him she was 20 years
21 old. She said she may have told him this before they
22 ever had sexual relations. She testified that she knew
23 and associated with older people, that she would go to
24 bars, and that she and others would drink alcohol in
25 the accused's presence. The accused testified that he
26 asked her several times because he had some doubts.
27 Each time she said she was 20 and he believed her.

1 With all five counts, the accused may rely on his
2 mistaken belief as to her age. All he has to do is
3 raise a reasonable doubt. There must be evidence that
4 the accused made an earnest inquiry as to age (and here
5 there is evidence that he asked the complainant how old
6 she was) but the necessary extensiveness of that
7 inquiry depends on the circumstances.

8 It was very obvious to me that the complainant
9 tries to act and present herself as older than what she
10 is. I may not have believed her if she told me she was
11 20 years old, but that is not the test. Based on all
12 the evidence, I cannot say beyond a reasonable doubt
13 that the accused would not have believed her. I am
14 satisfied by what I heard that the accused need not
15 have done more than what he did to ascertain her age.
16 I have a reasonable doubt as to his belief as to her
17 age. I therefore find the accused not guilty of counts
18 1, 2, 3, 4, and 5.

19 Count 6 is a charge of possessing child
20 pornography depicting K.L. I viewed the videotape
21 which depicted this complainant. On it, she clearly
22 says she is 17 years old. There is no reasonable
23 excuse available to the accused for not being aware of
24 her correct age. The offence is made out if the
25 subject is under 18. Therefore, I find the accused
26 guilty on count 6.

27 Count 7 is a charge of procuring involving K.L.

1 She testified that the first time she had sex with the
2 accused, she was 17. That in itself is not a crime.
3 She said that she had no knowledge about getting any
4 money and that she did it because the accused was kind
5 to her. This, too, is not a crime. She said she did
6 not have sex with him again for about a year. By then
7 she may have been 18. She said it was her idea to get
8 money from him in exchange for sex so as to buy
9 things. But if she was 18 already, this would not be a
10 crime.

11 The videotape in which the complainant said she
12 was 17 depicts the accused giving some money to her.
13 If this was the first time they had sex, then it is not
14 inconsistent with her evidence that she did not expect
15 money that time. The tape shows that after the sexual
16 encounter, the complainant asked the accused for some
17 money because she needed some to get to a party. It
18 seems to me that this is the type of situation that is
19 not contemplated by the use of the phrase "obtains for
20 consideration" in Section 212(4). There was no
21 evidence of some express agreement or bargain. There
22 was no evidence of any expectation of getting paid on
23 the part of the complainant. I have a reasonable doubt
24 that this encounter was part of some ongoing
25 prostitution-type arrangement at the time. I find the
26 accused not guilty on count 7.

27 Count 8 is a charge of sexual assault. The basis

1 of the charge is non-consent since the complainant was
2 17 at the time. She said she was asleep; she awoke to
3 the accused touching her; she did not like it; he
4 talked to her for a while; then, as she said, she went
5 along with it. The accused related, in his testimony,
6 a consensual sexual encounter.

7 Just on the basis of the complainant's evidence, I
8 have a reasonable doubt as to non-consent. The accused
9 is not required to prove consent or even raise a
10 reasonable doubt. Rather the onus is on the Crown to
11 prove non-consent beyond a reasonable doubt. Here,
12 even if there was non-consent at one point (and
13 obviously if someone is asleep there can be no
14 consent), that non-consent was vitiated by the
15 complainant's subsequent consent. By her own words,
16 she knew what was going on and she went along with it.
17 I find the accused not guilty on count 8.

18 Counts 9 and 10 involve charges of procuring and
19 possession of child pornography involving C.L. She
20 testified to an arrangement being struck between her
21 and the accused where she would be paid \$100 in
22 exchange for sex. She was between 14 and 16 at the
23 time. I also viewed a videotape depicting this
24 complainant engaging in sexual activity with the
25 accused. She testified she was 14 at the time. She
26 said that the accused inquired about her age and she
27 told him her correct age. She said she had no reason

1 to lie. She was not concerned with her age. As she
2 said, and I quote from her testimony: "Business was
3 business and age had nothing to do with it." The
4 accused admitted paying for sex with this complainant
5 but claimed that he thought she was over 18.

6 I am satisfied beyond a reasonable doubt that the
7 accused knew that this complainant was under 18 at the
8 time of these offences. I find him guilty on counts 9
9 and 10.

10 Count 11 is a charge of sexual assault on M.M.
11 The Crown played a videotape depicting the complainant
12 and the accused. The complainant appears at first to
13 be asleep (one could not see her eyes, though, because
14 they were covered by sunglasses), but I also recall
15 some points where the complainant appeared to be
16 responsive. The accused testified that the complainant
17 was awake, although tired, and consented to having
18 sex. In court the complainant testified that she did
19 not consent to sex with the accused. Consent is the
20 issue because she would have been at least 17 at the
21 time.

22 The complainant testified that she visited the
23 accused many times over the years. She was never drunk
24 or stoned at his place. She did not remember the day
25 the video was taken. She did not know when this
26 happened. She could not remember if she was awake at
27 the time. This evidence is simply too unreliable to

1 justify a criminal conviction. I find the accused not
2 guilty on count 11.

3 Counts 12, 13, and 14 are procuring and
4 pornography charges relating to the complainant M.C.
5 She engaged in sexual activity with Lee for money when
6 she was 16 or 17 years old. The accused asked her how
7 old she was and she testified that she told him she was
8 18. My impression from her evidence is that she worked
9 very hard to convince him that she was 18 because she
10 wanted to be in the room where the accused ran the
11 poker games. As she said, and I quote: "He believed
12 me when I told him I was 18." The accused testified
13 that he believed she was 18 or older.

14 Based on this evidence, I have a reasonable doubt
15 as to the accused's mistaken belief as to the
16 complainant's age. I am satisfied that he took all
17 reasonable steps in the circumstances. I find the
18 accused not guilty on counts 12, 13 and 14.

19 Count 15 is the charge I dismissed for lack of
20 evidence at the conclusion of the Crown's case.

21 Count 16 is a charge of trafficking in that the
22 accused allegedly supplied cocaine to H.W. The
23 complainant, who is now 22 years old, identified
24 herself in a videotape depicting sexual activity
25 between herself, the accused, and C.L. She said she
26 was 16 or 17 at the time. She said she could not
27 remember the details about what happened, but she said

1 she would engage in this activity only for drugs or
2 money. But she could not recall if she ever talked to
3 the accused about drugs or money or if she actually got
4 drugs or money that time. She simply assumed that the
5 accused gave her drugs.

6 C.L. testified that on this occasion the accused
7 left and came back with cocaine and gave it to her.
8 However, on cross-examination several inconsistent
9 previous statements were adduced. She had told the
10 police in an earlier statement that the accused never
11 gave her drugs. She testified at the preliminary
12 hearing that it was H.W. who went out and came back
13 with the drugs. The accused denied supplying drugs and
14 testified there was no deal for money or drugs in
15 exchange for the sex depicted on the videotape.

16 The charge is trafficking to H.W. There is no
17 evidence that Miss W. received anything from the
18 accused. The evidence of Miss L. is too unreliable on
19 this point. I find the accused not guilty on count
20 16.

21 Count 17 is a charge of possession of child
22 pornography depicting H.W. Miss W. testified she was
23 16 or 17 when the videotape in question was made. She
24 said that she never told the accused her age and he
25 never asked. The accused had an obligation to
26 ascertain this complainant's age. He failed to do so.
27 I find the accused guilty on count 17.

1 Count 18 is a charge of procuring involving H.W.
2 I related already the complainant's evidence that she
3 could not recollect ever talking to the accused about
4 money or drugs or ever receiving anything from the
5 accused. She just assumed things. That is not good
6 enough to support a criminal conviction. There is a
7 lack of evidence as to consideration passing from the
8 accused. I find him not guilty on count 18.

9 Counts 19, 20, and 21 are charges of possessing
10 and making child pornography and procuring relating to
11 S.W. The complainant testified that she engaged in sex
12 with the accused two or three times when she was 16 or
13 17 years old. She said she was paid \$100 each time.
14 She said the accused asked her age and she told him.
15 She identified herself on a videotape and said she was
16 16 at the time. The accused admitted having sex with
17 this complainant in exchange for money when she was
18 under 18.

19 I find the accused guilty on counts 19, 20, and
20 21. But, with respect to the charge of possessing
21 pornography in count 19 and that of making pornography
22 in count 20, since both charges relate to the same
23 videotape, I decline to enter a conviction on both on
24 the basis that to do so would offend the rule against
25 multiple convictions (the Kienapple principle). A
26 conviction will be entered only on count 20. That
27 charge carries the higher penalty. A judicial stay

1 will be entered on count 19.

2 Count 22 is a charge of procuring involving C.G.
3 This complainant testified that she met the accused
4 when she was 14 years old and often went to his room to
5 ask him for money. He would give it to her. She
6 related one incident, when she was either 14 or 15,
7 when she went to the accused and told him she needed
8 money to leave town. She testified that the accused
9 said he would not give it to her for nothing so he
10 performed an act of oral sex in exchange for \$70. She
11 said that he asked her at some time earlier how old she
12 was and that she thinks she told him her correct age.
13 She said she would not lie about it. The accused
14 denied the sexual incident altogether.

15 I accept this complainant's evidence and find the
16 accused guilty on count 22.

17 Count 23 relates to an attempt to obtain sex for
18 consideration from S.J. She testified that she went to
19 see the accused frequently to get money. The incident
20 relating to this charge occurred when she was 14 years
21 old. She first testified that the accused asked her
22 for sex in exchange for money. She said no. Then,
23 somehow, he was touching her breasts and then he paid
24 her \$20. On cross-examination, however, she
25 acknowledged that she could not recall if they talked
26 about money on this occasion or whether she in fact
27 received money that time. She testified that she let

1 him touch her breasts because she figured that if she
2 did, he would give her money. This was so even though,
3 as she said, all the other times he gave her money he
4 never demanded anything in exchange. The accused
5 denied any financial arrangement.

6 The Crown's evidence on this count is the type of
7 uncertain, unfocused evidence that is simply too
8 unreliable to support a conviction. The witness
9 contradicted herself and, on cross-examination, negated
10 any evidence of an agreement as to consideration. I
11 find the accused not guilty on count 23.

12 Count 24 is a charge of procuring also involving
13 S.J. The complainant testified at first that on this
14 occasion the accused asked her to perform a sexual act
15 and that he paid her. She said, however, that she
16 could not remember when she got the money or how much
17 she got or even how it was that she knew she was going
18 to get money for this. On cross-examination, she made
19 a comment to the effect that, and I quote: "If he
20 wasn't going to give me money after this time, I was
21 going to get it from him somehow."

22 Again, this evidence is simply too unfocused and
23 unreliable to support a conviction. The accused denied
24 giving her any money. I have a reasonable doubt as to
25 the existence of an agreement or arrangement to obtain
26 sex for consideration or even if there was any
27 consideration. I therefore find the accused not guilty

1 on count 24.

2 To summarize, the charges under counts 1, 2, 3, 4,
3 5, 7, 8, 11, 12, 13, 14, 15, 16, 18, 23, and 24 are
4 dismissed. Count 19 is judicially stayed. Convictions
5 will be entered on counts 6, 9, 10, 17, 20, 21, and
6 22. These are three charges of procuring, three
7 charges of possession of child pornography, and one
8 charge of making child pornography.

9 In conclusion, let me say that I hope not too much
10 time and consternation will be expended on asking why
11 there were only convictions on seven charges or why the
12 Crown evidence was not stronger. It seems to me that
13 the more important question to ask is: Why is it that
14 these young people turned to drugs and alcohol? What
15 are the problems in this community that would lead so
16 many young people into this tragic way of life? That
17 seems to me to be the most important issue arising out
18 of this case.


19 There will be an order directing the R.C.M.P. to
20 take possession of all exhibits currently in the
21 possession of the Court. They are to retain all
22 exhibits and all items under seizure pending further
23 order of this Court.

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Certified pursuant to Practice
Direction #20 dated December 28, 1987



Jane Romanowich
Court Reporter