

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

JOACHIM RABESCA

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Transcript of the Reasons for Sentence delivered by The Honourable Justice J.E. Richard, sitting in Yellowknife, in the Northwest Territories, on the 21st day of December, A.D. 1999.

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APPEARANCES:

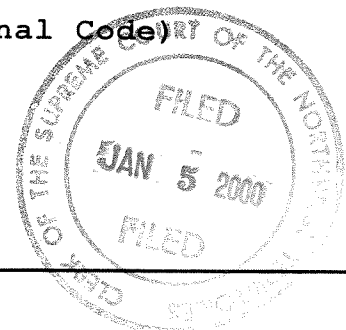
Ms. L. Colton:

Counsel for the Crown

Mr. A. Mahar:

Counsel for the Defence

(Charge under s. 271 of the Criminal Code)



1 THE COURT: Both the offender and the victim  
2 in this very difficult case have an intellectual  
3 disability. Each functions at the level of a  
4 ten-year-old child. In past years, both of them  
5 participated in special programs offered at the Abe  
6 Miller Centre by the Yellowknife Association for  
7 Community Living. Eventually each of them moved out  
8 of the supervised group home into their own  
9 apartments, where they each lived independently with  
10 assistance and support from the staff at the Abe  
11 Miller Centre.

12 The victim, Renee Elias, is now 46 years of age.  
13 The offender, Joachim Rabesca, is now 47 years of age.

14 The victim and offender know each other from the  
15 time that they were both clients at the Abe Miller  
16 Centre. The Court was told that in the past the two  
17 of them had a relationship and engaged in consensual  
18 sexual activity with each other. However, on November  
19 30th of last year, the sexual activity which occurred  
20 between them was not consensual. On that date,  
21 Mr. Rabesca raped his friend Renee Elias.

22 He apparently met her on the street in  
23 Yellowknife and took her back to his apartment where  
24 he had forcible intercourse with her without her  
25 consent. In the course of the sexual assault, he used  
26 considerable physical force and was physically rough  
27 with her. I am told that Mr. Rabesca was under the

1 influence of alcohol at the time of committing this  
2 very serious crime.

3 On this sentencing hearing, the Court was  
4 provided with a brief, written summary of  
5 Mr. Rabesca's participation in programs at the Abe  
6 Miller Centre over the years, and, from that summary,  
7 it is clear that Mr. Rabesca has a history of "losing  
8 control" while under the influence of alcohol. Apart  
9 from that observation, it appears that Mr. Rabesca was  
10 a cheerful and willing participant in the Abe Miller  
11 programs and benefitted from life skills training that  
12 he received there despite his difficulty with the  
13 English language.

14 Mr. Rabesca is a Dene person who grew up in the  
15 Dogrib community of Fort Rae. He is a member of a  
16 well-known family in that community. Some years ago  
17 his family arranged for him to move to Yellowknife and  
18 become involved with the special programs at the Abe  
19 Miller Centre so that he could learn some basic  
20 independent living skills, something that was very  
21 difficult to do in Fort Rae because of his  
22 intellectual disability. However, his years in  
23 Yellowknife have had mixed blessings. Although he has  
24 clearly benefitted from the excellent programs and  
25 dedicated staff at the Abe Miller Centre, he has also  
26 periodically got himself into trouble on the streets  
27 of Yellowknife where he is able to have ready access

1 to alcohol and exposure to people who get him into  
2 trouble.

3 Prior to the sexual assault which occurred on  
4 November 30th, 1998, Joachim Rabesca accumulated a  
5 criminal record which consisted of assault charges,  
6 mischief charges, and breaches of probation orders.  
7 All of these incidents occurred here in Yellowknife.

8 Immediately after the sexual assault occurred on  
9 November 30th of 1998, the victim disclosed it to one  
10 of the staff at the Abe Miller Centre, and it was  
11 reported to the police. Mr. Rabesca was arrested the  
12 next day, December 1, 1998.

13 In February 1999, Mr. Rabesca, with the able  
14 assistance of his then counsel, obtained his release  
15 pending trial by an order of this Court. His release  
16 was granted upon his entering into a recognizance with  
17 certain terms and conditions, with his brother and  
18 sister-in-law as sureties. The terms and conditions  
19 of his release were essentially that he reside with  
20 Eddy and Madeline Rabesca at their home in Fort Rae,  
21 that he abstain from the consumption of alcohol, and  
22 that he obey all household rules including a midnight  
23 curfew. From the evidence of Madeline Rabesca at this  
24 sentencing hearing, it appears that all went well with  
25 the bail conditions between February and October of  
26 this year. Ms. Rabesca indicated that a few times  
27 when Joachim forgot about his curfew, they had to go

1 out and find him in the community and bring him home.  
2 She stated that Joachim regularly attended the special  
3 education classes that were offered at the Friendship  
4 Centre in Fort Rae. However, she stated that in  
5 October he started to drink, and, as a result, she  
6 reported him to the police. She reported that he was  
7 in breach of his recognizance, and he was arrested.  
8 He has remained in custody since then. He has  
9 approximately four months of pre-trial custody in  
10 total.

11 It is now time for him to be sentenced for  
12 sexually assaulting Renee Elias.

13 He has pleaded guilty to the charge and he does  
14 so with the assistance and advice of competent  
15 counsel. This is to his credit and clearly must act  
16 in mitigation of sentence.

17 Crown counsel in this case fairly and candidly  
18 acknowledged that had the Crown been required to prove  
19 the charge, it would have been a very difficult trial  
20 given the intellectual disability of both offender and  
21 victim.

22 As required by law, the victim was given an  
23 opportunity to provide a Victim Impact Statement to  
24 the Court for purposes of this sentencing hearing.  
25 However, the Court was informed through the Crown that  
26 Ms. Elias's counsellor was of the view that it would  
27 be too difficult and not in the victim's interest to

1 do so in any formal way given her personal  
2 circumstances.

3 When Ms. Elias first disclosed the incident, she  
4 was not only emotionally upset but also spoke of the  
5 physical pain that the offender had caused her. When  
6 now asked about the incident, all the victim says in  
7 response is that it "hurt".

8 I find that the degree of force used by this  
9 offender in the commission of the crime is an  
10 aggravating feature, as is the victim's obvious  
11 vulnerability because of her own disability.

12 The Court's task now is to impose an appropriate  
13 sentence. This is never an easy task, and here in  
14 this case, the appropriate sentence is not immediately  
15 obvious.

16 The type of sexual assault crime committed in  
17 this case normally attracts a sentence of two to four  
18 years imprisonment. However, this is a rather unusual  
19 case and the Court must carefully consider the  
20 principles of sentencing and the objective or purpose  
21 of the sentencing process and apply those to the  
22 special circumstances of this case.

23 Maintenance of a safe and peaceful community and  
24 the protection of the members of the community are  
25 fundamental objectives of the sentencing process. As  
26 counsel in this case have mentioned, denunciation and  
27 deterrence are important objectives in this

1 jurisdiction whenever the Court is sentencing an  
2 offender for a major sexual assault. Proportionality  
3 is relevant here. In other words, a sentence must be  
4 proportionate to the seriousness of the crime  
5 committed and to the degree of responsibility of the  
6 offender before the Court. Parity is another  
7 important issue here, that is, the principle that any  
8 sentence imposed ought to be similar to sentences  
9 imposed on similar offenders for similar offences  
10 committed in similar circumstances. Although having  
11 said that, I note that in this jurisdiction we have  
12 not had many offenders before the Court who are  
13 similar to Joachim Rabesca or with his unique personal  
14 circumstances.

15 I have given careful consideration to each of  
16 those objectives and principles which have governed  
17 the sentencing process for decades and which are now  
18 codified by Parliament in the *Criminal Code*.

19 As I mentioned earlier, Mr. Rabesca is an  
20 aboriginal person, and, as required, I take particular  
21 note of that fact.

22 Parliament has now stated in fairly explicit  
23 terms that an offender should not be deprived of his  
24 liberty if less restrictive sanctions are appropriate  
25 in the circumstances. Indeed, as the Supreme Court of  
26 Canada stated in Gladue, "the availability of the  
27 conditional sentence of imprisonment, in particular,

1 alters the sentencing landscape in a manner which  
2 gives an entirely new meaning to the principle that  
3 imprisonment should be resorted to only where no other  
4 sentencing option is reasonable in the circumstances."

5 In this case, Joachim Rabesca's counsel asks that  
6 the Court utilize the provisions of Section 742.1 of  
7 the *Criminal Code* and impose a conditional sentence,  
8 allowing Joachim Rabesca to serve his sentence in the  
9 community. His counsel submits that because of  
10 Mr. Rabesca's unique circumstances, he should be given  
11 consideration to serving his sentence in an  
12 environment other than an ordinary jail such as the  
13 Yellowknife Correctional Centre.

14 Mr. Mahar states that his client is remorseful  
15 for what he did, he knows that it was wrong, and he  
16 also knows that alcohol consumption leads to problems  
17 for him. Mr. Mahar further describes his client as  
18 being very frustrated with his handicap and that  
19 Mr. Rabesca has a keen desire to live independently as  
20 a grown adult, particularly since he has enjoyed that  
21 opportunity and experience in recent years.

22 The offender's sister-in-law Madeline Rabesca  
23 stated in her testimony that she and her husband,  
24 Eddy, are prepared to have Joachim live with them  
25 again in their family home in Fort Rae and are willing  
26 to give Joachim another chance. Ms. Rabesca states  
27 that she is also willing to assist a sentence



1 supervisor.

2 Ms. Rabesca and her husband are long-time foster  
3 parents in the community of Fort Rae. They strike me  
4 as very caring people, and I say again that Joachim  
5 Rabesca is very fortunate indeed to have such a caring  
6 and supportive family in Fort Rae. I note that  
7 Madeline Rabesca also stated that they do not allow  
8 alcohol in their home.

9 It is noteworthy, in my view, that for the most  
10 part the offender performed satisfactorily while under  
11 bail conditions in Fort Rae earlier this year. The  
12 one breach that did occur, the drinking in October,  
13 was immediately resolved by his surety reporting the  
14 breach, and he was taken into custody.

15 With respect to the four months of pre-trial  
16 custody served by the offender, I am satisfied that  
17 with his limited abilities and reduced intellect that  
18 period of time in a jail environment would have been a  
19 very difficult and frustrating experience for him.

20 The Crown opposes the notion of this offender  
21 serving his sentence of imprisonment in the community,  
22 stating that the Crown's main concern is the  
23 offender's previous criminal conduct evidenced by his  
24 record and, in particular, the breaches of previous  
25 Court orders.

26 Taking into account all of the factors and  
27 circumstances here and the very helpful submissions of

1           counsel, I have concluded that it is open to me, as a  
2           sentencing judge in this unique case, to consider the  
3           conditional sentence option. On all of the evidence,  
4           I am satisfied on a balance of probabilities that  
5           allowing Joachim Rabesca to serve his sentence in the  
6           community of Fort Rae will not endanger the safety of  
7           the community and would not be inconsistent with the  
8           statutory principles of sentencing.

9           As sentencing judge, I do not have any more  
10          ability to predict the future than other people, and  
11          there is no guarantee that Joachim will not break the  
12          law again. There are no such guarantees in life.  
13          However, I am convinced that we should do our best to  
14          keep him out of ordinary jail. That kind of  
15          institutional incarceration should indeed be a last  
16          resort for this man, and, instead, we should supervise  
17          his behaviour in the community with appropriate  
18          conditions attached to his sentence.

19          With proper monitoring by the sentence supervisor  
20          and the assistance of the members of the Rabesca  
21          family, I am satisfied that the community's safety  
22          will not be at risk. I am also satisfied, in  
23          reiterating the unique nature of this case, that the  
24          principles of sentencing, in particular the ones that  
25          I have mentioned earlier - denunciation, deterrence,  
26          proportionality, and parity - will not be offended by  
27          this disposition. In reaching this decision, I will

1 mention that I have reviewed some relevant case law  
2 including, in particular, the Alberta Court of Appeal  
3 decisions last year in Brady and Waldner.

4 The bottom line is that I simply do not accept  
5 that regular jail is an appropriate place for this man  
6 unless that is shown to be absolutely necessary.

7 In the result, then, I impose a conditional  
8 sentence pursuant to Section 742.1.

9 Mr. Rabesca, would you stand now, sir, to be  
10 sentenced.

11 Mr. Rabesca, I want you to listen very carefully  
12 to me. For the crime that you have committed, that is  
13 the sexual assault of Renee Elias, it is the sentence  
14 of this Court -- your sentence is a sentence of  
15 imprisonment of two years less one day. But I order  
16 that you serve this sentence in the community --

17 THE INTERPRETER: When you say "community", is that  
18 in Rae?

19 THE COURT: Yes, the community of Fort Rae.  
20 -- subject to compliance with the following  
21 conditions, and listen to these carefully. You shall  
22 keep the peace and be of good behaviour; you will  
23 appear before this Court when required to do so; you  
24 will report to a supervisor within two working days of  
25 today; you will remain within the Northwest  
26 Territories unless you have written permission to go  
27 outside the territories from the Court or the

1 supervisor; you will notify the supervisor in advance  
2 of any change of your name or address and any change  
3 in your employment or occupation; you will abstain  
4 from the consumption of alcohol; you will submit to a  
5 breathalyzer test on demand by your supervisor or an  
6 R.C.M.P. officer; you will perform 200 hours of  
7 community service work as directed by your supervisor  
8 within the first 12 months of your sentence; you will  
9 reside in a residence in Rae-Edzo as directed by your  
10 supervisor; you are not to be away from your residence  
11 between midnight and seven a.m. without the permission  
12 of your supervisor; you are to attend such educational  
13 or training courses as directed by your supervisor;  
14 you are to report weekly to the R.C.M.P. detachment in  
15 Rae-Edzo; you are to have no contact whatsoever with  
16 Renee Elias; and you shall not attend at the premises  
17 of the Abe Miller Centre in Yellowknife.

18 In the circumstances, there will be no victim  
19 fine surcharge and the usual firearm prohibitions  
20 order will issue for a period of ten years. Any such  
21 item will be surrendered forthwith. You may sit down,  
22 Mr. Rabesca.

23 Pursuant to the *Criminal Code*, I direct that  
24 prior to Mr. Rabesca's release that he be given a copy  
25 of the order and an explanation of the provisions and  
26 procedures of Section 742.4 and 742.6.

27 Now, Mr. Mahar, I am going to ask, with respect,

1 that you participate in this explanation, with the  
2 assistance of the interpreter, Ms. Nitsiza, and  
3 possibly - there should be no rush on this - possibly  
4 with the assistance or the participation of the  
5 eventual supervisor, and possibly, even if by phone or  
6 not at the same time, with the participation of  
7 Madeline Rabesca. All of this with a view to ensuring  
8 as much as possible that Joachim understands the very  
9 heavy consequences of any breach of those conditions.

10 Now, is there any clarification required?

11 Counsel, anything further?

12 MS. COLTON: No, Your Lordship. Thank you.

13 MR. MAHAR: Sir, I'm just not exactly sure  
14 how the -- the Yellowknife Correctional Centre is  
15 going to be ordered to release him after these  
16 conditions have been met; correct?

17 THE COURT: After they've been explained to  
18 him.

19 MR. MAHAR: And the order is signed.

20 THE COURT: Yes. Well, the order -- he gets  
21 a copy of the order - that's very technical - because  
22 I take it he wouldn't necessarily be able to read the  
23 legal terminology. What I contemplate, Mr. Mahar, is  
24 that in the next day or two, and not necessarily  
25 within the hour, after the order has been prepared,  
26 that someone sit down with him, with an interpreter  
27 and with people who are going to be dealing with him

1 longer than you, like Mrs. Rabesca and the supervisor,  
2 and I guess I'm asking you as an officer of the Court  
3 to be satisfied that he understands as much as  
4 possible in his situation that this is not like the  
5 bail.

6 MR. MAHAR: I'll do that, Sir.

7 THE COURT: There is a very heavy consequence  
8 here if he breaches his conditions. One that none of  
9 us want for him.

10 MR. MAHAR: What I'm contemplating, Sir, and  
11 this might perhaps be an easier way to deal with it,  
12 is perhaps we can do this at one o'clock tomorrow  
13 afternoon at the Yellowknife Correctional Centre.  
14 I'll request that the interpreter join me at my  
15 office. Perhaps at that point in time I can contact  
16 the interpreter's office for those purposes. I was  
17 also expecting the Rabescas to be here. I don't know  
18 what the hold-up was. I'll contact them also. With  
19 any luck, Sir, this will be taken care of tomorrow  
20 afternoon.

21 THE COURT: Fine. I appreciate that. Thank  
22 you. Before we close I do want to compliment counsel  
23 for their conduct of this very difficult file, and in  
24 that I include previous defence counsel,  
25 Miss Mercredi, as I'm aware she was involved with the  
26 file as well. Thank you. We'll close court.

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Certified Pursuant to Rule 723  
of the Rules of Court



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Jane Romanowich, CSR(A)  
Court Reporter

