

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

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.

APPEARANCES:

Mr. B. Lepage: Counsel for the Crown
Mr. J. Mahon: Counsel for the Accused

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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