R. v. Vital 2009 NWTSC 29

S-1-CR2008000042

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

CHRISTOPHER JAMES VITAL

Transcript of the Reasons for Sentence by The Honourable Justice D. M. Cooper, at Yellowknife in the Northwest Territories, on April 30th A.D., 2009.

APPEARANCES:

Ms. J. Walsh: Counsel for the Crown

Ms. K. Payne: Counsel for the Accused

Charge under s. 271 Criminal Code of Canada

An order has been made banning publication of the Complainant/Witness Pursuant to Section 486.4 of the Criminal Code of Canada

THE COURT: Christopher Vital stands convicted by a jury on April 2nd, 2009, of the charge of having sexually assaulted a 12-year-old girl on or between December 9th, 2005 and September 26th, 2007 at Behchoko in the Northwest Territories. For this, the penalty can be a maximum of ten years in jail.

The Crown is seeking a sentence of a period of incarceration in the range of four years, arguing the accused was in a position of trust and the victim was 12 years old when the first sexual assault occurred. Crown counsel also points to the frequency of the assaults, the criminal record of the accused, and says there are no mitigating circumstances.

The Crown has filed a book of authorities which the Court has found to be helpful.

The defence argues that a lesser period of incarceration of two years would be appropriate given there was no evidence of intercourse, digital penetration, or even fondling of the genital area under clothing. She cites the case of R. v. Beaulieu, 2007 NWTSC 18 where the accused had assaulted a 13-year-old girl on two occasions, one of which intercourse was simulated without penetration and on the other where there was fondling of the genital area but no digital

penetration. The accused was not in a position of trust with the victim. He was sentenced to two years in jail on one count and one year consecutive on the second count. The defence also relies on the case of R. v. Casaway, 2004 NWTSC 61, where the accused was sentenced to two years in jail for having sexually assaulted an 11-year-old girl on one occasion by putting his finger in her vagina. He had two previous, albeit dated, convictions for sexual assaults of a less serious nature. He did not live in the same house as the victim but was a guest from time to time.

In any sentencing, the Court has to take into account the sentencing principles that are set out in the Criminal Code, the circumstances of the person who is being sentenced, the impact upon the victim, and the circumstances of the offence committed. Sentencing is a very individualized process, many things must be taken into account and balanced. It is not an easy thing to do because in every case there are many things to consider and many competing factors.

I will speak first about the sentencing principles that are set out in the Criminal Code. I am not going to read all of the applicable sections of the Code, but it is important to cite

some of them as they provide the legal framework for the decision this Court has to make.

The purpose of sentencing is set out in Section 718 of the Code. It reads as follows: The fundamental purposes of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and others from committing offences;
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> (c) to separate offenders from society where necessary;
>
> (d) to assist in rehabilitating offenders,
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and an acknowledgment of harm done to the victims and the community.

Another fundamental principle is set out at Section 718.1. It says:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Section 718.01 states:

> When a Court imposes a sentence for an offence that involves the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Section 718.2 sets out a number of principles. They do not all apply in this case but ones that should be considered are:

> (a) a sentence should be increased or reduced to account for any relevant or aggravating or mitigating circumstances; and
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

Section 718.2(a)(ii.1) states:

> Evidence that the offender, in committing the offence, abused a person under the age of eighteen years...shall be deemed to be aggravating circumstances.

Another important principle is that,

> (e) all available sanctions other than

imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

I will have to more to say about that principle in a moment. These are the principles and the legal framework under which I must operate today in attempting to decide what a fit sentence is for this offender for this crime.

The accused stands before the Court as a 31-year-old man who was born and raised in Behchoko and who has a Grade 9 education. He does not not speak or write English or Tlicho with a degree of fluency that one would expect from a Grade 9 graduate, and that has hampered his ability to make his way in life. He comes from a family of four brothers and one sister. His father died of cancer when he was eight years old. Prior to this period, the Court is told that the home was a troubled one where both parents struggled with problems related to alcohol consumption. The accused himself has had difficulties with alcohol although I note there is no evidence that alcohol played a role in any of the incidents that transpired in this case. The accused's work record is what counsel described as "spotty". He has worked driving a

water truck in Behchoko, spent a brief period at Snap Lake as a carpenter's helper, and also worked for a construction company as labourer.

He has a relatively long record of convictions but until 2008 these were mainly for break and enter or mischief. In April of 2008, the accused was convicted of assault and being unlawfully in a dwelling house and was given a conditional sentence of six months. Later in 2008, the accused was arrested on a charge of sexual assault which occurred subsequent to the time of his arrest in this case. In October of 2008, the accused was remanded into custody and despite some confusion with the Court on time spent serving sentences and time spent on remand, it is common ground between counsel that the accused has spent six months on remand. On March 10th, 2009, the accused was convicted on an unrelated charge of sexual assault and sentenced to nine months in jail and probation. The circumstances were that the accused had grabbed the buttocks of a woman who was on the walking trail surrounding Frame Lake in Yellowknife. On April 23rd, 2009, he was convicted on charges of resisting arrest and failing to comply with his recognizance.

While not the worst record the Court has

seen, it is nevertheless not an enviable one. It is noted that the sexual assault for which he was convicted on March 10th, 2009 occurred after the accused was charged with the offence before the Court. While the Court cannot perhaps treat this as a prior conviction in the usual manner, I cannot ignore the fact of the conviction and must attribute some weight to it.

I now turn to the facts in this case. To have found Mr. Vital guilty, the jury had to accept the evidence of the victim, and in my view that was a sound conclusion. I do not think that the jury's verdict, nor the evidence, leave much room for ambiguity but out of an abundance of caution I do find that the events unfolded in the manner described by the complainant with one exception. Regardless of how relentless a predator Mr. Vital was, and that is how I would characterize him, I find it difficult to accept that these assaults occurred seven days a week or virtually every day during a period that could have been as long as 21 months as related by the complainant. I have no doubt, however, that in reflecting on what happened to her, it seemed to her as if these assaults did occur every day. I do accept that they did happen, to use her words "more than [she could] remember" and that there

was a recurring and persistent pattern of sexual assault.

The key aspects of the evidence were that on the night of December 9th, 2005, the victim, who was born December 13th, 1992, was babysitting her two young nephews. She lived in the home of her parents along with her sister and her sister's common-law husband Christopher Vital. On this night, the parents and the sister were away and Mr. Vital entered the house at approximately 7:30 p.m. The victim was watching television and laying on a mattress in the livingroom of the two-bedroom house which was also the place where she slept at night.

Mr. Vital approached her and held her wrists with his arms as she was laying on her stomach. He then proceeded to push against her with his body while moving in a simulated act of sex or what was described at trial as "humping". From the complainant's evidence, the jury had to find that there were countless other incidents which routinely occurred after the sister and the parents had gone to bed. Mr. Vital would leave the bedroom where he slept with the sister during the night and assault the complainant in the manner described. As well, the complainant testified that often Mr. Vital would touch her

with his hands and fingers over and under her clothing in the area of the shoulders, arms, stomach, legs, knees, thighs, and chest.

The victim did not tell her sister or her parents what was going on for a long time because she did not want to have to deal with the police and go to court. She was afraid for her sister's happiness and she felt her family was going through enough. She finally did advise her sister of what Mr. Vital was doing but her sister, though seemingly troubled by the revelation, made her promise not to tell the parents. The sister either did not intervene with the accused or her inquiries of him were brushed off, nothing changed, and the assaults continued. This matter finally came to the attention of authorities on September 26th, 2007 after the victim had given a note to her teacher indicating that she was being abused.

I have reviewed the victim's impact statements filed with the Court. The victim has indicated she does not wish to have her statements read in open court. It is abundantly clear that the sexual assaults visited upon this young girl have had a profound and traumatic psychological impact.

In reading the statements, one is left with

the unmistakable impression that the memories of these assaults have been consuming her very existence and have left her bitter, severly depressed, and desperately unhappy. As she said in her statement, her life was a "living hell". She is extremely scarred emotionally from this experience and the Court can only hope that she will be able to cope with and overcome the nightmare of her ordeal now that this case has been concluded.

I want to now return to one of the sentencing principles that I referred to earlier which is engaged because Mr. Vital is an aboriginal person.

The provision in question, which is paragraph (e) of Section 718.2 of the Code, was interpreted and analyzed by the Supreme Court of Canada and that interpretation is binding on all Courts in this country. It was interpreted to be a remedial provision, a recognition by Parliament that aboriginal people are overrepresented in Canadian jails. The Supreme Court found that this section directs all courts to recognize that many aboriginal people have faced the systemic problems that have contributed to their overrepresentation in jails and that the provision creates a duty for sentencing courts in

all cases. This duty is to approach sentencing differently when dealing with an aboriginal offender, an approach that takes into account some of the systemic factors that have placed many aboriginal people in difficult conditions and have contributed to them coming into conflict with the law. It also requires the Court to examine the types of procedures or sanctions that might be most appropriate in light of a person's aboriginal heritage and in some cases it may mean a more restorative approach to sentencing.

This is a different analysis that must be undertaken both to decide the type of sentence that will be imposed, that is, a jail term or not a jail term, and if jail is imposed it can also have an impact on how long the sentence will be. The Supreme Court of Canada has also recognized what the section does not mean. It does not mean that the fact that an offender is of aboriginal descent is a mitigating factor. It does not mean that sentences imposed on aboriginal persons will necessarily be more lenient or different than the sentence that would be imposed on a non-aboriginal person for the same crime. In fact, the Supreme Court of Canada has specifically said that the more serious or violent an offence, the less likely it is that

the ultimate result is going to be different.

I have not heard evidence or submissions about any systemic challenge that Mr. Vital has faced as an aboriginal person. But I did hear that he lost his father when he was eight years old, that he functions at an educational level well below the ninth grade which he apparently achieved, and that he has struggled with alcohol abuse. As well, I have read the three letters of character that have been provided by his mother, an aunt, and a niece. They show that these relatives trust Mr. Vital and think that he has been and is a good person. Mr. Vital is fortunate to have the loyalty and support of his mother and his relatives.

There is nothing before the Court by way of evidence or submissions to assist in understanding why Mr. Vital committed this offence or the sexual assault referred to earlier. I find this disturbing and very troubling and trust that Mr. Vital will receive counselling upon his incarceration but it will be up to him as to whether or not he will avail himself of counselling and other programming.

The offence of sexual assault is, as I have said, punishable by up to ten years in jail. Few cases call for the maximum sentence to be imposed

and this is not one of them.

In law, sexual assault can cover a wide range of behaviour from simple touching to sexual intercourse. The duty of the Court is, among other things, to impose a sentence that is reflective of the gravity of the crime.

While there is no hard rule for minimal sentence per se, the general rule is that in serious cases of sexual assault a significant term of imprisonment, usually in excess of two years, is appropriate. Courts then look to the facts in the case to identify any aggravating or mitigating factors in order to arrive at a fit sentence.

There is no evidence that intercourse occurred in this case or even digital penetration. In cases where the victim is an adult, a Court could be persuaded that one incident in the nature of the assaults that occurred here would fall short of being characterized as a sexual assault on the more serious end of the scale.

But in this case, I find there are three aggravating factors.

First, the complainant was 12 years old when the assaults started and they continued for 21 months. Sexual assault is a serious offence

regardless of age but it is extremely serious when the victim is a child and very vulnerable. Adults will have developed some coping mechanisms which they can draw upon to try to get through traumatic events. A child has no such coping skills. And, as here, stands to have her childhood robbed from her and turned into a nightmare from which she may never fully recover. So this factor alone elevates the offence into the very serious category.

Further, it must be said that the repetitiveness of the assaults here is a highly aggravating factor. Had the behaviour ceased after the first or a few occasions, it may not have had the same nightmarish impact it has had on the victim. The accused was indifferent to the effect that his self-indulgence and sexual gratification were having on the victim. He had no sobering second thoughts and continued his conduct until arrested by the police.

Finally, Mr. Vital was in a position of trust with the victim. He may not have stood in loco parentis to her but he was an adult living in the same home with her while living in a common-law relationship with her sister. At trial he said that he thought of her like he thought of his little sister in Yellowknife and that the

relationship was if the victim was a little sister. Mr. Vital should have been her guardian in these circumstances and not her persecutor.

I can find no mitigating factors in this case. The accused had a right to have the charge against him proved in a court of law. As courts have made clear, the exercise of the accused's right to have a trial is not an aggravating factor but the accused does not derive the benefit of mitigation of sentence he may have had if he had entered an early guilty plea. Further, I find no evidence that the accused has shown any remorse for the crime that he committed.

Many Judges before me have commented on the prevalence of this type of crime in the Northwest Territories. It could be characterized as epidemic given the frequency of these offences. Courts in the Northwest Territories have almost invariably said that the principles of sentencing that require emphasis in these cases are denunciation, deterrence, and protection of the public. Sentences involving significant periods of incarceration have been meted out to offenders consistently for many years, and yet these offences continue. Something more is required to alter or affect this kind of behaviour. Community leaders must discuss this openly with

constituents and residents and condemn this conduct which violates and invades the bodily integrity of women, young and old. It is only when the community as a whole is prepared to send the message that anyone who commits a sexual assault will have lost all respect and earn the community's censure that the prevalence of this kind of offence might decrease.

The accused has spent six months on remand for having breached his recognizance. The Crown suggests that this time be credited on a one-to-one basis because the accused was not held in custody on the charge before the Court but rather because he was in breach of his recognizance. The defence argues that the remand time should be credited on a two-to-one basis as consistent with the law.

The Supreme Court of Canada in R. v. Wust, [200] 1 S.C.R. 455, said that while two months credit for every month spent in pre-sentence custody is appropriate to reflect the harshness of pre-trial custody, a different rationale can be applied depending on the circumstances of the detention and that the issue of credit for time served is to be left to the discretion of the sentencing Judge.

The Crown submits that remanded prisoners in

institutions in the Northwest Territories live in the same conditions as sentenced inmates and have all the program entitlements available to the general population save those programs that are offered outside the institution and those which would require the remanded inmate to discuss the circumstances of the offence for which he is charged and potentially admit his or her guilt. This state of affairs has been recognized by our courts in recent years [see R. v. Epelon, [2008] NWTTC No. 97] So, remand time in the Northwest Territories is neither harsh nor "hard time". It may be appropriate in a case in the future for evidence to be given by a senior official with the Corrections Division of the Department of the Justice (Northwest Territories) and to have this evidence placed on the public record of precisely what the conditions are for remand prisoners in the Northwest Territories.

Following the logic expressed by Bruser J. in the Epelon case, I agree that it would make no sense to credit an accused with remand time on a two-for-one basis where the accused is incarcerated for having breached his recognizance. To do so would invite those who are at large but facing a lengthy period of incarceration to breach their recognizances in

order to shorten their sentences. In the result, and to reflect the fact that there is no remission on time served on remand, I will credit Mr. Vital with eight months of incarceration.

Counsel have provided the Court with a number of authorities. I have reviewed the Beaulieu and Casaway cases submitted by defence counsel. In Beaulieu, there were two discrete sexual assaults. The accused had no previous convictions for sexual offences, and there was no victim's impact statement before the Court. In Casaway, there was one incident, and the accused's previous record of sexual assaults was 17 years old and the accused had received sentences of seven days intermittent on each charge consecutive which led the Court to infer that these offences were at the less serious end of the scale of these kinds of offences. As well, again, there was no victim's impact statement for the Court to consider.

I have balanced all of the factors I have referred to in an attempt to arrive at a sentence that is appropriate in all of the circumstances, including time spent on remand.

Please stand, Mr. Vital.

For the offence of sexual assault in this case, I consider a sentence of 44 months would be

appropriate but, taking into account time served on remand, will impose a sentence of three years of imprisonment.

You may sit down.

Counsel for the defence has asked that the Court recommend the offender be able to serve his sentence in the Northwest Territories so that he can be close to his family. I accept this submission and will make that recommendation and ask the clerk to endorse the warrant accordingly.

In the circumstances, the victim surcharge will be waived.

There will be a DNA order in the usual terms and a firearms prohibition order commencing today and expiring ten years from Mr. Vital's release from custody. As well, I make an order under the Sex Offender Information Registration Act requiring Mr. Vital to register and obligating him to report for a period of 20 years.

Is there anything, counsel, that I may have missed and you would like to address?

MS. PAYNE: No, sir, thank you.

MS. WALSH: Not from the Crown's perspective, sir, thank you.

THE COURT: I would like to thank both of you for your competent and professional conduct throughout the course of this matter, very

helpful. And I would also like to thank the court staff for the work that you have done as well. Thank you, we will close court.

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

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Lois Hewitt, CSR(A), RPR, CRR
Court Reporter