

R. v. Simon, 2010 NWTSC 07

S-1-CR2009000067

S-1-CR2009000105

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JOHNNY JEFFERY SIMON

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Transcript of the Reasons for Sentence by The Honourable  
Justice D.M. Cooper, at Yellowknife in the Northwest  
Territories, on January 27th A.D., 2010.

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APPEARANCES:

Ms. T. Nguyen: Counsel for the Crown  
Mr. T. Boyd: Counsel for the Accused

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Pursuant to Section 486.4 of the Criminal Code of Canada,  
an order has been made banning publication or disclosing  
any information which could reveal the identity of the  
Complainant/Witness identified in the charge under  
Section 271 of the Criminal Code

1 THE COURT: On November 9th, 2009, the  
2 accused entered guilty pleas on six outstanding  
3 charges, one of which was that he did commit a  
4 sexual assault upon L. K. on or  
5 about June 13th, 2007 at Inuvik, Northwest  
6 Territories. The other five offences all  
7 occurred in Fort McPherson on December 7th, 2008.  
8 They are that the accused did endanger the life  
9 of John Simon Sr. thereby committing an  
10 aggravated assault contrary to Section 268 of the  
11 Code; that on two counts he failed to comply with  
12 the terms of a probation order, first to have no  
13 contact with John Simon Sr., and the second, to  
14 not approach within 10 meters of his residence  
15 contrary to Section 733.1 of the Code. Further,  
16 that he did assault Douglas Vaneltsi by  
17 threatening him with a weapon contrary to  
18 Section 267(a). And, finally, that he had in his  
19 possession a weapon, namely a knife, for the  
20 purpose of committing an offence contrary to  
21 Section 88 of the Code.

22 Given the record of the accused and the  
23 seriousness of these offences, the Crown asks for  
24 a jail sentence of between eight and ten years.  
25 The defence suggests a provincial type sentence  
26 of two years less a day and that this would be  
27 appropriate in all of the circumstances.

1           The facts on the sexual assault matter are  
2 as follows:

3           On the 13th day of June, 2007, L. K.,  
4 who is a resident of the Inuvik  
5 hospital long-term care unit, left the unit for a  
6 walk. Ms. K. suffers from the effects  
7 of a serious brain injury and cannot care for  
8 herself. She has a functional age which varies  
9 according to the activity but is generally around  
10 that of a ten-year-old. She is very compliant  
11 but cannot make adult decisions for herself,  
12 including whether to consent to sexual contact.  
13 Her brain injury is apparent to any reasonable  
14 observer.

15           During her walk, she encountered the accused  
16 John Jeffery Simon and she went to drink with  
17 him. The two consumed a small amount of alcohol.  
18 The accused then took Ms. K. to an area  
19 of bushes where he removed her jeans and panties  
20 and had sexual intercourse with her which  
21 Ms. K. did not resist.

22           Ms. K. then returned to the  
23 hospital where she reported the incident. She  
24 was able to give only a scant description of the  
25 accused. A sexual assault kit was taken and  
26 semen found. The semen was later identified  
27 through DNA analysis to be that of the accused.

1 Ms. K. suffered no physical injuries as  
2 a result of the offence.

3 With respect to the other charges, on  
4 December 7th, 2008, the accused was bound by a  
5 probation order issued May 15th of that year  
6 being part of the sentence he received for having  
7 been convicted of assaulting John Simon Sr. At  
8 the time, he was also at large on an number of  
9 separate undertakings related to other offences.

10 On the morning of December 7th, at  
11 approximately 8 a.m., the accused attended at the  
12 home of the same John Simon Sr., age 78, in Fort  
13 McPherson and beat him to the point of  
14 unconsciousness and in the course of the assault  
15 used a metal chair. The household was found to  
16 be in disarray and there were numerous blood  
17 stains on the floor.

18 I have seen the photographs of Mr. Simon,  
19 and there is no doubt that he was viciously  
20 beaten about the head.

21 When found by the police, the victim was  
22 unresponsive to pain or verbal stimulus and he  
23 was medevaced to Edmonton. After leaving John  
24 Sr.'s house, the accused encountered Mr. Vaneltsi  
25 and he threatened him with a knife.

26 Mr. Simon was hospitalised until the date of  
27 his death on February 9th, 2009.

1           At the time of the assault, Mr. Simon had  
2 other serious medical conditions including a long  
3 history of heart disease, tuberculosis although  
4 it was inactive at the time; he suffered some  
5 residual facial numbness as a result of a  
6 previous stroke and weakness from the previous  
7 assault by the accused against him in 2007. He  
8 also suffered from acute alcoholism.

9           As a result of the assault, the victim  
10 suffered injury to his brain. It is difficult to  
11 ascertain how grave and lasting the injury may  
12 have been since although Mr. Simon regained  
13 consciousness by approximately January 7th, 2009,  
14 he could barely speak and move his arms and body.  
15 He did appear to medical staff to be cognizant  
16 enough to make a mark on a paper to indicate his  
17 consent to the release of medical information.  
18 The extent of his bodily functioning, however,  
19 did not improve prior to his death.

20           Among other things, an autopsy confirmed  
21 that Mr. Simon Sr. died of heart failure and that  
22 although the head injury was considered a  
23 significant contributing factor to Mr. Simon's  
24 death, it was judged that his death would have  
25 occurred in the absence of the brain injury given  
26 his age and medical condition.

27           Having regard to the personal circumstances

1 of the accused, I have reviewed the very thorough  
2 pre-sentence report prepared by Ms. Huismanns  
3 which helps to understand how it is that the  
4 accused is in court today and has been virtually  
5 every year of his life since 1994.

6 The circumstances in which the accused grew  
7 up were unfortunate, even tragic, but all too  
8 familiar.

9 His mother was an alcoholic, and he did not  
10 know who his father was. His mother died as a  
11 result of a stabbing when he was a young teenager  
12 and it is suggested that no one was ever held  
13 accountable for the crime. The accused was  
14 shunted between residences, sometimes living with  
15 his grandfather John Simon, the victim here;  
16 sometimes with his uncle in Old Crow; and he  
17 spent several years in and out of a young  
18 offender group home as a teenager. He alleges he  
19 was sexually abused by his grandfather. He was  
20 exposed to severe alcoholism at a young age and  
21 was himself addicted to liquor and solvents,  
22 including propane and gasoline, at the age of 12.  
23 Although in recent years he lived with a woman  
24 and fathered two children, his life has been  
25 characterized by acute dysfunction and crime. He  
26 once tried to commit suicide. He has been  
27 unemployed for most of his life.

1           He holds his grandfather responsible for his  
2 mother's death. Coupled with his allegation of  
3 sexual abuse at the hands of his grandfather, the  
4 Court can discern the motive behind the  
5 offender's brutal assault on John Simon but that  
6 is not an excuse.

7           Most people interviewed by the probation  
8 officer were of the view, and the accused himself  
9 admitted, he has a severe problem with anger, and  
10 the probation officer is of the professional  
11 opinion that he is in need of a high degree of  
12 counselling and psychotherapy.

13           The criminal record of the accused discloses  
14 39 previous convictions, dating from 1994, and  
15 offences in every year except for 1998 and 2000  
16 when he was incarcerated for much of the time.  
17 He is an habitual criminal, in the plain meaning  
18 of that phrase, who has not been amenable to  
19 changing his ways despite countless  
20 interventions. He is a recidivist and either  
21 cannot or will not cease his criminal behaviour  
22 which has included numerous property offences,  
23 assault, resisting arrest, a previous conviction  
24 in 2002 for a sexual assault, many offences  
25 against the administration of justice, assault  
26 with a weapon in 2006, and assault causing bodily  
27 harm in 2008 involving his grandfather.

1           The one environment where the accused  
2 appears to be responding to counselling and  
3 programming is at the River Ridge corrections  
4 facility. The accused has never been  
5 psychologically tested but it is suggested that  
6 he has experienced some cognitive impairment. It  
7 is reported that his mother consumed alcohol  
8 throughout her pregnancy and his use of solvents  
9 would suggest that he may be suffering from some  
10 Fetal Alcohol Syndrome and Fetal Alcohol Effects.  
11 He admits to having a poor memory and other  
12 symptoms are further suggestive as is his use of  
13 solvents of organic brain damage. The  
14 programming at River Ridge is specifically  
15 designed to help those inmates who suffer from  
16 this kind of cognitive impairment and the accused  
17 wishes to serve any custodial sentence that I may  
18 impose at this facility.

19           The pre-sentence report would indicate that  
20 the accused has some feelings of remorse about  
21 the assault on his grandfather and that he does  
22 realize, as I have said, that he has anger  
23 management issues however it does not appear that  
24 he has a great deal of insight why his anger  
25 continues to fuel his destructive criminal  
26 behaviour. I have little doubt in his present  
27 state Mr. Simon would reoffend rather quickly if



1 released into society.

2 I should add that he has expressed no  
3 remorse whatsoever for the sexual assault  
4 perpetrated on L. K.

5 I turn briefly to the principles of  
6 sentencing which are familiar to counsel but  
7 which bear repeating.

8 The fundamental purpose of sentencing is to  
9 contribute, along with crime prevention  
10 initiatives, to respect for the law and the  
11 maintenance of a just, peaceful and safe society  
12 by imposing just sanctions that have one or more  
13 of the following objectives:

14 (a) to denounce unlawful conduct;

15 (b) to deter the offender and other persons  
16 from committing offences;

17 (c) to separate offenders from society where  
18 necessary;

19 (d) to assist in rehabilitating offenders;

20 (e) to provide reparations for harm done to  
21 victims or to the community; and

22 (f) to promote a sense of responsibility in  
23 offenders, and an acknowledgment of the harm done  
24 to victims and to the community.

25 I also take into consideration the  
26 principles of proportionality and totality and  
27 the provisions of Section 718.2(e) given that the

1 accused is an aboriginal person. I must say,  
2 however, that there is no evidence of systemic  
3 abuse in this case which might suggest a less  
4 restrictive sanction than imprisonment or a  
5 decrease in any period of incarceration which  
6 might otherwise be appropriate. This is a clear  
7 case where a significant jail sentence is  
8 warranted to give effect to the principles of  
9 sentencing which must be paramount here; namely,  
10 deterrence, denunciation, and protection of the  
11 public.

12 I note from the record of the accused that  
13 the offence of sexual assault would have been  
14 committed within a short time after his release  
15 from custody after having been sentenced to six  
16 months imprisonment on January 18th, 2007. He  
17 committed the other offences within months of his  
18 release on the sentence of ten months of  
19 incarceration for assault causing bodily harm on  
20 John Simon Sr. in 2008. It is noted that he was  
21 given credit for remand time and only did serve  
22 four months.

23 He has a previous conviction for sexual  
24 assault in 2002 for which he was sentenced to one  
25 year in jail. The victim in that case was also  
26 mentally disabled. A review of the transcript  
27 discloses that the Crown proceeded by summary

1 conviction and counsel had provided the Court  
2 with a joint submission calling for a sentence of  
3 one year which the Judge in that case somewhat  
4 reluctantly acceded to.

5 Sentences for aggravated assault, as the  
6 Crown has suggested, vary considerably depending  
7 on the facts in each case. The maximum is 14  
8 years but the maximum should only be imposed in  
9 the worst case for the worst offender. This is  
10 neither but it is certainly a very serious  
11 offence committed by an intractable recidivist  
12 offender.

13 In *R. v. Mitchell*, 2005 NLTD 80 (CanLii),  
14 the circumstances bore some similarity to those  
15 in this case. The victim was an 86-year-old male  
16 who was viciously assaulted by the accused who  
17 had a criminal history of violence. On appeal,  
18 the accused was sentenced to five and a half  
19 years, taking into account six months credit for  
20 time served on remand.

21 In the Manitoba case of *R. v. Harris*, 2004  
22 MBPC 4738 (CanLii), the accused violently  
23 assaulted a 14-year-old by repeatedly kicking him  
24 in the head. He was rendered unconscious and  
25 left close to death. The victim suffered severe  
26 injuries including damage to his brain and was  
27 left with motor impairment and loss of cognitive

1 functions from which he will not recover. The  
2 19-year-old accused was sentenced to five years  
3 in jail, taking into account a credit of 15  
4 months for time served on remand.

5 I consider the offence of sexual assault  
6 here to be very serious.

7 As the Crown has ably pointed out, the  
8 victim is a mentally disabled person and this is  
9 the second occasion on which the accused has  
10 preyed upon a victim with a mental disability.  
11 She cites the case of R. v. Rusk 2006 ABPC 365  
12 (CanLii) in which the trial Judge quoted with  
13 approval a statement of the Ontario Court of  
14 Appeal in R. v. Major (1996) 48 C.R. 296 and with  
15 which I agree, as follows:

16 Society has a special responsibility  
17 for those who are unable to fully  
18 look after themselves, children,  
19 infirmed, aged, and the blind, and  
20 those who took advantage of persons  
21 unable to protect themselves are  
22 particularly vicious.

23 Given the accused's record and the nature of  
24 the assault, the trial Judge rejected a joint  
25 submission for three years and imposed a sentence  
26 of six years in jail. While not disagreeing with  
27 the trial Judge's characterization of the offence

1 or her rejection of the joint submission, the  
2 Court of Appeal found the sentence unduly harsh  
3 and lowered the sentence to four years.

4 In the Northwest Territories, there is no  
5 set tariff for sexual assaults but a starting  
6 point is often to be found in the two and a half  
7 to three and a half year range. The range is  
8 increased or decreased depending upon aggravating  
9 or mitigating circumstances. The fact the victim  
10 here had a mental disability is aggravating, as  
11 is the fact that the accused had a prior record  
12 for sexually assaulting a mentally disabled  
13 person. He has shown no remorse. He is a  
14 definite threat to reoffend.

15 The only mitigating factors are his guilty  
16 plea, which came more than two years after the  
17 offence was committed but for which he must  
18 receive some credit, and the fact that he gave  
19 the police a partially inculpatory statement when  
20 finally confronted with DNA evidence in 2008.  
21 The Crown had earlier suggested that he ought to  
22 be given special consideration for his plea since  
23 it saved the cost and difficulty of prosecution  
24 where the victim has no recollection of the  
25 offence.

26 With respect, the Crown had DNA evidence  
27 implicating the accused, a K.G.B. application

1 would have been required to advance the case and  
2 possibly some expert evidence. It may have even  
3 been likely.

4 The accused gave a statement.

5 This is a serious case. While the guilty  
6 plea should be taken into consideration, I am not  
7 inclined to attach special weight to it simply  
8 because the Crown did not have a straightforward  
9 path to successful prosecution. I do take into  
10 consideration that the accused did not visit  
11 physical violence or any gratuitous or physical  
12 violence on the victim apart from the sexual  
13 aspect of the offence. On balance, I find that  
14 the aggravating factors outweigh the mitigating  
15 factors.

16 In sentencing the accused, I am mindful that  
17 I must consider the principle of totality and  
18 therefore I must be cautious in borrowing too  
19 readily from cases with similar fact situations  
20 and imposing precisely similar sentences. But  
21 nor can I set the bar too low so as to ignore  
22 what a fit and proper sentence would be in  
23 expressing society's denunciation of these crimes  
24 and giving effect to the principles of deterrence  
25 and protection of the public.

26 Now, I have surveyed approximately 20 cases  
27 in the Northwest Territories in which sentences

1 were imposed for manslaughter. The list is not  
2 exhaustive but, rather, representative of the  
3 seriousness with which our courts have dealt with  
4 this offence. I will briefly identify these  
5 cases for the record:

6 They are R. v. Raddi, 2001 NWTSC 50;  
7 R. v. Ettiagiak, [1986] N.W.T.R. 286 which both  
8 counsel have referred to; R. v. Baillargeon,  
9 [1986] N.W.T.R. 121, [1986] 3 C.N.L.R. 104 which  
10 Mr. Boyd referred to yesterday;  
11 R. v. Villeneuve, [1983] N.W.T.R. 274;  
12 R. v. Elias, 2006 NWTSC 41, [2007 A.W.L.D. 461;  
13 R. v. Krengnektak, 1980 CarswellNWT 16, 27 A.R.  
14 247; R. v. Itsi, 2005 NWTSC 92, [2006] A.W.L.D.  
15 463; R. v. Yukon, 2005 NWTSC 24; R. v. Caisse,  
16 2005 NWTSC 93; R. v. Sangris, 2003 NWTSC 51;  
17 R. v. Bruha, 2003 NWTSC 41; R. v. Attagutaluk,  
18 [1987] N.W.T.R. 21; R. v. E. (A.J.), 2000 NWTSC  
19 36; R. v. Kakfwi, 2004 NWTSC 58, [2006] A.W.L.D.  
20 1740; R. v. Stromberg, 2002 NWTSC 49;  
21 R. v. B. (R.M.), 2001 NWTSC 25; R. v. Bruha,  
22 2006 NWTSC 68, [2007] A.W.L.D. 1747;  
23 the first Bruha case is 2003, and this Bruha case  
24 that I am referring to now is 2006. R. v. Firth,  
25 2001 CarswellNWT 55, 2001 NWTSC 51; R. v. Drybones,  
26 [1986] N.W.T.R. 340; and R. v. Kierstead, 2003  
27 NWTSC 71.

1           Now sentences in these cases have ranged  
2           from ten years in jail to a conditional  
3           discharge. The average sentence on these  
4           manslaughter cases is 4.9 years. From my reading  
5           of them, and given the circumstances of the  
6           offence and the offender, I would place this  
7           matter in the higher end of the range and I would  
8           consider a sentence in the neighbourhood of seven  
9           years to be appropriate had the victim here died  
10          directly from his injuries. However, as defence  
11          has pointed out, the accused does not stand  
12          convicted of manslaughter and he ought not be  
13          sentenced for that offence which is punishable by  
14          up to life imprisonment.

15           I have decided to reject the submission that  
16          the sentence I impose on the accused for sexual  
17          assault be made concurrent to the penalty imposed  
18          for aggravated assault and the remaining  
19          offences. In my view, to do so would offend a  
20          basic legal principle, namely, that sentences for  
21          offences that were committed separately and are  
22          wholly unrelated should be made consecutive and  
23          not concurrent to one another. I would refer to  
24          the decisions in *R. v. Haines*, [1975] O.J. No.  
25          251, 29 C.R.N.S. 239; and *R. v. Chisholm*, [1965]  
26          2 O.R. 612.

27           I will say that if a concurrent sentence



1           were to be imposed for the sexual assault in this  
2           case, it could not help but send a message that  
3           would be perplexing indeed to the public and  
4           which would suggest the accused was effectively  
5           unpunished for that offence. To address the  
6           issue by imposing a sentence of from eight to ten  
7           years for aggravated assault, in my view  
8           overreaches and is either well outside of what  
9           would be an appropriate range or would smack of  
10          trying to do through the back door that which  
11          should be done through the front door.

12                     At the end of the day, I have sought to  
13          balance all of the relevant factors and to arrive  
14          at a sentence that fits not only the offences  
15          here but the offender.

16                     Stand up please, Mr. Simon.

17                     On the charge under Section 271, for sexual  
18          assault, I sentence you to two and a half years  
19          in jail.

20                     For the offence of aggravated assault upon  
21          John Simon Sr., you are sentenced to a term of  
22          imprisonment of three and one-half years.

23                     On the charge of breach of probation  
24          contrary to Section 733.1(1) for having had  
25          contact with John Simon Sr., I sentence you to  
26          six months concurrent.

27                     On the charge of breach of probation by

1 being within ten meters of the residence of John  
2 Simon, I sentence you to one month concurrent.

3 For the offence of assault upon Douglas  
4 Vaneltsi by threatening him with a knife, you are  
5 sentenced to six months consecutive.

6 On the charge of possession of a weapon,  
7 being a knife, for the purpose of committing an  
8 offence, you are sentenced to one month  
9 concurrent.

10 You have spent 14 months on remand, as I  
11 said in the Omilgoituk case earlier today, in the  
12 past year we have had the benefit in our courts  
13 of having heard cogent evidence from a  
14 Corrections supervisor concerning the conditions  
15 of remanded inmates in the Northwest Territories  
16 and I refer to the proceeding before Judge  
17 Schmaltz of our Territorial Court in R. v. Stuart.  
18 Suffice to say remand is not "hard time" in this  
19 jurisdiction and there is no compelling reason in  
20 this case to award you credit for time served,  
21 Mr. Simon, over and above what is necessary to  
22 acknowledge that you have not received the  
23 benefit and will not receive the benefit of  
24 statutory remission for the time that you have  
25 served. Accordingly, I am going to credit you  
26 with 20 months time served. Your sentence  
27 effectively totals six and a half years. If one

1 subtracts credit for time served, you will serve  
2 58 months in jail.

3 Given the progress that you seem to have  
4 been making in River Ridge and that institution's  
5 dedication to the treatment of FAS/FAE inmates, I  
6 make a strong recommendation that you be  
7 permitted to serve your sentence in the Northwest  
8 Territories and specifically at the River Ridge  
9 correctional facility in Fort Smith.

10 You can sit down, Mr. Simon.

11 I will make the DNA order under  
12 Section 487.051 and an order under the Sex  
13 Offender Information Registration Act. Further,  
14 I will order a Section 109 lifetime firearms  
15 prohibition.

16 Finally, I will decline to levy a victim  
17 crime surcharge in the circumstances here.

18 Does counsel have anything further?

19 MS. NGUYEN: Nothing further from the  
20 Crown, sir.

21 THE COURT: Are there any exhibits that  
22 need to be dealt with?

23 MS. NGUYEN: No.

24 MR. BOYD: Nothing from defence, Your  
25 Honour.

26 THE COURT: I would like to say something  
27 to you, Mr. Simon. Would you stand up for a

