R. v. Mannilaq, 2012 NWTSC 48

S-1-CR2011000155

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

FRANK MANNILAQ

Transcript of the Reasons for Sentence by The Honourable Justice L. A. Charbonneau, at Yellowknife in the Northwest Territories, on May 31st A.D., 2012.

APPEARANCES:

Mr. B. MacPherson: Counsel for the Crown

Mr. S. Petitpas: Counsel for the Accused

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

THE COURT: Counsel, I am ready to give my decision on Mr. Mannilaq'a matter. Before I start, I just want to reiterate that yesterday I issued a publication ban so that no information that could disclose the identity of the complainant in this matter should be published or broadcast.

Yesterday, Frank Mannilaq pleaded guilty to a charge of sexual assault, and today it is my responsibility to decide what a fit sentence is for the serious crime that he has committed.

It is often said that sentencing is one of the hardest tasks that a Judge has, and that is for many reasons. One of them is that in those cases, such as this one, where a jail term has to be imposed, there really is nothing joyful about that. There is nothing joyful about sentencing someone to a long jail term but sometimes that is what the law and the objectives of sentencing require.

Even though the task and process of imposing sentence is never easy, it can certainly be made less difficult, in some ways at least, where counsel provide thorough submissions in support of the position that they advance, whether they do so by presenting

a joint submission or simply by justifying whatever position they are advancing.

In this case, I not only have the benefit of a joint submission presented by counsel but I also have the benefit of very thorough and very helpful submissions from both of them explaining the reasons why they each say that this joint submission is a fit sentence for this offence. So at the outset, I want to thank both counsel for those submissions and commend them on the quality of the submissions and the materials that they presented to me yesterday because they really were very helpful.

In any sentencing, the Court has to take into account a number of factors - the sentencing principles that are set out in the Criminal Code, the circumstances of the offence that was committed, and the circumstances of the person that committed it. All that must be considered.

Starting with the circumstances of the offence, I am not going to read again all the paragraphs of the agreed statement of facts that was read into the record yesterday, but I do want to summarize the facts to put the matter in context.

The victim of this crime and Mr. Mannilaq knew each other somewhat but not very well. On the evening in question, they met at the drop-in centre of the John Howard Society in Yellowknife. The victim had some vodka with her and she offered him some. At one point they left the drop-in centre and they went to the Northern Lites motel, essentially looking for a party. They walked to an exterior corridor that runs along the back side of the building on the second floor. Mr. Mannilaq made sexual advances to her and she told him that she was not interested. His response was to throw her on the floor and get on top of her. She continued to protest but to no avail. He pulled her pants and underwear down and pried her legs open. The admitted facts are that she became so overtaken with fear that she blacked out and has no memory of what he did after that.

Police officers, who happened to be in the area, overheard part of what was going on, mainly her protests. They attended the area and intervened.

What they saw when they arrived was the victim on her back struggling with her pants and underwear down, Mr. Mannilaq holding her

legs apart, and his face close to her genital area. They pulled him off of her and arrested him. They noted he was very intoxicated. They noted the victim was also intoxicated and very upset.

She was taken to the hospital and samples were collected for DNA testing. No evidence gathered as part of that testing suggests that sexual intercourse took place.

The victim was not seriously injured physically. She experienced some discomfort in her buttocks area from being thrown to the floor. She was, however, quite traumatized by this as is evidenced by her Victim Impact Statement, which has been filed as an exhibit, and which I will return to later.

Mr. Mannilaq gave a statement to the police saying he did not have any memory of the incident and this remains his position at this hearing although, through his guilty plea, he acknowledged that this is what he did and through his counsel he acknowledged the seriousness of what he did.

Turning now to his circumstances, he is 38 years old and spent most of his life in the Nunavut community of Taloyoak. He is currently single but has two daughters, aged

13 and 15, from a previous relationship, and they live with their mother in Taloyoak.

Mr. Mannilaq moved to Yellowknife in 2009. For a time he lived at Bailey House which is a transitional home for men in Yellowknife. He was evicted from there as a result of his alcohol consumption. After that, he lived at the Salvation Army which offers beds for homeless people and he has lived there for the last two and a half years.

Both of Mr. Mannilaq's parents struggled with alcohol as he was growing up. He witnessed a lot of violence in the home. He himself was subjected to physical and mental abuse from his father. He and several of his siblings started drinking alcohol at a young age. He, according to his counsel, was an alcoholic by the time he turned 16 years old.

He has tried to make efforts to deal with his alcohol issues. He has attended AA meetings and twice he took residential treatment programs. The first was a two week program in Dettah in 1999 when the treatment centre on the road to Dettah was still open. He was able to complete that program. He took another program in Hay River in the year 2000 but was not able to complete it because he was

caught consuming intoxicating substances while he was there.

It is very much obvious from the circumstances of the offence for which I must sentence him today, and from other things I have heard about his living situation in Yellowknife (including how he lost his ability to stay at the Bailey House) that alcohol remains an issue for him and he has not yet found a way to win his battle against that addiction.

He has a Grade 8 education which he has supplemented by taking training in various areas. I am told that he took a one year carpentry course in 1998 and also a course as as driller's helper in the year 2000 through Arctic College. A year and a half ago, he was diagnosed with schizophrenia, an illness which he controls by taking medication, and he has been on disability since then. But before that he had been able to work on various jobs. He was a labourer for the hamlet of Taloyoak. He built tables, boxes, and cabinets also, and he also paints on canvass so he does have artistic abilities. He has also undertaken activities out on the land with his father and helped his father build a cabin in the year

2005.

Mr. Mannilaq has a lengthy and significant criminal record. I have no doubt that a lot of his convictions are related to the consumption of alcohol. But, there is a disturbing number of convictions for sexual offences on that record, a total of four, between the years 2000 and 2009. And now, of course, there is this additional conviction for this offence that he committed in 2011.

He is, of course, not to be sentenced on his criminal record; that is, he is not to be punished over and over for the crimes that he has committed in the past and for which he has already been sentenced. But there is no doubt that a criminal record like his raises immense public safety concerns even though the sentences imposed for his earlier sexual offences suggest that they were less serious than the offence I have to sentence him for today.

I also do not think that these convictions, and this most recent offence, can simply be attributed to the consumption of alcohol. A lot of people drink and a lot of people drink too much and do not become violent and do not become sexual predators.

It is the Court's hope that while in jail serving his sentence for this offence, Mr. Mannilaq will have the benefit of counselling and treatment programs to try to get at the root of his behaviour. It does not sound as though he has had much access to that type of treatment or resources until now.

In the interests of his rehabilitation and to ensure that the public is protected in the future, it is, in my view, imperative that this be addressed in a meaningful way and every attempt to do so should be undertaken by the correctional authorities. As I have said, the sentences imposed for his other sexual offences, and the sentences that he has received generally for his various offences, show that this recent crime is by far the most serious one that he has committed so there is an escalation in his behaviour which is of concern to the Court. And I am not a doctor, but I presume that if he is taking medication in relation to his schizophrenia, the mix of that medication with alcohol might have very severe and dangerous consequences both to him as far as his health, and also potentially other negative consequences for others.

Sadly, it may be that by receiving a

significant jail term today, Mr. Mannilaq will have access to programming and help he may not have been able to access as a free man. But I simply make this point about the need for treatment and counselling because, as I say, the escalation in his behaviour is of concern and I think the underlying issues have to be addressed to the extent possible. And for that reason I direct that a transcript of my reasons for sentence be sent to the correctional authorities. It is not done as a matter of course when sentences in the territorial range are imposed, but this is a case where I think it should be done.

The next consideration, on sentencing, are the principles of sentencing. They are set out in the Criminal Code, and I will not refer to them all here, but the fundamental sentencing principle is proportionality. The sentence should be proportionate to the gravity of offence committed and the degree of blameworthiness of the offender. All the other sentencing principles flow from that general one.

Looking at the gravity of the offence, although counsel have presented a joint submission, they are not entirely agreed as to

how this offence should be characterized; more specifically, whether it falls within the category of "major sexual assault" as defined in case law from the province of Alberta, which has also been adopted and applied for many years in this jurisdiction.

The concept of major sexual assault is a creation of the jurisprudence - a means of identifying certain categories of sexual assault which are serious enough to make deterrence and denunciation the paramount sentencing principles on the basis of the harm that those types of assaults cause and the level of blameworthiness that they entail.

The concept of major sexual assault has been the subject of much commentary but it has been reaffirmed in Alberta by the Court of Appeal in Arcand [2010] ABCA 363, and that decision has itself been adopted in our Court of Appeal in R. v. A.J.P.J. 2001 NWTCA 2, so therefore it is binding on me as a Supreme Court Judge. The definition, such as it is, of a major sexual assault, was reiterated at paragraph 171 of the Arcand decision:

> A sexual assault is a major sexual assault where the sexual assault is of a nature or character such

that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.

Then the Court went on to say that sentencing Judges could determine whether a specific set of facts corresponded to this definition in the event that a sexual assault is not one of those specifically identified situations that they talked about. So it is up to a sentencing Judge in each case to assess whether a particular sexual assault is a major sexual assault.

Here, there is no suggestion of sexual intercourse having taken place. There is not even evidence that Mr. Mannilaq's clothes were off when the police officers intervened. There is no evidence establishing that he

forced oral sex on the victim because she has no memory of what happened, and all the police officers saw was that his head was between her legs and close to her genitals. So there is no proof that he actually was able to do what he seemed on his way to doing before the police officers intervened. And I agree with the defence counsel that the facts, as admitted, do not establish that actual contact was made with her genital area.

That being said, in my view the behaviour described here falls within the parameters of what constitutes a major sexual assault. Whether or not oral sex is completed or not, or whether an act of attempted intercourse is completed or not, one must look at the surrounding circumstances and the whole context to determine the level of seriousness of the conduct.

Here, those circumstances are that he made advances to this woman and she said 'no'. She was thrown to the ground, her clothes were taken down, her legs were pried apart, and she had Mr. Mannilaq on top of her ignoring her protests, holding her legs apart and with his head between them. This is a serious violation of her personal and sexual integrity

and a serious violation of her human dignity. It would be a traumatic violating experience no matter if there was actual contact with the genitals or not. In my respectful view, it does fall within the parameters of a major sexual assault and the sentencing principles that apply to that category of offence apply to this case.

That being so, the starting point for sentencing is three years in jail. That is not a minimum sentence and it is not a rigid tariff. Rather, it is where the sentencing Court must start and make the necessary adjustments to reflect any aggravating or mitigating features of the case. The starting point is simply a reflection of the proportionality principle. It reflects the gravity of an offence like this one and the degree of blameworthiness of the offender who commits it. And this is for good reason. Serious sexual assaults have a terrible impact on the victims and on the community as a whole.

The Victim Impact Statement that was filed in this case is an example, stated in simple but compelling terms, of the type of harm that sexual assaults cause. On the Victim Impact

Statement form the victim indicated that she did not want to read it in court herself, and I can certainly understand that, especially after hearing Crown counsel's description of how upset she was the last time she had to be in court. But I am going to read it into the record because I think it serves a purpose. The impact of these crimes should be known and it should be known not just in a theoretical and intellectualised level but in the very real concrete way in which people affected by these types of things describe them. This Victim Impact Statement reads as follows:

> I don't go out as much anymore. I am afraid of the dark now. As soon as it starts getting dark I go home. I have become leery of who I talk to and befriend. Not as outgoing as I used to be. The first month was the worst. I felt dirty, afraid, humiliated. I asked how did it happen, what could I have done differently? After I cried a lot all the time at night too. I had dreams, scarey images at night, I couldn't sleep. Every time I closed my

eyes I wondered. I don't go to the drop-in anymore. I don't feel comfortable there. It is the closest place in town with a phone but I can't go there anymore, I don't feel safe. I had to go to court for the preliminary. First time I saw him since it happened. So scared I felt sick to my stomach, having to be there in front of him, staring at me while I talked about it. Since then I've been waiting for it all to be over, worrying about it. I was dreading the thought of having to go to court again. I used to feel confident walking down the street, with dignity. Since this happened, it has been hard. I am working hard to get my confidence and dignity back. This shouldn't have happened. I don't want to see him after this is over, if possible, I want him to stay away. That is what this type of offence does.

That is the effect. This event has robbed this particular victim of a lot of things. It

has taken away her ability to go to a drop-in centre where she felt comfortable and a place she was able to use to socialize. She has lost her ability to access the support that she got from that drop-in centre. That is terribly unfair because she did not do anything wrong. And yet she loses not only her sense of personal safety but access to a place where she could get support. The Court can only hope that with some help and with time she will be able to overcome her trauma and her fear and she will be able to resume some of the things that she was able to do in the past.

This type of sexual assault is inherently serious, even when no violence is used other than the force inherent in the act. Here, there was some force used to subdue the victim. She was thrown to the ground. Although she was not seriously injured physically, it is a fact that Mr. Mannilaq did use some force to overcome her, and that is to be considered.

The criminal record is also an aggravating factor because it is extensive and it is related. As I have already said, it raises serious concerns about the threat that

Mr. Mannilaq poses to the community.

The prevalence of sexual assaults in our community is another factor that I must consider.

Sadly, this Court often has the opportunity to comment about the prevalence of sexual assaults in this jurisdiction. In this case, there is more, because Crown counsel has noted that there have been a number of other instances of sexual assaults that have taken place in public areas in the city of Yellowknife. And whatever the reason is for that, it does have a profound impact on people's sense of safety in the community, especially a community like this one where people are accustomed to feeling safe. And it underscores the need for sentences that will have a denunciatory and deterrent effect on others who might be inclined to behave in this appalling way.

The Crown has argued that there was an element of breach of trust here. That may be so to some extent in the sense that the victim knew Mr. Mannilaq a little bit, met him in a place where she was comfortable (the drop-in centre), and obviously, she did not expect this kind of conduct from him or she would not

have gone anywhere alone with him. This, however, could probably be said in most situations involving sexual assault.

There is no evidence here of a special trust relationship we sometimes see, for instance when the accused is the spouse of a victim (as in the R. v. D.W.G. case which was filed by the Crown), or when the offender is a relative or someone who is acting in a position of trust (a teacher or a parent or an older relative), or when someone is a guest in the victim's home. So I do not see the element of breach of trust as being a significant one in this case.

Apart from the inherent seriousness of the offence, the main aggravating factor really is the criminal record, especially because of the related convictions. That record would suggest that a sentence higher than the three year starting point is warranted. But there are mitigating factors also. And the first, a very important one, is the guilty plea.

A guilty plea is always a mitigating factor on sentencing and for very good reason. It is a very concrete expression of an offender's remorse. It avoids the time and expense of a trial. And, mostly, it spares

the victim and other witnesses from having to testify. That is especially important in a sexual assault case.

It also provides certainty of outcome to the victim and it avoids anyone continuing to believe or choose to believe that maybe the incident did not happen, maybe she consented, or maybe she is lying about what happened. Because sometimes when matters go to trial and people are convicted, there remain some who refuse to accept that the incident actually happened. A guilty plea removes all of that and one can hope that it relieves some burden or takes some burden off the shoulders of the victim. And here, based on what Crown counsel said and based on what is in the Victim Impact Statement, it is clear that for this particular individual this was a significant factor; she was dreading court proceedings and she did not have to go through them for trial, and that is because Mr. Mannilaq was willing to accept responsibility even if his guilty plea came only a few days before trial.

On that point, it is true that this was not a guilty plea at the earliest opportunity but it was ahead of the trial date, sufficiently ahead that the complainant did

not have to come to court yesterday. And the timing of the guilty plea, in my opinion, has to be placed in context.

Mr. Mannilaq has no recollection of what happened on that night. The complainant herself experienced a blackout in the middle of the incident. Under those circumstances, and again I understood the Crown to fairly concede this, one can understand why the accused and his counsel wanted to have a preliminary hearing to assess the nature and the strength of the Crown's case.

Another reason why it might be argued that the guilty plea might have less of a mitigating impact is that Mr. Mannilaq was basically caught in the act by two police officers. That is a factor. It could be said that in some ways, at least, Mr. Mannilaq was almost inescapably caught. But he was still presumed innocent, he still had the right to rely on that presumption of innocence, and he still had the right to have a trial. And he gave up that right so he should, in my view, get enormous credit in all of the circumstances for his guilty plea.

I must also consider his circumstances as an aboriginal offender. He is an Inuk from

the community of Taloyoak, as I have already said, and this requires the Court to approach his sentencing differently than what otherwise might be the case, and that is because of Section 718.2(e) of the Criminal Code and how that provision has been interpreted by the Supreme Court.

What I heard about Mr. Mannilaq's circumstances as he was growing up, what he faced, the type of abuse that he was subjected to, his early involvement with alcohol and becoming an alcoholic at a very early age, all that unfortunately is something we commonly hear in this jurisdiction, and there is no doubt in my mind that these things played a part in his involvement with the criminal justice system, as it has with many aboriginal people of all ages in this jurisdiction. That said, when a person becomes a threat to the safety of the community and commits serious crimes and, as in this case, seriously violate the physical integrity and personal dignity of another person, the tragic circumstances that played a part in them having that kind of behaviour does not relieve the Court of its responsibility to impose sentences that will protect the public and denounce the behaviour.

The Court is required to examine sentencing options other than imprisonment and to exercise restraint if imprisonment is required. But as fairly and realistically conceded by defence counsel in this case, the circumstances here require the imposition of a significant jail term notwithstanding the consideration that must be given to Mr. Mannilaq's aboriginal descent, his background, and the circumstances that he faced.

The other factor that I must take into account is the time that Mr. Mannilaq has spent on remand. He has been in custody for ten and a half months since his arrest on this charge, although after he was taken into custody he pleaded guilty to an unrelated charge and was sentenced to three months in jail. So the total remand time that can be taken into account at this sentencing hearing is seven and a half months.

Under the Criminal Code, the Court has discretion to give an offender credit for time spent in pre-trial custody. That discretion is now less broad than it once was. The Criminal Code used to say simply the time spent in pre-trial custody could be taken into account by the sentencing Judge. Now there

are more specific parameters that have been set and that limit how that discretion can be exercised.

There are situations where there is no discretion to give credit beyond the ratio of one for one. And even when the Court has the discretion to do more, it cannot give enhanced credit beyond a ratio of one to one and a half. This is the case where I have the discretion to increase the credit to be given to pre-trial custody beyond the one for one ratio.

Defence has brought to my attention the case of R. v. Desjarlais which is a decision by the Chief Judge of the Territorial Court which addresses the issue of credit to be given to remand time. In that decision, the Chief Judge agreed with the Crown's suggestion that the amendments to the Criminal Code showed an intention by Parliament that, generally, credit for remand time should be given on a one for one ratio and not on an enhanced basis. However, the Chief Judge ruled that evidence about a person's good behaviour while on remand could justify enhanced credit being given for remand time because if, as a serving prisoner, displaying

similar behaviour could earn remission, it would be unfair not to take that into account when a remand prisoner who behaved in the same way is not able to get remission while in pre-trial custody.

The starting point in the analysis has to be the provisions of the Code, more specifically paragraph (3) and paragraph (3.1) of Section 719. So paragraph (3) says,

> In determining the sentence to be imposed on a person convicted of an offence, the Court may take into account any time spent in custody by the person as a result of the offence but the Court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Paragraph (3.1) says,

> Despite subsection (3), if the circumstances justify it, the maximum is one and a half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsections 515(9.1) or the person was

detained in custody under Section 524(4) or (8).

The last part refers to those circumstances where the Court does not have discretion. In this case I do. So despite subsection (3), if the circumstances justify it, it is open to me to give credit on an enhanced basis up to a ratio of one to 1.5.

I agree with the conclusion that was reached by the Territorial Court in the Desjarlais case that there should not be an assumption that every serving prisoner will earn remission.

I also agree that where there is evidence or credible information presented to the Court that a prisoner on remand has displayed behaviour that is such that they would have earned remission if they had been a serving prisoner, that is a relevant consideration in deciding whether credit for remand time should be calculated on an enhanced basis.

There are undoubtedly a variety of other circumstances that could justify enhanced credit being given for remand time and it could well be also, conversely, that even when a person has behaved very well while on remand the Court may decide not to grant credit on an

enhanced basis. In my view, the exercise of discretion in this area has to be driven by the specific circumstances of each case and not by applying any kind of automatic or mechanical approach.

It is noteworthy that Parliament chose to limit the discretion of sentencing Judges in this area in some ways but not in others. The amendments to the section do set out specific circumstances where enhanced credit cannot be given, and the amendments also set a limit to the rate to which the enhancement can be given. It cannot be more than to a ratio of one to 1.5. But within those limits, the Parliament has set out a fairly broad test (the test "if the circumstances justify") for sentencing Judges to use in deciding how the discretion should be exercised. That signals that despite the fact that in some ways the discretion has been limited, the intent is still for sentencing Judges to apply their discretion based on the individual circumstances of each case.

Here, the information provided by Mr. Mannilaq's counsel was not contested by the Crown. Counsel are officers of the Court and unless there are objections from the other

party or concerns about the reliability of the information conveyed (for example if the offender himself is the only source of the information) I do not see any reason not to rely on any information that counsel provide, especially when, as in this case, counsel has spoken directly with the offender's case manager. So I accept without any hesitation what I have been told about the fact that Mr. Mannilaq was essentially a model prisoner while he was on remand and for those reasons, in the circumstances of this case, I am of the view that it is appropriate to give him enhanced credit for his remand time on the basis of a one to 1.5 ratio. So that means for the seven and a half months that he has spent in pre-trial custody, I will give him credit roughly for 11 months and a week.

The joint submission that counsel have presented is that a fit sentence for this crime would be in the area of three years and, once remand time is taken into account, that the Court should impose a sentence of two years less one day because there is no compelling reason to impose a penitentiary sentence at this point.

In my view counsel are correct. A

sentence in the area of three years imprisonment, in my view, is fit for this crime. The criminal record is aggravating but there are also mitigating factors and, in my opinion, the mitigating and aggravating factors in this case essentially cancel each other out, if I can put it that way.

There is never one single fit sentence for a crime. I have no hesitation in agreeing with counsel that little would be accomplished here by imposing a sentence of three years, give 11 months and a week credit for the remand time, and arrive at a sentence of 24 months and three weeks, the net effect of which would be risking that Mr. Mannilaq be sent to a southern penitentiary.

In Yellowknife, Mr. Mannilaq is already far away from his home community of Taloyoak.

Despite the relatively lengthy criminal record, the longest sentence that he has ever received, by my count, is six months in jail and other sentences have been a few months. I do not see any benefit in imposing a penitentiary sentence on him today. I do not think that the objectives of sentencing, including deterrence and denunciation, require that I do that. The principle of restraint

means that jail should be used as a last resort on sentencing. But it also means that when jail is required, no sentence should ever be any longer than what is required to achieve the objectives of sentencing and, in this case, I do not see in that any sentencing objective would be undermined in any way by keeping the further jail term that I impose today within a range that would allow Mr. Mannilaq to serve it in the institution where he has spent his remand time and where, by all accounts, he has done well.

This approach also takes into account the principle of rehabilitation which, although not paramount in a case like this, must never ever be overlooked.

I have not referred in any detail this afternoon to the legal principles that talk about the fact that sentencing Judges should give very serious consideration to a joint submission and only decline to follow it if it is clearly unreasonable. I do not need to say much about this principle because in this particular case I agree with this joint submission and in fact I can say that I would likely have imposed the same sentence even if it had not been presented as a joint

submission. So to me the fact that counsel have jointly arrived at it shows that they were both realistic and fair in their approach to this case.

The only caveat or hesitation that I have about the joint submission is something that I raised yesterday and it has to do with whether it would be beneficial to add a term of probation to this jail sentence. But this is where, having heard from counsel on this, I am extending to their joint submission the deference that the law requires me to and since they are both agreed that it should not be part of the sentence, I will follow the joint submission completely and I will not impose any probation order.

The Crown has sought some ancillary orders and I will deal with those first.

There will be a DNA order as sexual assault is a primary designated offence.

There will also be an order that Mr. Mannilaq comply with the terms of the Sexual Offender Information Registration Act for a period of 20 years.

There will be a firearms prohibition pursuant to Section 109 of the Criminal Code which will start today and expire ten years

from his release from imprisonment.

Given the length of the jail sentence that I will impose and having regard to Mr. Mannilaq's personal circumstances, I am not going to order that he pay a victim of crime surcharge as I am satisfied that this would result in hardship.

Mr. MacPherson, I just thought of something. With respect to the Sexual Offender Information Registry Act, is it when an order has already been made that a subsequent order has to be for life? It doesn't have to do with prior convictions?

MR. MacPHERSON: I believe it has to do with prior convictions but perhaps we can look at that.

THE COURT: Yes, we should. It just occurred to me that because of the prior sexual assault convictions on the record I wonder if some other -- what is the section, do you know? Do you have the form, Mr. Clerk? The form probably gives the section.

490.011. I don't feel so bad now not remembering section numbers that have six digits.

Do you have a Code with you, Mr. Petitpas?

MR. PETITPAS: I didn't bring mine, I'm sorry.

THE COURT: Mr. MacPherson, I am looking at 490.013, paragraph (2.1).

MR. MacPHERSON: Yes.

THE COURT: An order made under subsection 490.011 applies for life if the person is convicted of more than one offence. Which would seem to suggest that if there is a prior sexual assault conviction it might trigger a longer...

MR. MacPHERSON: Your Honour, that would be Section 490.013?

THE COURT: Paragraph (2.1).

MR. MacPHERSON: Yes, Your Honour, I believe this matter has come up before, and it would be the Crown's position that the term of the SOIRA order should be for life.

THE COURT: It is not like a, not a driving, I am thinking of the firearms prohibition where if it is a subsequent one it is longer but then the Crown has to give notice of intention, I think, to seek the higher one. Are you saying that this has been raised and decided on before or?

MR. MacPHERSON: Your Honour, it did not occur to me that we were dealing with this

issue in this particular case but I do recall in a different case that this particular issue came out. And that at the end of the day, because the person had a criminal record with prior convictions of a similar nature, that the term was for life. Now, you raise the issue of a notice. I don't know if that applies here, notice to...

THE COURT: There is this whole area of the law where some of these orders are not considered to be part of the punishment. There is a section in the Criminal Code that says that if the Crown wants to rely on prior convictions to seek a higher punishment, there has to be notice. And that's why in the drinking and driving cases, if you are going to engage the minimum penalties you have to serve notice. But I think that things like DNA orders, SOIRA orders, are not considered to be part of the punishment.

MR. MacPHERSON: Yes.

THE COURT: I think that's the way that I remember it. Mr. Petitpas, I see that you now have a Code?

MR. PETITPAS: I do, Your Honour. I don't believe there is a notice requirement. I am reading the synopsis at page 955 of the 2012

Martin's Criminal Code and it does mention, and I quote,

> The Attorney General or minister of Justice, as the case may be, may serve notice to comply with the registration requirements in accordance with Section 490.02 where on the day this Act came into force...the person was still serving sentence for or had not received an absolute discharge under Part XX.1.

I don't believe that notice is required.

THE COURT: To trigger the higher --

MR. PETITPAS: -- to trigger...

THE COURT: You don't take the issue that the order should be for life?

MR. PETITPAS: I don't take issue with that, I don't believe it is a requirement.

MR. MacPHERSON: Your Honour, looking at Section 727 which deals with previous convictions.

THE COURT: Yes.

MR. MacPHERSON: In the annotation in the Martin's Code, at page 1459, "when notice required", and there are two cases there, one dealing with firearms and another one dealing

with driving prohibition. But those would, would be different. There is a substantive effect on the offender which isn't the case here.

THE COURT: No, I think that you are right. Now, given Mr. Petitpas's position, I think that the wording of the section suggests that the SOIRA order should be for life which, in the circumstances of this case, actually makes some sense given the prior convictions. So unless anyone has anything further to say, that will be the order of the Court. You are content that that is the proper interpretation, Mr. Petitpas?

MR. PETITPAS: It is, Your Honour.

THE COURT: Thank you. So that takes care of the ancillary orders.

Now Mr. Mannilaq, if you could stand, please.

As far as the jail term that I will impose on you today for this offence, if it wasn't for the time that you spent in pre-trial custody, I would have imposed a sentence of 35 months in jail. I am giving you credit for 11 months and a day credit for the time that you have spent in pre-trial custody because of what I heard yesterday. So the sentence that

I will impose today is a further jail term of two years less one day, which is a jail sentence that will be served here in the NWT and more likely than not at the North Slave Correctional Centre which is where you have been on remand.

THE ACCUSED: That's right.

THE COURT: All right, you can sit down.

There is just something else that I want to tell you, Mr. Mannilaq.

You heard my exchange yesterday with the lawyers and you heard what I said today about the question of whether a probation order should be included in the sentence. And as you have heard, I decided not to do that. I decided to follow the suggestions of the lawyers which was a joint submission which I am required to give the most weight possible to, and I can't say that it is unreasonable for them to not have asked for probation as part of this sentence.

But I guess what I want to say to you, my last words to you, is that it struck me, that what I have heard about how you were behaving on remand, that you were a model prisoner, that you follow the structure, that you were respectful of people, that you did the work

that you were supposed to, that you volunteered to do anything that you were being asked to do. You were not drinking alcohol while in the jail. So I am sure that you can make that connection between not drinking alcohol and being able to function and follow rules and be respectful and generally behave in a good way. And so to be honest my concern is that when you are released and you are not on any kind of conditions and you don't have to report to anyone and there is no structure anymore, I am concerned that it might be difficult for you to stick with that good behaviour that you are able to display for the last several months. That's why I was wondering about the probation order. It wasn't with the view of giving you more punishment, it was with the view of helping you. That's why I thought long and hard about it but I decided in the end not to because of what the lawyers said.

I heard that you have got the ability to work, you have got some skills, you have got a medical condition but it sounds like it can be controlled with medication. You have told me that you write journals, that you have been doing that for a long time, and I have also

heard that you have artistic abilities. So it sounds like there are a lot of things that you can do that are much more constructive than drinking and hurting other people. So I really hope, and I am not ordering you to do this, I am just telling you, I really hope that when you are released you will go regularly to AA meetings, that you will take the steps to get counselling to help you deal with those underlying issues that have got you in trouble with the past. Because you know this better than me - it will not be easy to stay out of trouble. It will not be easy not to drink. But I encourage you, I urge you, before you are released to talk to your case manager and try to have a plan, get her help to get you a plan for the kinds of services that you might be able to access once you are no longer in custody. Because you will be going from complete structure to no structure. So it may be that your case manager, with the time that you have, can help you take some programs while you are in jail and maybe she can help you form a plan for when you are released. Because I really hope that you will be able to stay out of trouble and I would really like not to see you again in court in

these circumstances.

As I say, I am not ordering you to do any of this. It is just what I hope for you, I guess is the best way to put it. It is what I hope for you and what I hope for the public, because the best way to protect the public is for you not to behave like this again in the future.

Is there anything that I have overlooked, counsel?

MR. PETIPAS: Nothing further, Your Honour.

MR. MacPHERSON: Nothing further, Your Honour, thank you.

THE COURT: All right, we will close court.

Counsel, once again, I thank you for you your submissions on this case. They were very helpful.

(ADJOURNED)

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,
Court Reporter