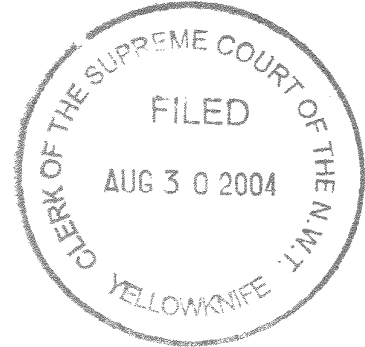


IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN



- V -

JOHNNY ELIAS AVIUGANA

Transcript of the Oral Reasons for Sentence by The Honourable Justice V. A. Schuler, sitting in Inuvik, in the Northwest Territories, on the 24th day of August, A.D., 2004.

APPEARANCES:

Ms. S. Tkatch:

Counsel for the Crown

Mr. J. MacFarlane:

Counsel for the Defence

1 THE COURT:

2 Mr. Aviugana has pleaded guilty
3 to and has now been convicted of sexual assault
4 causing bodily harm. He did not appear for his jury
5 trial on that charge, which was to have commenced
6 yesterday, and upon being arrested was brought before
7 this Court today. He declined to show cause, that he
8 had a legitimate excuse for failing to appear
9 yesterday, and therefore is deemed under Section 598
10 of the *Criminal Code* to have elected trial by a judge
11 without a jury, and it was in those circumstances that
12 he entered his guilty plea.

13 The facts of the case are that the victim had
14 been out with some friends who accompanied her to her
15 home. When the last friend left, she was alone and
16 she blacked out. She awoke to find an unknown male on
17 top of her, hitting her in the face and trying to pull
18 her pants down. Her neighbours called the police
19 about the noise that they heard from her home, and
20 when the police arrived, they heard a woman crying and
21 saying "help." They entered the residence where they
22 observed the accused. They observed that the victim
23 was in a semi-prone position on the floor with her
24 pants and panties down to her ankles and blood on the
25 floor around her, as well as on her face and
26 elsewhere.

27 At the hospital, the victim was noted to have a
bruised ear, two black eyes, swollen lips, blood on

1 her face and hands, and blood clots in her hair. The
2 victim was not able to say whether Mr. Aviugana, who
3 she did not know, penetrated her, or describe the
4 state of his clothing. She did remember him being on
5 top of her, according to what was said here in terms
6 of the facts. When the police entered the home and
7 saw Mr. Aviugana, he was wearing pants that were not
8 unbuttoned or unzipped.

9 The question that arises then on the evidence,
10 which was put in by agreed statement of facts, is
11 whether Mr. Aviugana attempted or did penetrate the
12 victim or had genital-to-genital contact with her.

13 The DNA results in the reports that were made
14 exhibits are not conclusive as to the presence of
15 semen on the exhibits, and in my view the most that
16 could be said from those reports is that there is a
17 possibility of genital-to-genital contact, but not a
18 certainty. So I have to find that penetration or
19 genital-to-genital contact has not been proven beyond
20 a reasonable doubt, which of course is the test for
21 facts on a sentencing.

22 However, in any event, based on the victim's
23 memory as was described, in other words that
24 Mr. Aviugana had his pants down at one point, and the
25 fact that there was, according to the facts read in,
26 some time line between the assault being in progress
27 and the police actually entering the residence and

1 seeing Mr. Aviugana, and that combined with the fact
2 that they announced their arrival, it seems to me that
3 there was certainly time for Mr. Aviugana to pull up
4 his pants and be dressed as described by the police on
5 observing him.

6 In all the circumstances, this is what at one
7 time would have been called an attempted rape; in
8 other words, an attempt to have intercourse with the
9 victim, and in this case with violence used to
10 overcome her resistance.

11 The victim impact statement makes it clear that
12 this terrible incident has had a strong effect on the
13 victim. She has been afraid to be alone, afraid that
14 Mr. Aviugana, who as I said earlier was unknown to her
15 before this, might be around. Along with the physical
16 injuries that she suffered, she also suffered
17 embarrassment, and the psychological effects that are
18 invariably suffered by victims of this type of
19 offence.

20 The fact that Mr. Aviugana was intoxicated at the
21 time of the offence is of course not a mitigating
22 factor. Mr. Aviugana has pleaded guilty to the
23 offence, although only today after, as I said, he
24 failed to appear for his jury trial and lost his jury
25 election. There is still some mitigation in his
26 guilty plea, as late as it is, because it does mean
27 that the victim has not had to testify again and go

1 through the difficult situation of waiting to hear the
2 jury's verdict. So some credit is to be given to
3 Mr. Aviugana for his guilty plea, just not as much
4 credit as if it had come earlier on in the
5 proceedings.

6 It is aggravating that this sexual assault
7 occurred in the victim's own home, where she is
8 entitled to feel safe and secure from intruders and
9 from harm. How Mr. Aviugana got into the home, in my
10 view, really is not very important. He clearly had no
11 right to be there, as he was unknown to the victim. I
12 do accept that there is no evidence of any planning on
13 his part beforehand.

14 Mr. Aviugana is 29 years old, an Inuvialuit man
15 raised in a fairly traditional life-style, from what
16 has been said here. He says, through counsel, that he
17 does not drink often, but when he does he does so to
18 excess. Mr. Aviugana has been through alcohol
19 treatment. I am sure that he knows what he needs to
20 do about his drinking. Drinking to excess is not an
21 excuse for what happened here or for committing crimes
22 in general.

23 Of concern is the fact that Mr. Aviugana has a
24 related record. In 1999 he was convicted of assault
25 for which he received a fine. In 2002 he was
26 convicted of sexual assault for which he received six
27 months incarceration. He was also convicted at that

1 time of three offences involving failures to comply
2 with court process.

3 Counsel advised that the 2002 sexual assault
4 involved him sexually touching a victim who was in her
5 home alone. Now he stands convicted of sexual assault
6 causing bodily harm, a crime for which Parliament has
7 decreed the maximum punishment is 14 years in jail.

8 It has been said repeatedly that the main
9 sentencing principles in sexual assault cases are
10 denunciation, in other words showing how society
11 condemns this type of behavior; and general
12 deterrence, in other words discouraging others from
13 committing these types of offences.

14 In this case, I have to be concerned about those
15 things, but I also have to be concerned about
16 deterring Mr. Aviugana himself from committing any
17 further such offences. The six-month jail sentence he
18 received in 2002 obviously did not deter him. The
19 community, and the community, of course, includes
20 women who may be alone in their homes, needs
21 protection from him, especially since this offence is
22 even more serious than what he did in 2002, and it
23 does involve a significant level of violence.

24 I do take into account the three months that
25 Mr. Aviugana spent on remand, and I will credit them
26 as six months. I also take into account that he is an
27 aboriginal person; however, no factors have been

1 brought to my attention in connection with that which
2 would justify it having an impact on the sentence I
3 impose.

4 AS is always the case, the various cases that
5 have been referred to by counsel have some
6 similarities to this one, but in some ways they are
7 also different; they are helpful, however, in
8 determining what the sentence should be in this case.

9 Stand please, Mr. Aviugana. Taking into account
10 all of the circumstances, what stands out in this
11 case, in my view, is that it was a very violent
12 assault. You are 29 years old, Mr. Aviugana. Quite
13 often I see people in court who have serious records
14 when they are younger, but as they get older they tend
15 to either stop committing crimes or they do not commit
16 as serious crimes. You are 29 years old, and your
17 crimes seem to be getting more serious. So you better
18 do some pretty serious thinking on your own, because
19 if you commit another offence like this you can only
20 be assured of looking at longer and longer periods of
21 time in jail, and I am sure you do not want to spend
22 the rest of your life in jail.

23 So in all of the circumstances, as I say, in my
24 view this was a very violent offence, and the
25 appropriate term of imprisonment would be three and a
26 half years. I am going to credit the six months
27 against that. So the sentence that I am giving you is

1 three years in jail. You may sit down.

2 Now, there will be a firearm prohibition order
3 commencing today, and it will expire ten years from
4 your release from imprisonment. Unless I hear
5 otherwise, the order will be that all firearms and
6 other items referred to under Section 109 are to be
7 surrendered to the RCMP forthwith.

8 There will also be, since this is a primary
9 designated offence, there will be an order for the
10 taking of Mr. Aviugana's DNA in the usual terms. I
11 take it you may not have a draft order with you,
12 Ms. Tkatch?

13 MS. TKATCH: Unfortunately it's in
14 Yellowknife. I will have that prepared for
15 Mr. MacFarlane's approval.

16 THE COURT: All right. That is fine then.
17 Then I will ask you to ensure that it is submitted to
18 me for signing within 30 days of today. And in the
19 circumstances the victim fine surcharge will be
20 waived.

21 Now, is there anything else that I have
22 overlooked?

23 MR. MACFARLANE: Your Honour, I don't know if it's
24 Your Honour's practice or not, but defence would
25 request, if possible, a recommendation on the Warrant
26 of Committal that if possible Mr. Aviugana serve his
27 sentence in a Northern facility. Sometimes that may

1 help the people at North Slave Correctional Centre,
2 where he would be in a population of many similar
3 offenders and programs that are targeted for their
4 needs. I would ask, if possible, that recommendation
5 be included.

6 MS. TKATCH: Your Honour has not had any
7 evidence before you with regards to many family ties
8 or close family ties to the area. I'm a little
9 hesitant in having the Court maybe restrict the
10 Corrections hands in terms of classification or
11 placement for Mr. Aviugana, particularly when this is
12 one of violence and whether Territorial can handle it.
13 So I'm just a little leery of that recommendation.

14 THE COURT: All right. Well, I think that
15 the people at the Correctional Centre are very well
16 placed to decide where inmates should serve their
17 time. I am going to make the recommendation,
18 considering that Mr. Aviugana is a resident of the
19 Northwest Territories and from what I have heard about
20 his background, and I am sure that the Correctional
21 authorities will do what is best in the circumstances.
22 It is, after all, a recommendation, not a direction.
23 So I am content to make it and then leave it in their
24 hands as to what they decide to do in the end.

25 Is there anything further then, counsel, that
26 needs to be addressed?

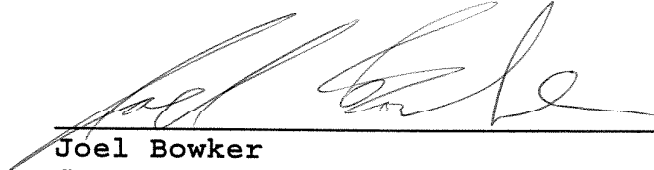
27 MS. TKATCH: No, Your Honour.

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MR. MACFARLANE: No.

THE COURT: All right. Well, thank you very
much for your efforts and for resolving this case. We
will close court.

Certified to be a true and accurate
transcript, pursuant to Rules 723 and 724
of the Supreme Court Rules



Joel Bowker
Court Reporter