

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

ADRIAN HAPPY KELLY

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Transcript of the Reasons for Sentence in the Sentencing Hearing held before The Honourable Justice J.E. Richard, sitting in Yellowknife, in the Northwest Territories, on March 7 and 8, A.D. 2006.

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APPEARANCES:

Ms. S. Smallwood: Counsel for the Crown

Ms. P. Taylor: Counsel for the Accused

(Charge under s. 273(2)(b) of the Criminal Code of Canada)

Ban on Publication of Complainant/Witness  
Pursuant to Section 486 of the Criminal Code

MS. TAYLOR: Good afternoon. If I may have  
the accused at counsel table.

THE COURT: He can remain in the  
prisoner's box.

MS. TAYLOR: Okay.

THE COURT: Adrian Happy Kelly has pleaded  
guilty to a charge of aggravated sexual assault  
contrary to Section 273(2)(b) of the Criminal  
Code. The maximum sentence for this crime is  
life imprisonment. The circumstances of this  
offence are particularly egregious and comes  
close to falling within the category or group of  
the worst offences committed under this section  
of the Criminal Code.

Both Mr. Kelly and the victim come from  
well-known families in the community of Fort Good  
Hope. The crime occurred there on September  
22nd, 2005. Mr. Kelly is 37 years old. The  
victim is 43 years old.

The victim had been drinking during the  
night with her sister and some other people. At  
one point around 5 a.m., she accepted a ride in  
Mr. Kelly's van; the intention being that he  
would drop her off at her parents' home in Fort  
Good Hope, which is where she lived. Instead, he  
drove the vehicle to an isolated spot outside of  
the community of Fort Good Hope where he stopped

the vehicle. The nearest residence was at least four kilometres away. After he stopped the vehicle, he proceeded to force himself sexually on the victim, using serious physical violence to achieve his purpose.

When she initially resisted him, he punched her hard with his closed fist on the left side of her face. She says that in the course of the next two hours or more while they were there, he repeatedly punched her on the face and threatened further violence if she did not do as he said.

Firstly, he forced her to perform oral sex on him when they were in the front part of the van. Mr. Kelly was unable to maintain an erection. He then dragged the victim to the back of the van. He subsequently, at the back of the van, instructed her to get on her hands and knees, and then he attempted to have anal intercourse with her from behind. She says that he was continuing to punch her on the face, and she also says that he put his penis partways into her anus. Mr. Kelly then turned her around. The victim pleaded with him to stop. He then forced her to perform oral sex again. He then got on top of her and attempted to have vaginal intercourse with her. She says he penetrated her. In her words, putting his penis "partways"

into her vagina. She says, during this time, he kept uttering death threats and punching her face.

At one point during this ordeal, the victim tried to run away and was yelling for help. Mr. Kelly pursued her and shoved her to the ground. She says that he kicked her on the face while she was on the ground. She says he then grabbed her by the hair and dragged her back to the van where he continued his assault on her.

During much of this terrifying ordeal, the victim had difficulty seeing and was disoriented because of the swelling around her eyes, and her face was covered in blood.

The victim testified that throughout this traumatic experience, the offender, Mr. Kelly, made several references to killing her. She said that he asked her at one point, "Do you want to die now or die later?" At another point, she says, he stated that he would take her body into the bush and leave it there where no one would find it. Also, that if he got caught and went to jail, that he would come back and kill her.

The victim was fearful of her very life during this nightmare, and, indeed, she says that she was praying to herself while she was being attacked. She pleaded for her life and she

promised him that she would not tell anyone what happened. At daylight, she was able to convince him to drive her back to the community and to her parents' home.

In addition to the severe psychological trauma suffered by the victim to this day, she suffered the following physical injuries, and I am quoting from paragraph 31 of the Agreed Statement of Facts:

"Cuts on her nose, under her left eye and inside her mouth; two loose teeth; swelling and bruising on her left eye and cheek, right upper and lower lip; bruising on her right jaw and chin and her left arm; pain in her anus and perineum; fracture of her nose; blow out fracture of the orbit of her left eye and subretinal hemorrhage in her left eye."

The subretinal hemorrhage in her left eye caused her to have reduced vision in that eye. She had eye surgery five days after the assault in an effort to displace the subretinal hemorrhage. She continues to receive treatment to try and stabilize the damage done to the blood

vessels behind her eye, and she has a permanent reduction of the vision in her left eye because of this attack.

That is a summary of the horrible circumstances of Mr. Kelly's crime.

As stated earlier, Mr. Kelly is now 37 years of age and is a native of Fort Good Hope. His criminal record indicates that he has been in and out of jail since age 17. His criminal record entries are mainly property offences, having committed six property offences as a youth and another ten property offences as an adult. The most significant entry on his criminal record, though, is in September 1993 when he was convicted for sexual assault with a weapon in his home community of Fort Good Hope, a conviction for which he received a sentence of five years' imprisonment in the federal penitentiary. I am told that he did not receive parole or early release, but, rather, served the entire five-year sentence in custody. He would have been released, then, in September 1998 when he was 29 years of age.

Subsequent entries on his criminal record include a conviction in May 2002 for trespassing at night in a private residence, for which he was sentenced to time served and placed on probation

for one year; and, also, a conviction in October 2002 for assaulting his spouse, for which he was sentenced to three months' imprisonment.

The offender, Mr. Kelly, was arrested just a few hours after the commission of the present offence and has been in custody since that time, a period of five and a half months. In accordance with the usual practice of the Court and binding case authority, he will receive credit for that remand time in the determination of the sentence to be imposed.

Mr. Kelly has pleaded guilty to this serious crime, and yesterday when he spoke at the sentencing hearing, he did apologize to the victim and said he was sorry for what he did. His guilty plea operates to mitigate the sentence that would be otherwise imposed had there been a trial followed by a conviction. Some of that mitigation, however, is vitiated by the fact that it was necessary, in any event, for the victim to testify at the sentencing hearing about the awful details of this demeaning and degrading assault at the hands of Mr. Kelly and to be cross-examined on those details.

Although Mr. Kelly has admitted to an aggravated sexual assault and to much of the circumstances, he denies certain other

circumstances alleged by the victim. He testified at the sentencing hearing in an effort to minimize some of the aggravating circumstances alleged by the victim. Specifically, he says that he punched her in the face only once and not many times, that he did not threaten to kill her at any time, and, finally, that there was in fact no penetration either vaginally or anally.

Having heard the testimony of both offender and victim, I find the victim to be the more credible witness. In general terms, I find that this prolonged assault occurred as the victim said it did. Based on the viva voce testimony, the photographic evidence of her injuries, and the admissions made by the offender as to the extent of her injuries, I find that she was indeed punched and/or kicked in the face several times. Also, I find that the offender indeed uttered threats to harm her if she told anyone and that he made references to killing her. I find that she was, in fact, in fear for her life because of what he did to her and because of what he said to her, and I find that there was either penetration or attempted penetration, and, in the big picture, I see no huge distinction, in any event, as regards the seriousness of these circumstances.

Notwithstanding that Mr. Kelly quibbles about some of the aggravating circumstances, the fact remains that his guilty plea does operate in mitigation of sentence in this case. I want him to know that but for his guilty plea, he could very well have been facing the maximum sentence of life imprisonment.

Mr. Kelly presents as a man who does not display emotion, but who in hindsight, I believe, does recognize the seriousness of his appalling behaviour. I glean this partly from his appearance in court and, also, from the letter of apology to his victim which was filed with the Court in which he also requests her forgiveness and promises never to hurt her again.

Although I am a layperson in the fields of psychiatry and psychology, it does seem to me that Mr. Kelly suffers from some form of illness or disorder because his history shows that he has an unnatural need to control or degrade women. Hopefully during his next stay in penitentiary, he will seek and receive treatment for any such disorder.

I acknowledge the letters of support filed on Mr. Kelly's behalf. Two of them are authored by persons who hardly know Mr. Kelly. The other two letters are written by Mr. Kelly's

73-year-old mother, who also attended in court for the sentencing hearing. In the letters, Mrs. Kelly indicates her love for her son and her plea that he be returned to Fort Good Hope. I mean no disrespect whatsoever to Mrs. Kelly when I observe that a mother's love knows no bounds.

I return again to the 43-year-old woman who is the victim of Mr. Kelly's vicious assault.

She filed a Victim Impact Statement with the Court in which she attempts to describe the harm done to her by this crime and how this crime has affected her life. As stated, she has permanent reduction of the vision in her left eye. She endures pain in the eye and soreness in her left cheekbone. Her teeth are still loose and are painful, and she is in need of dental work and cannot, at least as of the date of the Victim Impact Statement, eat out of one side of her mouth. She has scars on her face that give her low self-esteem and that require plastic surgery. She states that she suffers from insomnia, nightmares, flashbacks, and panic attacks which affects her ability to breathe, and all of this related to her ordeal at the hands of Adrian Happy Kelly. She remains scared and paranoid, always feeling that someone is going to attack her. She is no longer able to trust people and

has lost the intimate part of her relationship with her boyfriend or partner. She has had suicidal thoughts. It is not an overstatement, in my view, to say that Mr. Kelly has ruined her life.

In the determination of a sentence for this offender, Adrian Happy Kelly, for this crime, the primary consideration is obviously the protection of the public, in particular, the protection of women. It almost goes without saying that the sentence must also reflect our society's denunciation or repudiation of such appalling criminal behaviour. The important objective of deterrence, both specific and general, is also a major consideration given the circumstances of this case, the fact that Mr. Kelly is a repeat offender, and the fact that we have such a high incidence of sexual assault generally in this jurisdiction.

There are many aggravating circumstances to this case. In particular, there is the extent of the gratuitous violence and threats which accompanied this sexual assault and the injuries which resulted, both physical and psychological. Mr. Kelly, in doing what he did, displayed a contemptuous disregard for the personal feelings and the bodily integrity of another human being.

This was a prolonged attack over two hours, during which the victim was pleading for her life. It is also an aggravating feature that this offender has a prior conviction for a similar serious offence.

There is but one mitigating feature, and that is Mr. Kelly's plea of guilty.

In all of the circumstances, including the fundamental sentencing principle of proportionality - that is, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender - I am satisfied that a lengthy penitentiary term is required in this case.

Once having determined the term of imprisonment, I must consider a request made by the Crown prosecutor in this case that I increase the period of parole ineligibility for Mr. Kelly to one half of the term imposed pursuant to Section 743.6 of the Criminal Code. That section of the Criminal Code permits the Court in certain circumstances to override the usual authority of the National Parole Board to determine when an inmate might be eligible for full parole, and the operative part of the section reads as follows:

"The court may, if satisfied,  
having regard to the

circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence..."

The section goes on to say:

"For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to those paramount principles."

In considering again the objective of denunciation, I note the particular degrading aspect of Mr. Kelly's crime, the viciousness of the violence perpetrated on the victim over a period of a few hours, and the fact that there

was not just one assault but several. I also note the genuine fear for her very life which the victim endured over the duration of this attack in the circumstances which pertain, that is, it was at an isolated location where she could not seek or expect help or assistance from anyone, it was in the dark of night, and she could hardly see because of the blood running down her face and because of the swelling around her eyes.

As to the objective or principle of specific deterrence, I note in particular that a previous five-year sentence, actually served in full, did not seem to have had a resulting deterrent impact on Mr. Kelly's commission of subsequent crimes, including the present offence.

In all of the circumstances, I am satisfied that both the expression of society's denunciation of this particular offence and the objective of specific deterrence of this offender require an order under Section 743.6. I am not satisfied that denunciation or specific deterrence will be achieved without a Section 743.6 order.

Please stand, Mr. Kelly.

Adrian Happy Kelly, for the crime that you have committed, aggravated sexual assault contrary to Section 273(2)(b) of the Criminal

Code, it is the sentence of this court that you be imprisoned for a period of 14 years. I order, pursuant to Section 743.6(1) of the Criminal Code, that you must serve one half of this sentence before you may be released on full parole. I further grant the DNA order sought by the Crown. I further order, pursuant to Section 490.012(1) of the Criminal Code, that you comply with the Sex Offender Information Registration Act for life. I further grant a firearms prohibition order, pursuant to Section 109 of the Criminal Code, for life. I further order that the two firearms seized from Mr. Kelly's vehicle be forfeited to the Crown, and, finally, I direct that there be no victim fine surcharge. You may sit down, Mr. Kelly.

Now, Counsel, is there anything further with respect to this case?

MS. SMALLWOOD:                    Nothing on behalf of the Crown, sir.

MS. TAYLOR:                        I don't know if it's too late to ask for a Section 113 exemption in the event that -- for sustenance. We do have evidence before the Court that he has hunting skills and it was useful to -- for the benefit of his family in the past.

THE COURT:                         Well, firstly, it is too late,

and, secondly, in any event, I am not satisfied on the evidence presented that it justifies a court-ordered exemption from the firearms prohibition order.

If there is nothing else, then we will close court. Thank you.

(CONCLUSION OF REASONS FOR SENTENCE)

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Certified Pursuant to Rule 723  
of the Rules of Court

Jane Romanowich, CSR(A), RPR  
Court Reporter