

R. v. Kodzin, 2011 NWTSC 02

S-1-CR2009000060

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

SHAWN JASON KODZIN

Transcript of the Reasons for Sentence by The Honourable
Justice J.Z. Vertes, at Yellowknife in the Northwest
Territories, on January 28th A.D., 2011.

APPEARANCES:

Mr. B. MacPherson: Counsel for the Crown

Mr. P. Fuglsang: Counsel for the Accused

Charge under s. 271 Criminal Code of Canada

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

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1 THE COURT: The offender, Shawn Kodzin,
2 was convicted by me, after a trial, on a charge
3 of sexual assault committed in Yellowknife on
4 April 20th, 2008. I will read a brief excerpt
5 from my reasons for convicting him, delivered on
6 October 25th, 2009, to set out the facts of the
7 offence:

8 The complainant had been
9 drinking with her common-law
10 husband for a day or so. She
11 described events as being "like a
12 blur".

13 On April 20, the complainant's
14 cousin Andrew, who was not
15 drinking, went to the complainant's
16 home at around midnight. The
17 complainant and her husband were
18 drinking. At around 4 a.m., the
19 accused arrived at the house.
20 Andrew described him as drunk. The
21 complainant and her husband, along
22 with the accused, continued
23 drinking. Between 8 and 9 a.m.,
24 the drinkers started passing out.

25 The complainant and her husband
26 went upstairs to go to sleep.
27 Andrew went up a short time later

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1 to see if they were awake but he
2 saw that both of them were
3 apparently passed out in their
4 bedroom, asleep naked lying on the
5 bed. Andrew then went back
6 downstairs to try to get the
7 accused to leave. The accused was
8 pushing at him and said he wanted
9 to say goodbye to the others. The
10 accused then asked to use the
11 washroom which, in that house, was
12 located upstairs.

13 The accused went upstairs.
14 After 15 minutes or so, Andrew
15 became suspicious and went back
16 upstairs to check. He looked in
17 the bedroom and saw the accused on
18 top of the complainant. He had his
19 pants and underwear off. She was

20 naked. When asked what he saw,
21 Andrew answered "he was fucking her
22 when she was unconscious". Her
23 eyes were closed. Her husband was
24 still asleep beside her.

25 Andrew told the accused to get
26 off of her. The accused did so and
27 ran out of the house. Andrew then

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1 tried to wake the complainant's
2 husband but could not do so.

3 The complainant had no
4 recollection of what happened that
5 evening. She may recall the
6 accused being at her house but she
7 could not be sure if that was a
8 real memory or based on what she
9 heard from her husband and cousin
10 the next day. She did say that she
11 never consented to sexual activity
12 with the accused...

13 The police were called and
14 found a wallet, a men's pair of

15 pants and men's underwear at the
16 foot of the complainant's bed. The
17 wallet belonged to the accused.
18 DNA analysis of samples from the
19 underwear matched to the accused's
20 DNA...
21 The accused testified. He
22 said he had been drinking that
23 evening, first at a bar and then at
24 a cousin's house. He has no memory
25 of being at the complainant's home.
26 Based on this evidence, I was satisfied
27 that the complainant was passed out and asleep

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1 throughout the encounter with the offender. He
2 took advantage of a vulnerable victim and I
3 convicted him as charged.

4 Many times the courts in this jurisdiction
5 have commented on the prevalence of this type of
6 crime, specifically sexual assaults committed
7 against women while they are either asleep or
8 otherwise unconscious. Courts have repeatedly
9 said that since this particular type of sexual

10 assault is so frequent, sentencing must
11 emphasize deterrence, denunciation and promotion
12 of a sense of responsibility in the offender.
13 The most recent pronouncement of this came from
14 the Court of Appeal on January 18, 2011, in the
15 case of *R. v. A.J.P.J.* (2011 NWTCA 2),
16 where it increased the sentence of a person
17 convicted of a similar crime from two years
18 imprisonment to one of four years.

19 Recently, the Alberta Court of Appeal, in
20 the case of *R. v. Arcand* (2010 ABCA 363),
21 reiterated the principle that where a
22 complainant is passed out when an offender
23 forces intercourse on her constitutes an
24 aggravating factor in sentencing. The majority
25 judgment stated as follows:

26 Sexually assaulting an unconscious
27 victim elevates an offender's

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1 degree of responsibility for the
2 crime beyond the norm contemplated
3 by the three year starting point.
4 An offender who sexually assaults a

5 person who is asleep or passed out
6 is treating that person as if the
7 person were an object to be used -
8 and abused - at will. Since the
9 offender knows full well that the
10 person is not consenting, this
11 reveals an enhanced degree of
12 calculation and deliberateness by
13 the offender. Further, at that
14 point, the person is at their most
15 vulnerable, unable to defend
16 themselves in any way and unable to
17 call for help from others. The
18 offender knows this too, adding
19 further to the high level of moral
20 blameworthiness for the illegal
21 conduct. The place people most
22 expect to enjoy security of their
23 person is in their home. This
24 complainant was entitled to assume
25 that she could sleep in a bed in
26 her family home without having her
27 clothes removed while in a

1 vulnerable state and penetrated
2 sexually without her consent. For
3 these reasons, sexually assaulting
4 an unconscious victim is an
5 aggravating circumstance.

6 I recognize that the offender himself was
7 extremely intoxicated at that time, so much so
8 that he claims to have no memory of it.
9 Intoxication, of course, is no defence to this
10 charge. The seriousness of the sexual assault
11 is not lowered because an offender was
12 intoxicated by alcohol or drugs while committing
13 it. It is not generally a mitigating factor.
14 However, intoxication can indicate that the
15 offender acted out of character or spontaneously
16 as opposed to careful and deliberate planning.

17 The offender is a 25-year-old Dene man,
18 raised in the small traditional Tlicho community
19 of Wekweti. I have had the benefit of a
20 pre-sentence report which indicates that he grew
21 up in a stable and loving environment. He is a
22 high school graduate and has been employed
23 full-time at the BHP diamond mine since 2006.
24 He has been in a common-law relationship for the
25 past five years and he has a two-year-old
26 daughter. He has been described as a "good
27 father" and a "good provider" for his family.

1 This is a truly tragic situation. It is
2 tragic for the victim, of course, because her
3 personal integrity has been violated by someone
4 whom she knew since high school and was a friend
5 of her husband. It is tragic for the offender
6 because notwithstanding his good background and
7 personal history, he will be going away to
8 prison for this crime, a crime committed because
9 he went on a drinking binge that day. And, it
10 is even more tragic for his family because they
11 will lose this good father and good provider for
12 a long time. But it is this man's actions that
13 caused this tragedy. He is the only one
14 responsible.

15 There is no question that the principle of
16 restraint, as reflected in the provisions of the
17 Criminal Code, must be kept in mind. This is
18 particularly so in the case of a first offender
19 facing his first prison sentence.

20 I also keep in mind the circumstances of
21 the offender as an aboriginal offender, as I am
22 required to do by Section 718.2(e) of the

23 Criminal Code. I recognize that there are
24 wide-spread systemic factors of a general nature
25 affecting all aboriginal Canadians that have
26 placed them at a disadvantage. However, in this
27 case, I have not been told of any systemic

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1 factors specific to this accused that may have
2 played a part in bringing him before the Court.
3 Quite the contrary, he had a healthy upbringing,
4 he has family support; and he has been a useful
5 and productive member of society.

6 This crime demands no different a sentence
7 than if it were committed by a non-aboriginal
8 offender in the same circumstances. Serious
9 sexual assaults on women, especially aboriginal
10 women, are a clear and pressing problem in this
11 jurisdiction.

12 The courts have repeatedly said that the
13 starting point sentence for this type of crime
14 is three years imprisonment. Nothing in the
15 circumstances of this case takes it out of this
16 category. But to the starting point I must of
17 course apply and consider the aggravating and

18 mitigating circumstances of the case.
19 As previously noted, the fact that the
20 victim was asleep at the time is an aggravating
21 circumstance.
22 Crown counsel says that there are no
23 mitigating circumstances. But, yet, we have a
24 relatively young offender, one who was 22 years
25 old at the time of the offence, a man of
26 previous good character. It seems to me that
27 even in Arcand, these factors were recognized as

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1 considerations in mitigation.
2 Furthermore, I am convinced that the
3 offender is truly remorseful for his actions.
4 In speaking before sentencing, he gave what I
5 consider to be a sincere apology to the victim.
6 These too serve to mitigate the sentence. And I
7 also note that there was no specific breach of
8 trust in this case, a factor that weighed
9 heavily in the imposition of the sentences in
10 the recent A.J.P.J. case and some of the other
11 cases cited by Crown counsel. While this is
12 certainly not a mitigating factor, it does not

13 add to the list of aggravating factors.
14 Crown counsel recommends a sentence of
15 three to four years imprisonment. In doing so
16 he has relied on numerous precedents of this
17 Court and the recent reaffirmation by the Court
18 of Appeal of the three year starting point.

19 Defence counsel asks that I consider a
20 sentence of less than two years. He also
21 submitted that I should consider a conditional
22 sentence so that the offender could serve his
23 sentence in the community. I heard as well
24 several heart-felt pleas for leniency from
25 family members, including the offender's father
26 and mother, asking that he be sent back to his
27 family and his community.

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1 Let me say that I take to heart the
2 comments of the family members who spoke on the
3 offender's behalf. I know that they do not want
4 to see their loved one gone from his family and
5 gone from home for an extended period of time.
6 But let me also say as directly as I can that
7 this is something that I cannot do. I cannot

8 send him back to his family and his community.
9 Sentencing in every criminal case is a
10 difficult process. It requires the balancing of
11 different objectives. If I look at this case
12 strictly with the offender in mind, I might be
13 far more lenient. I have no doubt that he has
14 been a good son, a good husband, a good father,
15 and a good worker. But, he made a terrible
16 mistake. He made a terrible decision when he
17 got drunk. He made a terrible mistake when he
18 violated someone else. It is not just a
19 mistake, it is a crime, and he is responsible
20 for the harm he has caused. So I cannot just
21 think about what would be best for this offender
22 and his family. I have to think as well about
23 vindicating the victim, about upholding the law
24 so other women are not victimized, and about
25 sending a message to everyone that this type of
26 behaviour is morally wrong and young men who
27 take advantage of vulnerable women will be

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1 punished for it.

2 I cannot send Shawn Kodzin back to his

3 community for all of these reasons.

4 Furthermore, as counsel know or should
5 know, on December 1st, 2007, the Parliament of
6 Canada amended Section 742.1 of the Criminal
7 Code so as to preclude the availability of a
8 conditional sentence on a conviction for sexual
9 assault. So it is simply not available in this
10 case.

11 Having considered the starting point as
12 enunciated by the Court of Appeal, the
13 circumstances of this case, and the aggravating
14 and mitigating factors I previously mentioned, I
15 have concluded that I can go somewhat below the
16 starting point primarily because of the previous
17 good character of this offender. I have
18 concluded that an appropriate sentence is one of
19 30 months imprisonment. From that I will deduct
20 the three months the offender has already served
21 in custody.

22 Stand up, Mr. Kodzin.

23 Mr. Kodzin, I know that you know that you
24 made a terrible mistake. But your actions
25 caused harm to someone else and now you must pay
26 the price for that. But I want you to keep in
27 mind all the good things that were said about

1 you. I heard what your parents and your aunt
2 said. I read what was said about you in those
3 letters of support that your counsel gave to me.
4 Everyone considers you to be a good son, and you
5 can still be a good man. So you should think
6 about your future because you still have a very
7 long and valuable future in front of you.

8 The sentence of this Court is that you
9 serve a term of 27 months imprisonment.

10 You may sit down.

11 In addition, since a conviction for sexual
12 assault brings into play various mandatory terms
13 of the Criminal Code, and in the absence of
14 information and evidence to suggest that the
15 making of these orders would be grossly
16 disproportionate as between the interests of the
17 offender and the interests of society, I make
18 the following orders:

19 1. There will be an order requiring the
20 offender to provide a sample for DNA analysis
21 and submission to the DNA databank pursuant to
22 Section 487.051 of the Criminal Code.

23 2. I make an order that the offender must
24 comply with the provisions of the Sexual
25 Offender Information Registration Act for the
26 designated period of 20 years pursuant to

27 Section 487.012 of the Criminal Code.

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1 3. I make an order under the mandatory
2 provisions of Section 109 of the Criminal Code
3 prohibiting the offender from having in his
4 possession any firearms, ammunition, or
5 explosives for a period of no less than ten
6 years from the date of his release from his
7 sentence of imprisonment, ending ten years from
8 that date. However, considering the offender's
9 background and circumstances I will order,
10 pursuant to Section 113 of the Criminal Code,
11 that consideration be given to authorizing the
12 lifting of the prohibition order for sustenance
13 purposes.

14 I will rely on Crown counsel to provide the
15 necessary and appropriate formal orders for
16 entry on the Court record.

17 Under the circumstances, there will be no
18 victim of crime fine surcharge.

19 Finally, considering all of the
20 circumstances, I recommended that Mr. Kodzin
21 serve his sentence in the Northwest Territories.

22 Anything else, counsel?
23 MR. MacPHERSON: No, thank you, Your Honour.
24 MR. FUGLSANG: No, sir, thank you.
25 THE COURT: Very well then, thank you for
26 your submissions, court is closed.
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Certified to be a true and
accurate transcript pursuant
to Rules 7 23 and 7 24 of the
Supreme Court Rules,

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

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