

S-1-CR-2007-000014  
S-1-CR-2007-000015

R. v. Esau, 2007 NWTSC 99

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JOSHUA ESAU

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Transcript of the Reasons for Sentence by The Honourable  
Madam Justice R. Nation at Inuvik in the Northwest  
Territories, on Tuesday, October 30 A.D., 2007.

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APPEARANCES:

Mr. B. Lepage: Counsel for the Crown

Mr. J. Mahon: Counsel for the Accused

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Charge under s. 271 x 2 of the Criminal Code of Canada

Official Court Reporters

1 THE COURT: All right. Thank you.

2 This is a sentencing of Joshua Esau on two  
3 convictions of sexual assault. The conviction on  
4 the first assault was by a jury so there is no  
5 statement of facts as they were found by the  
6 court but to convict, the jury must have accepted  
7 the evidence of the complainant Jenna that when  
8 she was between the ages of six and ten at least  
9 on one occasion and possibly two the accused  
10 licked her vaginal area.

11 The accused pled guilty to the second  
12 assault as the jury was being impaneled for the  
13 trial on that charge, which had been scheduled to  
14 follow the trial on the first assault against  
15 Jenna. The Agreed Statement of Facts in relation  
16 to that assault are marked as Exhibit S-1 and  
17 they indicate between 1988 and 1995 the accused  
18 would babysit Angela and on two occasions the  
19 accused entered her bedroom, held her down,  
20 removed her pants and underpants and touched her  
21 bum and vaginal area, putting his finger in her  
22 vagina. On the second occasion, he tried to get  
23 Angela to touch his penis, at which point she  
24 screamed and bit his hand. Angela was somewhere  
25 between the ages of four and seven when this  
26 occurred.

27 The victims' father had been taken in as a

1 child by the family the accused's father and it  
2 was agreed that the accused is the foster brother  
3 of the girl's father so that the accused was  
4 considered to be or treated to be an uncle to the  
5 victims. The evidence is that the accused was  
6 staying at the house where the complainants lived  
7 with their parents and he stayed there from time  
8 to time as a youth during his parents' domestic  
9 disputes and separations. The events occurred  
10 when Mr. Esau was between 18 and 21 years old.

11 The information about the offender that is  
12 set out in the pretrial report, which is Exhibit  
13 S-3, describes him as 33 years old. The report  
14 is equivocal as to whether the offender expresses  
15 remorse. In one way it indicates he accepts  
16 responsibility and is sorry but in another sense  
17 he is evasive about a true understanding of the  
18 crime and its effect to the family members.  
19 Clearly there was little disclosure of the  
20 offence or the charge to the family members by  
21 the offender or details of the offence to his  
22 current common-law spouse.

23 There seems to be a consensus in the report  
24 that the offender would benefit from some therapy  
25 or rehabilitation if only in relation to  
26 communication with his family.

27 The offender is Inuit. His family

1 background is described in detail in the  
2 presentence report. He is the seventh of ten  
3 children. His father was a hunter and trapper.  
4 Alcohol usage and physical abuse by his father  
5 against his mother is described in the report.  
6 He lived in Sachs Harbour and then more recently  
7 in Inuvik. The accused has a 15-year-old son  
8 with whom he has no contact. He is currently in  
9 a common-law relationship and his partner is  
10 pregnant. It does not appear that the offender  
11 completed high school but he has worked  
12 seasonally as a guide for hunting and also  
13 temporarily as a carpenter in Saskatchewan.

14 A Victim Impact Statement was provided by  
15 Angela who is 18 years old, or was 18 years old  
16 when she wrote the statement. Her statement is  
17 an indication of how scared and hurt she was and  
18 that she was, like so many other young victims of  
19 sexual assault, unable to talk to any adult about  
20 it. She outlines her troubled adolescence and  
21 the loss of respect for herself, which she  
22 attributes to these incidents. It is a poignant  
23 reminder to all of us how long lasting and  
24 serious the effects of these crimes can be for  
25 the victim.

26 The primary principles which relate to this  
27 sentencing are the principles of denunciation and

1           deterrence. The denunciation is a public  
2           condemnation of the activity of the offender.  
3           Our society does not accept sexual abuse of  
4           children. The Victim Impact Statement of Angela  
5           and the evidence of Jenna with her obvious upset  
6           while she testified on the stand illustrates the  
7           feeling of upset, shame, confusion and  
8           humiliation to a child who is assaulted by a  
9           family member. The effect on the victim lasts  
10          for a long time after the event occurs.  
11          Deterrence is to deter this offender specifically  
12          from this type of conduct as well as to deter the  
13          public in general from acting this way.

14                 The third sentencing principle that comes  
15          into play is rehabilitation. This is important  
16          as the offender can benefit from some insight  
17          into his behaviour with the hope it would stop  
18          any reoffence, although I acknowledge that there  
19          is no evidence before me of any ongoing issues  
20          from the time of the offence to the current time.

21                 As the offender is aboriginal, I have to  
22          consider his circumstances in that context and  
23          consider the considerations in the Gladue case.  
24          The presentence report has outlined his  
25          background. No doubt his upbringing plays into  
26          the situation here. I note he has not availed  
27          himself of any specific aboriginal programs or

1 counselling, nor does the presentence report or  
2 his counsel ask for any special accommodation due  
3 to his background other than the consideration of  
4 his institutional placement which I agree is  
5 important. I note here that the victims also  
6 were aboriginal and so the crime was between  
7 community members and that is a concern in a  
8 small community in the north. Also, this is a  
9 serious offence and so although the Gladue  
10 principles are important they may become less of  
11 the focus as it is recognized here that the  
12 sentence will involve incarceration.

13 The mitigating factor that I have to take  
14 account of is that the accused did plead guilty  
15 on the second charge. It was as the jury was  
16 being impaneled but he did spare the second  
17 victim from testifying at trial. He did not  
18 insist on a preliminary inquiry. That deserves  
19 some credit obviously but not the same amount  
20 that an earlier guilty plea would attract.

21 In addition, the accused was youthful at the  
22 time of the offences. He has no adult criminal  
23 record. His one conviction is a youth conviction  
24 in 1989 when he was 15 for break and enter and it  
25 really has little impact here today.

26 The aggravating factors are that the assault  
27 was against young children and also that the

1 offender, although not formally in a position of  
2 trust, was considered a family member. He was an  
3 adult but a very young adult. Section 718.2  
4 indicates both the age of the children is an  
5 aggravating factor and the position of trust,  
6 although I recognize that it is not a formal  
7 position of trust but there would be some  
8 equation in the children's mind of his position.

9 The general starting point for a major  
10 sexual offence would be a three-year sentence  
11 with the specifics to be examined. The Court of  
12 Appeal has indicated that digital penetration of  
13 a young child is significant and raises this  
14 beyond what would be termed a "fondling" case to  
15 a major sexual assault. So they start with the  
16 starting point of three years and then look at  
17 various factors. I do think it is important to  
18 note here that this is not a case of sexual  
19 intercourse or anything of that nature. One has  
20 to look at the details of the offence, the sexual  
21 intrusiveness of the conduct, the degree of  
22 violence used and the position of the offender.

23 Viewed in this way, the conviction in  
24 relation to Angela is the more serious offence  
25 and viewed separately, a range of two to two and  
26 a half years' imprisonment would be the range of  
27 a suitable sentence. The conviction related to

1 the violation of Jenna would carry a sentence in  
2 the range of 10 to 18 months.

3 There is some difficulty here in the  
4 sentencing as there are two distinct offences on  
5 two different indictments but from the evidence I  
6 am unable to tell how separate in time they are.  
7 One method of approaching this would be to  
8 recognize that and as it is hard to say that they  
9 are distinct in time to run the sentences  
10 concurrently.

11 Another way to view it is to see the  
12 offences as distinct and to run consecutively,  
13 but in that case the totality principle would  
14 warrant a look at the total time as this is the  
15 first conviction registered against the offender  
16 as an adult and also his first conviction for  
17 which formal or adult gaol time would be given.

18 There is probably not a lot of difference in  
19 the result but I find the appropriate way to look  
20 at the offence is to view them separately and to  
21 run the sentences consecutively. So choosing a  
22 sentence of 10 months as being appropriate on the  
23 first conviction for Jenna and 30 months as being  
24 appropriate on the second for Angela and that  
25 they would be served consecutively, that would be  
26 a period of incarceration of 40 months. On the  
27 totality principle that is excessive and as a

1 result I find the appropriate sentence would be a  
2 period of three years. This would be reduced for  
3 the time served. There has been two months  
4 served presentence. A two-for-one credit is  
5 appropriate. That is acknowledged by the Crown  
6 so that would be a reduction of four months.

7 So having considered all the factors, I  
8 conclude that a fit and total sentence to pass  
9 against Mr. Esau is 32 months. There will be a  
10 DNA order. Under section 487.052(1) there are a  
11 number of considerations I have to look at  
12 because this offence happened before the Act on  
13 those sections were put in force. There is a  
14 criminal record here that is not a consideration  
15 but when I look at the nature of the offence that  
16 it was against children, that there is more than  
17 one offence and more than one child and it was  
18 with family members, I do find that it is  
19 appropriate that there would be a DNA sample  
20 taken. The method is not intrusive these days  
21 and I note that the offender after his  
22 incarceration will be back in the community and  
23 will likely be in association with young  
24 children.

25 There will be a firearms prohibition. Under  
26 section 110 it is mandatory for 10 years with  
27 offences of sexual assault but under section 113

1 I am going to make a direction to the chief  
2 firearms officer or the registrar to issue  
3 whatever is authorized under section 113 so that  
4 this court order is not to apply to subsistence  
5 hunting or trapping and either of those for  
6 subsistence or employment purposes. The reason  
7 is that the offender is aboriginal. It is clear  
8 from the presentence report and his past  
9 employment that he has at times been involved  
10 with hunting for employment purposes. There was  
11 no use of a weapon in this offence and I don't  
12 have concerns about him being in the community  
13 with access to firearms for subsistence or  
14 employment reasons.

15 There will be no victim fine surcharge as  
16 the presentence report indicates that there is  
17 little chance of that being paid due to his  
18 economic circumstances before incarceration and  
19 the fact that he is now incarcerated.

20 There will be no order under the Sex  
21 Offender Information Registration Act. The Crown  
22 has not asked for that and there are issues about  
23 the retroactivity that neither counsel wish to  
24 argue today.

25 I am going to direct that a copy of the  
26 sentencing, as well as a copy of Exhibits S-1  
27 through S-4 be provided to Corrections Canada so

1           they will have the benefit of these reasons and  
2           those exhibits in terms of the placement of this  
3           offender because his aboriginal background and  
4           those circumstances I think should be clear to  
5           and known to them in their choice of where he is  
6           incarcerated since he does have a common-law  
7           spouse here who is expecting a child and the  
8           other background issues that I have reviewed.

9           All right. I believe that deals with all  
10          the matters.

11         MR. MAHON:                   Your Honour, if I might ask in  
12           respect of the Warrant of Committal oftentimes in  
13           sort of the vein of the last comment from the  
14           court, the court has endorsed on the face of the  
15           Warrant of Committal that it is recommended that  
16           the time be served in the Northwest Territories  
17           on the Warrant of Committal itself. My friend  
18           spoke about that in his submissions. I'm not  
19           sure --

20         THE COURT:                   Do you have any comment?

21         MR. LEPAGE:                  No, Your Honour.

22         THE COURT:                   I am fine to make that  
23           endorsement that it is recommended that it be  
24           served in the Northwest Territories but as you  
25           know that is not directive; it is just a  
26           recommendation because Corrections Canada makes  
27           their own independent decisions.

1 MR. MAHON: Thank you, Your Honour. Those  
2 are all my matters before the court.

3 THE COURT: Thank you.

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

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Janet Harder, CSR(A)  
Court Reporter

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