

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

DARREN LEE KENNY

Transcript of the Oral Reasons for Sentence by The
Honourable Justice V. A. Schuler, sitting in Fort Smith,
in the Northwest Territories, on the 30th day of June,
A.D., 2010.

APPEARANCES:

Mr. M. Lecorre: Counsel for the Crown

Mr. J. Bran: Counsel for the Defence

Charge under s. 271 Criminal Code of Canada

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of the Criminal Code

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1 THE COURT: Darren Lee Kenny has been
2 convicted of sexual assault after a trial, and it
3 is now my duty to sentence him for that offence.
4 The circumstances of the offence were reviewed in
5 my judgement yesterday, so I will not go into a
6 great deal of detail again.

7 The victim and Mr. Kenny had been seeing
8 each other for a period of approximately two
9 weeks prior to the events in question. She
10 considered him to be her boyfriend and he appears
11 to have considered her as his girlfriend. On
12 the night in question, after a few minutes of
13 consensual kissing, Mr. Kenny ignored the
14 17-year-old victim's attempts to physically
15 resist him and her verbal protests and ground
16 his groin into her bum, then turned her over
17 and had intercourse with her, again despite her
18 resistance, and then moved her on top of him and
19 continued to grind or press against her until she
20 was able to get off him. She had not had sex
21 before and she told him that while this was
22 happening. She was very upset and crying after
23 these events.

24 Mr. Kenny's actions amount to a serious
25 sexual assault, a serious breach of the victim's
26 sexual privacy and integrity. The victim made it
27 clear to Mr. Kenny that she did not want to do

1 anything more after the kissing, that she wanted
2 to go to sleep, but he ignored that and went
3 ahead for his own sexual gratification.

4 Mr. Kenny was 26 years old at the time. Although
5 there is a nine-year age difference between him
6 and the victim, both were students at the college
7 here in Fort Smith at the relevant time.

8 The victim has been traumatized by the
9 incident. In her victim impact statements she
10 refers to being afraid to stay alone, to not
11 feeling safe, to feeling dirty and being
12 distrustful of men, and concerned about how she
13 may react in future intimate relationships. She
14 was very emotional while testifying.

15 The psychological effects she describes are,
16 sadly, consistent with what the Court has heard
17 from other victims of sexual assault, and those
18 effects may be long lasting. Nothing the Court
19 can do can resolve the difficulties that the
20 victim is facing, but perhaps with the trial
21 having been held, that is one less obstacle for
22 her to deal with or one less obstacle standing in
23 the way of her efforts to cope with the effects
24 of this incident.

25 Mr. Kenny, now aged 28, is an aboriginal man
26 born in Inuvik and raised in Deline where he has
27 spent most of his life. At the time of the

1 offence he had obtained a grade 12 education and
2 was enrolled in a teacher education program at
3 the college. He has a two-year-old child who
4 lives with his mother in Edmonton, and his
5 current partner is expecting their child at the
6 end of July. Mr. Kenny's last full-time work
7 was in 2009 with a mining company engaged in
8 exploration work near Deline.

9 Mr. Kenny does have a lengthy record,
10 beginning with findings of guilt in Youth Court
11 in 1998 and 1999, and then continuing as an adult
12 with convictions from 2001 to 2009. He indicates
13 that the record is alcohol related, that he has
14 been an abuser of alcohol, especially in regard
15 to the convictions in 2003 for break and enter,
16 which involved looking for alcohol and which
17 resulted in a total 16-month jail sentence. I do
18 note that there is no evidence that he was under
19 the influence of alcohol at the time of the
20 offence for which I am sentencing him.

21 Mr. Kenny's record is mainly for property
22 offences and offences such as breach of probation
23 involving non-compliance with court orders. I
24 infer from the sentences imposed on Mr. Kenny
25 that certainly in the last five years the
26 offences were relatively minor in nature. It
27 is noteworthy that Mr. Kenny has no prior

1 convictions for offences of violence and no
2 prior convictions for sexual offences.

3 The maximum punishment for sexual assault
4 under Section 271 of the Criminal Code is ten
5 years imprisonment. There is no minimum
6 punishment. In the Northwest Territories a
7 serious sexual assault conviction, where the
8 offender does not have a prior related record,
9 generally results in a sentence in the area of
10 three years, but that may be increased or
11 decreased depending on the circumstances of the
12 offence and the offender.

13 Sentencing is, however, a very
14 individualized process, which is precisely
15 why it is one of the most difficult aspects of a
16 judge's work. No two offences and no two
17 offenders are ever exactly the same. In
18 determining what the sentence should be in this
19 case I have to take into account mitigating and
20 aggravating factors. The fact that Mr. Kenny
21 exercised his right to a trial is not an
22 aggravating factor, it just means that he does
23 not get the mitigating effect of a guilty plea.

24 In this case, despite the fact that
25 Mr. Kenny did not plead guilty, during sentencing
26 submissions, when asked if he wished to say
27 anything, he did say he wanted to apologize to

1 the victim and he said that it should never have
2 happened. I take that as an acknowledgment of
3 the harm he has caused to the victim and I do
4 give it some mitigating effect, although
5 obviously much less than had there been a
6 guilty plea and had the victim not had to
7 testify. There are no aggravating factors
8 outside the circumstances of the offence itself.

9 Crown Counsel seeks a sentence of three and
10 a half to four years in jail. Defence counsel
11 seeks a sentence of two years less a day. Both
12 recognize that some credit should be given for
13 remand time as against the suggested sentences,
14 and I will refer to the issue of remand time
15 further on.

16 Counsel have also referred to all of the
17 relevant principles of sentencing. The sentence
18 I impose must aim at denouncing Mr. Kenny's
19 behavior in sending the message that it is not an
20 acceptable way to behave, and that it will result
21 in serious consequences for the offender. The
22 sentence should also deter, in other words,
23 discourage other young men who might be inclined
24 to act the same way. In other words, it should
25 send the message to them that no means no, stop
26 means stop, and if they do not listen they will
27 have to face the consequences.

1 Although Mr. Kenny does not have a prior
2 record for sexual assault or offences related to
3 that, because he does have a prior criminal
4 record, the sentence should aim at deterring him
5 from committing any further crimes. At the same
6 time, Mr. Kenny's rehabilitation cannot be
7 ignored and should be encouraged. Despite his
8 past trouble and offences, he did obtain a grade
9 12 education, he did try to further his education
10 by enrolling in the teacher training program,
11 and he was able to get the job with the mining
12 company, which I expect is considered a good job
13 to have by people in a small community like
14 Deline. I infer that Mr. Kenny would like to be,
15 and that he can be, a productive member of
16 society, and in my view he should not be
17 discouraged from that.

18 The sentence I impose must also be
19 proportionate to the gravity of the crime and
20 the blameworthiness of the offender. This was,
21 as I have said, a serious sexual assault and
22 Mr. Kenny is fully responsible for what happened.
23 His actions were not predatory, but he did take
24 advantage of his much younger girlfriend. In
25 many ways this is a very sad case. Had Mr. Kenny
26 stopped when the victim told him to, obviously
27 no one knows, but it is possible that the

1 relationship might have continued and developed.
2 Maybe it would not have, maybe it would have
3 ended. But instead Mr. Kenny is here convicted
4 of a serious criminal offence. The complainant
5 is suffering, she is traumatized, and all of this
6 is because of Mr. Kenny's selfishness and his
7 disregard of the victim's wishes and feelings.

8 Pursuant to Section 718.2(e) of the Criminal
9 Code I do bear in mind that Mr. Kenny is
10 aboriginal, although there is no evidence before
11 me that systemic factors played a role in his
12 having committed this offence. It was not
13 suggested by counsel that any sanction other
14 than imprisonment would be reasonable in the
15 circumstances, nor do I think it would be
16 considering the nature and seriousness of the
17 offence and the prevalence of sexual assault in
18 the Northwest Territories.

19 I also have to consider that Mr. Kenny has
20 spent some time in pre-trial custody or what is
21 often called remand. The law is clear that the
22 extent to which I may credit that time towards
23 the sentence I impose today is in my discretion.
24 There is no submission before me that the new
25 legislation governing credit for remand time has
26 any applicability to this case in which the
27 offence pre-dates that legislation.

1 The law before that legislation is reflected
2 in the decision of the Supreme Court of Canada in
3 the case of R. v. Wust where the Court said that
4 a two-for-one credit, although not mandatory, is
5 appropriate to reflect the harshness of pre-trial
6 custody. Pre-trial custody is considered harsh
7 because it does not attract remission, as does
8 time after sentencing, and also because the
9 conditions of pre-trial custody may not offer
10 the programs or may be more difficult than the
11 conditions that apply after an offender is
12 sentenced.

13 I do not think that lack of priority in
14 programs, which is what defence counsel
15 described, can be put on the same level as lack
16 of any access to programs. Without evidence of
17 any specific conditions that could be considered
18 harsh in Mr. Kenny's pre-trial custody, it seems
19 to me that the main difference between pre-trial
20 and post-sentence custody is the lack of
21 remission.

22 Mr. Kenny's pre-trial custody consists of
23 approximately eight months, being the time from
24 his arrest on October 9, 2008, until he was
25 released on bail on November 26, 2008, and then
26 from the time of his rearrest on December 9,
27 2009, after he was erroneously released from

1 custody and then failed to appear at his earlier
2 trial date. He has been in custody since then,
3 in other words December 9, 2009, until the
4 present.

5 At least part of the reason Mr. Kenny has
6 been in custody, has been kept in custody, is
7 because of his failure to appear at the November
8 of 2009 trial that was scheduled. Counsel
9 advises that he has not been charged with failing
10 to appear. So if I take the fact that he did
11 fail to appear into account now in relation to
12 the remand time he will not be in a situation
13 where he may also be penalized for the same thing
14 by being sentenced on a charge of failing to
15 appear, but at the same time I think I need to be
16 cautious since I do not know if there is a reason
17 why he was not charged with failing to appear.
18 Counsel, both of whom are relatively new to this
19 case, have not been able to provide me with that
20 information. Ultimately, in all of the
21 circumstances, I take the view that a two-for-one
22 credit for the pre-trial custody is not
23 appropriate. I will, however, credit the time
24 on approximately a 1.5 basis.

25 There are certain ancillary orders that I
26 will deal with now. First, a DNA order is
27 mandatory in these circumstances under Section

1 487.051 of the Criminal Code. So I make that
2 order for the taking of a sample to obtain
3 Mr. Kenny's DNA.

4 An order for compliance with the Sex
5 Offender Information Registration Act is required
6 under Section 490.012 of the Criminal Code unless
7 Mr. Kenny establishes, under subsection (4), that
8 its impact would be grossly disproportionate,
9 which he has not sought to establish. So I order
10 that he do comply with the registration and
11 reporting requirements under that Act for a
12 period of 20 years.

13 Finally, under Section 109(1)(a) of the
14 Criminal Code, since sexual assault is inherently
15 a violent offence, I make a firearm prohibition
16 order in the usual terms. That order begins
17 today and will expire ten years after Mr. Kenny's
18 release from imprisonment. Stand please,
19 Mr. Kenny.

20 Having considered all of the circumstances,
21 including that this is the first time that
22 Mr. Kenny is convicted of an offence involving
23 violence or force against another person, I have
24 decided that a proper and adequate sentence in
25 this case is three years in jail. After
26 crediting the remand time the sentence that I
27 impose today is two years less a day. You may

1 sit down, Mr. Kenny. In the circumstances the
2 victim surcharge is waived.

3 I have considered the request that Crown
4 Counsel relayed from the victim that the warrant
5 be endorsed with the recommendation that
6 Mr. Kenny not serve his time at the correctional
7 centre in Hay River because that is where she
8 resides. I have considered that quite carefully
9 and I understand obviously why she makes that
10 request.

11 However, the reality in the Northwest
12 Territories is that there are only two
13 correctional facilities for adult males, and a
14 number of considerations go into the decision as
15 to which facility any individual inmate is placed
16 in. That, I believe, is a matter best left to
17 the correctional authorities. I do not feel that
18 I have enough information, information that they
19 would have, that would allow me to make a
20 recommendation.

21 The correctional authorities are certainly
22 used to dealing with instances where, because of
23 where an inmate is serving his sentence or her
24 sentence, there may be the potential for contact
25 with a victim or other witnesses in a case, and
26 I think they are best equipped to make the
27 decisions and put into place any conditions that

1 need to be put into place to deal with those
2 issues.

3 So for those reasons I decline to make
4 the recommendation. I would encourage victim
5 services and Crown Counsel to help the victim
6 make inquiries as to whether she may present her
7 concerns directly to the correctional authorities
8 and tell them how she feels and see whether they
9 will take that into account when they are making
10 a placement, but I will not go so far as to
11 actually making the recommendation as to where
12 he serves his time.

13 Is there anything further, counsel?

14 MR. LECORRE: No, Your Honour.

15 THE COURT: Is there someone here to take
16 Mr. Kenny back into custody?

17 THE SHERIFF: I believe there is.

18 MR. LECORRE: Yes, there is, Your Honour.

19 THE COURT: All right.

20 THE CLERK: Probation?

21 THE COURT: Pardon me?

22 THE CLERK: Will there be any terms of
23 probation?

24 THE COURT: No, there is no probation
25 order. We will close court.

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Certified correct to the best
of my skill and ability.

Joel Bowker
Court Reporter