

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

ERIC JOSEPH NELSON

Transcript of the Oral Reasons for Sentence by The
Honourable Justice L. A. Charbonneau, sitting in
Yellowknife, in the Northwest Territories, on the 22nd day
of October, A.D., 2009.

APPEARANCES:

Ms. J. Walsh: Counsel for the Crown

Mr. M. Hansen: Counsel for the Defence

Charge under s. 348(1)(b) Criminal Code of Canada

1 THE COURT: Mr. Nelson pleaded guilty
2 earlier today to a charge of break and enter into
3 a dwelling house and committing an indictable
4 offence, and I must now decide what sentence
5 should be imposed on him for this crime.

6 Sentencing requires a balancing of several
7 factors. The Court has to take into account the
8 circumstances of the crime that has been
9 committed, it has to take into account the
10 principles of law that are set out in the
11 Criminal Code and tell judges how they should
12 approach sentencing, and it has to take into
13 account the personal circumstances of the person
14 who is being sentenced.

15 The circumstances of the offence in this
16 case can be summarized briefly. On the date in
17 question Mr. Nelson was intoxicated. He broke
18 into the house of his aunt, who is in her 70s, in
19 the middle of the night. She was sleeping on a
20 couch and was using her jacket as a pillow.
21 Mr. Nelson took her jacket, there was some money
22 in it I am told, \$80. It was never recovered
23 even though eventually the jacket itself was
24 returned to her.

25 The victim was upset by this,
26 understandably, and even more so because for some
27 period of time while this was going on and

1 Mr. Nelson was in the house he talked dirty to
2 her, meaning he was telling her to take off her
3 clothes and telling her to sleep with him. She
4 had to tell him several times to leave, and at
5 first he did not comply. She threatened to call
6 the RCMP, and eventually Mr. Nelson did leave and
7 thankfully nothing further had happened.

8 It is not difficult to imagine how
9 frightening this whole experience must have been
10 for the victim. It is often said that a person
11 should feel the safest in their own home, and the
12 sanctity of this woman's home was completely
13 violated by Mr. Nelson's actions. Moreover,
14 elderly people should be able to expect respect
15 and protection from young people, not to be
16 subjected to this kind of abuse.

17 From time to time the Court hears about
18 cases involving the financial abuse or other
19 forms of abuse that is sometimes visited on the
20 elderly, and that kind of conduct is truly
21 despicable. Even though there was no damage to
22 the door and no physical injuries to the victim,
23 I do consider this to be a very serious offence;
24 the invasion of a home always is a serious
25 offence. I do not have a victim impact statement
26 from the victim in this case, but the facts make
27 it clear that when she was attended to after this

1 incident she was very upset, and we know that
2 emotional scars often take much longer to heal
3 than physical injuries.

4 So I agree with the Crown that this is a
5 serious offence and that deterrence and
6 denunciation are paramount sentencing principles
7 that I must uphold in this case, but this does
8 not mean that I should ignore other sentencing
9 principles. As I said, I have to take into
10 account other things that I have heard this
11 morning, including what I have heard about
12 Mr. Nelson's personal circumstances. Obviously
13 there is much that the Court does not know about
14 him, but the Court knows from the submissions
15 presented this morning that he faced difficult
16 circumstances as he was growing up.

17 As counsel said, Mr. Nelson was subjected to
18 very serious abuse. Whatever that abuse was it
19 is possible, and one might even say probable,
20 that it contributed to Mr. Nelson's subsequent
21 difficulties. It also seems clear that a lot of
22 the clashes that Mr. Nelson has had with the law
23 over the course of the last two decades, ever
24 since he was a youth really, have been fueled by
25 his abuse of alcohol. He admits that he is an
26 alcoholic and says that this has been a major
27 factor in him being in and out of jail since the

1 late '80s.

2 Sadly these are problems that the Court
3 hears about regularly in this jurisdiction. In
4 dealing with many aboriginal offenders the Court
5 hears about them growing up in difficult
6 circumstances with some family dysfunction,
7 facing all kinds of physical and emotional abuse,
8 turning to alcohol and drugs at a young age and
9 then spiraling into more and more difficulties as
10 a result.

11 By law the Court is obligated to approach
12 the sentencing of aboriginal offenders, taking
13 into account any kind of systemic difficulties or
14 factors that may have contributed to their
15 problems with the law. The Court is also
16 obligated to consider whether sanctions other
17 than imprisonment could be crafted to assist
18 these offenders with their rehabilitation, taking
19 into account their special circumstances while
20 also achieving the other important roles of
21 sentencing, including the goal of protecting the
22 public. So I have in this case tried to approach
23 the sentencing keeping those important principles
24 in mind.

25 A break and enter in a dwelling house, a
26 home, as I have already said is always a serious
27 offence. It is so serious that the maximum

1 penalty for it in the Criminal Code is life
2 imprisonment. I consider in this case that the
3 age of the victim is an aggravating factor
4 because it likely made her more vulnerable. I
5 say likely because we should not assume that
6 elderly people are helpless or incompetent, but
7 given the difference in age between these two
8 people I do not think it is unreasonable to
9 assume that this victim was in a vulnerable
10 position when she found herself with this
11 intoxicated man in her home.

12 As for the family relationship between the
13 two, it may well have made this event even more
14 shocking to the victim, especially given the
15 highly inappropriate sexual comments that
16 Mr. Nelson made to her. But I agree with defence
17 counsel that whatever trust relationship can be
18 said to exist between relatives it is not a
19 particularly significant factor in the context of
20 this case. Mr. Nelson broke into the house so it
21 is not as though he had been invited in there as
22 a guest because of the trust relationship and
23 then proceeded to abuse that trust by committing
24 an offence while in the house. But certainly
25 from the perspective of the victim this crime
26 must have created for her a sense of betrayal,
27 because obviously no one expects to be treated

1 this way, especially not by a relative.

2 Another aggravating factor is Mr. Nelson's
3 criminal record, which is extensive. It shows a
4 consistent pattern of criminal activity over the
5 last 20 years. The Court should not punish him
6 again for the crimes he has already been
7 sentenced for, of course, but the record does
8 suggest that he has consistently been a threat to
9 the safety of others over the past several years.
10 He has not only broken into places and stolen
11 things, but he has committed several assaults on
12 people and has often been sentenced to jail terms
13 of some significance.

14 I have to consider also whatever mitigating
15 factors may exist. Apart from the issue of
16 credit to be given to the time that Mr. Nelson
17 has spent on remand, which I will address in a
18 moment, the most significant mitigating factor is
19 the fact that he has pleaded guilty to this
20 offence. This was not a guilty plea at the first
21 opportunity, there was a preliminary hearing and
22 the victim did have to testify. However, at the
23 time his preliminary hearing was held Mr. Nelson
24 faced three charges arising from this incident
25 and his jeopardy was considerably higher.

26 I am told, and it is not disputed by the
27 Crown, that upon being committed to stand trial

1 for this one offence he was ready to plead guilty
2 to it immediately, but the Crown wanted to take
3 more time to consider its position. So given all
4 of this, this should not be treated as a late
5 guilty plea. It is unfortunate that the victim
6 had to come to court to recount what happened
7 that night at the preliminary hearing, but under
8 the circumstances of this case I consider that
9 the guilty plea is deserving of considerable
10 credit.

11 The Crown is saying that a fit sentence for
12 this offence, not taking into account the remand
13 time, should be one of two years less a day. The
14 Crown says I should give credit for the time that
15 Mr. Nelson has spent on remand on a ratio of
16 one-for-one or 1.5-for-one, which would bring the
17 net sentence between 15 and 18 months
18 imprisonment. The Crown is asking that I place
19 Mr. Nelson on probation after his release even
20 though he has a very poor track record of
21 compliance with court orders. The Crown wants me
22 to place Mr. Nelson on probation so that there
23 can be a condition limiting his contact with the
24 victim and also conditions having to do with
25 counselling which may assist him in his
26 rehabilitation.

27 Mr. Nelson's counsel is asking that there be

1 no further imprisonment imposed for this offence,
2 but that instead I impose a lengthy period of
3 probation. Alternatively he suggests that a
4 range between three and six months in jail
5 followed by probation could be appropriate.

6 I recognize that there are circumstances
7 where, taking into account the circumstances of
8 aboriginal offenders, the Court may decide not to
9 impose imprisonment when imprisonment might
10 otherwise have been warranted and also that the
11 Court may reduce a term of imprisonment because
12 of those circumstances.

13 But I have concluded in this case that to
14 impose no jail at all today and simply place
15 Mr. Nelson on probation would not be a fit
16 sentence for the crime that he has committed. I
17 do understand that he is anxious to be released
18 to be able to see his son again, to go back to
19 work and start working towards his goal of moving
20 away from Fort Liard, possibly go back to school
21 and go on with his life hopefully on a different
22 path, but as I said at the beginning this
23 sentencing is not only about Mr. Nelson.

24 The decision I make has to take into account
25 other things as well. It has to take into
26 account the need for the Court to send very clear
27 messages to the community as a whole about how

1 serious it is to violate the sanctity of a
2 person's home and how serious it is to take
3 advantage of or mistreat elderly people in the
4 way that Mr. Nelson did.

5 My decision also has to make it clear to him
6 that no matter what circumstances he faced as a
7 youth, and even if he at that time may have been
8 the victim of other people's wrongdoings, there
9 will continue to be serious meaningful
10 consequences to him if he continues to make the
11 choice to consume alcohol, knowing that when he
12 does he does cause harm to others.

13 As I have already alluded to, Mr. Nelson's
14 criminal record demonstrates that over the years
15 he has caused a lot of harm to a lot of people.
16 He has been sentenced to jail several times, so
17 presumably for those periods of time when he was
18 in jail and not consuming alcohol he was aware at
19 least to some degree of how he can behave when he
20 is under the influence of alcohol.

21 So even though he says he wants to put an
22 end to this, and even believing that he is
23 sincere in saying that, and even accepting that
24 he now may have more insight than before into his
25 behavior, the Court still cannot completely
26 ignore the consistent pattern of behavior he has
27 engaged in over the last several years.

1 So in my view it is imperative, not just for
2 Mr. Nelson's own good but for the protection of
3 those around him, to make sure that this sentence
4 underscores for him that his conduct on this day
5 was very serious and to encourage him to truly
6 take steps to change his ways. So for those
7 reasons, in my view, a further jail term is
8 required to address the principles of
9 denunciation and deterrence.

10 I am also of the view that it is not
11 inconsistent with Mr. Nelson's rehabilitation
12 because he can continue some of what he has
13 started as far as personal work while he has been
14 on remand. I am speaking here of what he has
15 said about thinking about his life and thinking
16 about where he wants to go from here. While in
17 custody he can benefit from counselling programs,
18 he might also even be able to take some schooling
19 and educational opportunities offered within the
20 facility, and all of this may well provide him
21 with a stronger foundation to build on when he is
22 released, because that will be when the true test
23 is as far as whether he can truly stay away from
24 alcohol and pursue a healthy and constructive
25 lifestyle.

26 To assist him in that, and even though there
27 is before this Court a record of very poor

1 compliance with court orders, I will go along
2 with the suggestion of counsel to have a term of
3 probation follow his release, and then it will be
4 up to Mr. Nelson to decide if he wants to make
5 use of that tool to assist him. I have heard
6 that there are people in his community who are
7 there, are respected and want to help. So that
8 help, the help of whatever probation officer
9 works with him, will be there if he chooses to
10 make use of it.

11 As I have said, the Crown is suggesting that
12 essentially I give Mr. Nelson credit for between
13 six and nine months for the time he has spent on
14 remand. The Crown says that in this jurisdiction
15 the situation in the facilities are such that
16 inmates on remand have access to almost all of
17 the same programs as serving prisoners, and for
18 that reason is suggesting that a two-for-one
19 ratio is not appropriate. Defence counsel, on
20 the other hand, is asking that I do use a
21 two-for-one ratio in calculating how much credit
22 will be given for the remand time.

23 Of course, the credit to be given to the
24 remand time is a matter of discretion, but the
25 jurisprudence from the Supreme Court of Canada
26 has provided some guidance to sentencing judges
27 about some of the factors that must be

1 considered. Particularly harsh detention
2 conditions are among those factors, and there is
3 no evidence of that here. But as the Crown
4 acknowledges, even in this jurisdiction there are
5 certain programs that remand prisoners do not
6 have access to. So that is a factor as well.
7 Another factor, of course, is that remand
8 prisoners do not earn remission on the time they
9 spend on remand.

10 So based on all of this, in my view
11 Mr. Nelson should get credit for his remand time
12 on a ratio between 1.5 and two-for-one. So for
13 the six months he has spent on remand I will give
14 him credit of ten months. This leaves the
15 question of how much of a jail term should be
16 imposed today. In attempting to arrive at a fit
17 sentence I have taken into account Mr. Nelson's
18 guilty plea which, for the reasons I have already
19 given, I do not treat as a late guilty plea even
20 though there was a preliminary hearing.

21 I have taken into account what has been said
22 about Mr. Nelson's increasing insight into his
23 behavior and I have taken into account what he
24 has said to me directly after the submissions of
25 counsel were finished. If I were to use the
26 range suggested by the Crown and with the credit
27 I have given Mr. Nelson for his remand time I

1 would arrive at a sentence of 14 months.

2 In my view, that would not at all be out of
3 line in the circumstances of this case given the
4 criminal record and the seriousness of the
5 offence, but there is never just one fit sentence
6 for a given crime committed by a given offender.
7 What I have heard from Mr. Nelson's counsel and
8 from him directly has convinced me that this is
9 an appropriate case to take a calculated risk and
10 exercise some restraint in the length of the jail
11 term to be imposed. Mr. Nelson, stand up please.

12 Mr. Nelson, for the offence you have
13 committed I am going to sentence you to a further
14 term of imprisonment of nine months. You can sit
15 down. This will be followed by a term of
16 probation of 18 months from your release. The
17 conditions of the probation will be that you take
18 counselling when and as directed by your
19 probation officer, that you have no contact with
20 your aunt except if she consents to it or if she
21 initiates it, and that you have absolutely no
22 contact with her under any circumstances when you
23 are under the influence of alcohol or any other
24 intoxicant.

25 I am also going to make a separate order, a
26 restitution order pursuant to Section 738(a) of
27 the Criminal Code, that within six months of your

1 release you will pay your aunt back the \$80 that
2 you took from her. No one has actually asked for
3 that, but even if it is not a very large sum of
4 money I think it is a good way to show that you
5 regret what happened and to make amends.

6 The Crown has asked that a DNA order be
7 issued. Break and enter in a dwelling house is
8 an offence that is listed in paragraph (a.1) in
9 the definition of a primary designated offence in
10 the Criminal Code, and when a person is found
11 guilty of an offence listed in that provision
12 Section 487.051(2) of the Code says that the
13 order is to be made unless the offender has
14 established that the impact of the order on him
15 would be grossly disproportionate to the public
16 interest that these orders are intended to
17 protect. No submissions were made here against
18 an order being made so there will be a DNA order,
19 as I have said, made under Section 487.051(2).

20 Given that I am imposing a further jail term
21 there will not be a victim of crime surcharge.
22 Is there anything else required that I have
23 overlooked, counsel?

24 MS. WALSH: No, Your Honour, not from the
25 Crown's perspective.

26 THE COURT: Mr. Hansen?

27 MR. HANSEN: No, Ma'am.

1 THE COURT: Mr. Nelson, I am sure you are
2 disappointed that you are not going to be
3 released today, but I would urge you to continue
4 to make use of the programs and resources that
5 are at the jail because you will be released, I
6 am not exactly sure when, but you will be
7 released probably before the nine months is over.
8 All the things you have talked about this morning
9 I hope you hold true even though the outcome of
10 this proceeding is not what you were hoping for.
11 You have spent a lot of time in jail, but you
12 have many many years ahead of you, and it is up
13 to you to decide what to do with them.

14 So counsel, before we close court I want to
15 thank you both for your submissions, they were
16 very helpful.

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

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Joel Bowker
Court Reporter

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