R. v. Casaway, 2004 NWTSC 61

S-1-CR-2003000112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

MARC CASAWAY

Transcript of the Oral Reasons for Sentence by The Honourable Justice V.A. Schuler, at Yellowknife in the Northwest Territories, on Tuesday, August 10, A.D., 2004.

APPEARANCES:

Mr. S. Hinkley: Counsel for the Crown

Mr. G. Watt: Counsel for the Accused

Charge under s. 271 of the Criminal Code of Canada

THE COURT: Mr. Casaway, before I sentence you, is there anything you would like to say? If there is you may stand and say it.

THE ACCUSED: Thank you, Your Honour, I've realized that being in court is not a pleasant thing, whether you are the accused or I would more imagine more so being a victim, and having said that I leave myself at the mercy of Your Honour.

THE COURT: All right. Thank you.

Marc Casaway has been convicted by me after a trial on a charge of sexual assault. The facts very briefly are that on April 21, 2003, he put his finger in the vagina of a then 11-year-old girl who was sleeping in the living room with another young girl. Mr. Casaway was going out with the victim's mother at the time and from time to time would stay overnight at her apartment, which is where he was that night and where the sexual assault occurred.

The relationship between Mr. Casaway and the victim's mother was, from the evidence at trial, an off-and-on one and there is no evidence that he acted as a parent in any way to the victim. He was, however, an adult approximately 47 years old at the time of the offence and a guest in the victim's home and she said in her evidence that she trusted him.

There is an element of breach of trust in this case in the sense that any adult in a home where there

is a child has at least a moral obligation to ensure the child does not come to harm. So that element of trust and accordingly breach of that trust is an aggravating factor in this case.

Mr. Casaway is 47 years old and originally from Fort Resolution. It is clear from what has been said by his counsel that he had a very difficult family background with involvement by Social Services and much disruption in his home life. He has, however, pursued education and has had good and steady employment, although twice he has lost employment due to drinking.

It has also been said that he has a drinking problem, that he describes himself as an alcoholic. I note, however, as was conceded by defence counsel, that there was no evidence at all that at the time of the offence he was under the influence of alcohol.

Mr. Casaway has a criminal record which is quite dated but is related in that it contains convictions for assault causing bodily harm in 1982, assault in 1986 and more importantly two convictions for sexual assault in 1990. The assaults are related in that they are offences against the person.

With respect to the sexual assault convictions, counsel has advised that these were for fondling his minor niece in 1987. The sentences imposed were seven days' intermittent on each charge consecutive and reflect -- and I infer from them that the offences must

have been at the less serious end of the scale of sexual assault offences.

The evidence at trial revealed that Mr. Casaway made apologies to the victim and her mother and led them to believe that he was going to plead guilty to this charge and he did waive his preliminary hearing. However, he did not plead guilty and this matter did proceed to trial. The law is clear that he cannot be treated more severely because he pleaded not guilty. He simply does not get the usual mitigating benefit of a guilty plea.

As far as whether any credit should be given for the apologies that he made, I think the effect of them is to a large extent simply cancelled out by the fact that he did go to trial. Certainly there is some mitigation in the fact that he waived the preliminary hearing because it did mean that the victim did not have to testify twice.

I have been told on this hearing that the victim did not wish to complete a Victim Impact Statement and of course that is completely her choice. She did testify at trial that she felt ashamed and she was clearly upset at points during her testimony. In any event, the effects of child sexual abuse are well documented and although nothing specific has been put forward in this case it is a fair assumption that she will have some difficulties at least as a result of

this event.

Defence counsel advised that Mr. Casaway himself was sexually molested by a baby-sitter as a child. Unfortunately that is not a very unusual circumstance. Sadly people who are molested as children sometimes do go on to in turn molest children when they become adults. The main significance I think of that is that Mr. Casaway would know the troubling effects and would know the suffering that he would cause a child by doing to her the type of thing that had been done to him.

I want to note here that neither counsel referred in their sentencing submissions to the proposed similar fact evidence which I ruled inadmissible at trial so I will just say so that it is clear that having ruled it inadmissible at trial I am not considering it on the sentence.

The cases that have been filed by counsel, which are very helpful, refer to a wide range of sexual activity and offenders in a wide range of personal circumstances. Each case has its own mitigating and aggravating factors. It is obvious that sexual abuse of children is a problem in our society, not just here in the Northwest Territories but all over Canada, and it is obvious that it must be dealt with by significant sanctions.

That the governing principles are denunciation and deterrence has been reiterated many times by many

courts. In this case individual deterrence is also a factor and, in my view, it is a significant factor in that Mr. Casaway has a prior record for sexually assaulting another young girl. The record is old, the offences having occurred approximately 17 years ago. He was a mature man then. Now, even older, he has yet again sexually assaulted a young girl and more seriously this time than the last.

He has never sought professional help despite having repeated the behaviour and having told the victim's mother in a telephone call on April 21st, 2003, that he had to deal with his problem. I, of course, don't know exactly how serious his problem is or what kind of help he needs or whether the help he needs is available to him here in the Northwest Territories.

Crown counsel seeks a custodial sentence in the range of 30 months - in other words, two and a half years - to four years. Defence seeks a custodial sentence of nine months to a year and a lengthy period of probation. I think that on the facts of this case and considering Mr. Casaway's background, I have to be concerned about whether he is a danger to the community and in particular what I mean by that is young girls. There is no evidence before me that there have been any incidents in the interim - in other words, between 1987 and 2003 - and I am not presuming that there have been,

but it is clear to me that having once done this type of thing - in other words, sexually assaulted a young girl - having gone to court for it, been sentenced for it, Mr. Casaway obviously had a problem then and he has now repeated it again in 2003, so the problem is still there.

In my view, the circumstances require that there be a custodial sentence. I will recommend as part of that -- I will have the warrant endorsed to recommend that he get counselling. I hope that he will avail himself of that. With Mr. Casaway's age and considering that he hasn't yet chosen to get help I don't think a probation order is really suitable in the circumstances.

Stand please, Mr. Casaway. In all the circumstances, the sentence I impose on you is two years in gaol. The warrant will be endorsed with a recommendation that you receive any counselling that the correctional authorities can make available to you and that is appropriate to sexual offenders. You can sit down.

I have signed the DNA order, counsel. Having not heard any submissions and understanding that it is on consent, it is appropriate that that order issue.

With respect to a firearm prohibition order, I do take into account that Mr. Casaway is aboriginal, that he does stay, it appears, for some periods of time at a

camp, that although close to Yellowknife is a camp out in the bush. I take into account that there was no firearm used in the commission of this offence and that he has no firearm offences on his record.

In the circumstances I am satisfied that he may require a firearm for purposes of sustenance when he is at his camp. There will be a firearm prohibition order for a period of time that commences today and expires 10 years from his release from imprisonment, but under section 113 of the Criminal Code I will authorize the chief firearms officer and the registrar to issue such authorizations and other documents that are mentioned under section 113 as Mr. Casaway may need for sustenance purposes, and if he does have any firearms they are to be surrendered forthwith to the RCMP. The victim fine surcharge will be waived in the circumstances.

MR. HINKLEY: Just one final piece of housekeeping. I believe that there was a publication ban with respect to a number of items. I would just like to have that reiterated by the court for the record.

THE COURT: Yes, there is a ban on publication of the name of the complainant in this case and any information that might identify her.

MR. HINKLEY: Thank you very much, Your Honour.

THE COURT: Is there anything further from you,

Mr. Watt?

MR. WATT: No, Your Honour.

THE COURT: All right. Thank you both for your conduct of the case. Close court.

(AT WHICH TIME THE PROCEEDINGS CONCLUDED)

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

Janet Harder
Court Reporter