

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

BRIAN JAMES MCLEOD

Transcript of the Oral Reasons for Sentence by The
Honourable Justice V. A. Schuler, sitting in Yellowknife,
in the Northwest Territories, on the 28th day of March,
A.D., 2012.

APPEARANCES:

Mr. G. Boyd: Counsel for the Crown

Mr. T. Bock: Counsel for the Defence

Charges under s. 271 x 2 Criminal Code of Canada

S. 486.4 PUBLICATION BAN

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1 THE COURT: Brian James McLeod has pled
2 guilty to and is now convicted of sexual assault
3 on two young girls, and I now have the duty to
4 sentence him for those crimes. The two young
5 victims are twins and they are cousins of
6 Mr. McLeod. At the time in question, in 2009,
7 they were a few months shy of 10 years old;
8 Mr. McLeod was 20.

9 He was invited to their home to drink
10 alcohol by the person who was looking after
11 the victims. He drank and then began to play
12 with the victim whom I will refer to as A.,
13 during which he held her and put his hand down
14 the front of her pajamas and touched her vagina.
15 He stopped and left the room when called away
16 by the caregiver. The victim then went to bed.
17 Mr. McLeod came into the bedroom and tried to
18 wake her, but she pretended to be asleep. He got
19 onto the bed and pulled down her pajama pants,
20 got on top of her, and had anal intercourse with
21 her. During this she pretended to be asleep.
22 When Mr. McLeod left the room she locked herself
23 in the washroom and remained there until the
24 morning.

25 During the same time period, in 2009, but
26 on a different evening, Mr. McLeod was again
27 at the victims' home visiting the individual

1 looking after them. He was drinking with that
2 individual. The victim M. went to bed that
3 night and awoke early in the morning to find
4 that her pants had been pulled down and her
5 panties removed. It is admitted that Mr. McLeod
6 had done this. The victim found him sleeping
7 beside her. She put her pants and panties
8 back on, turned on the TV, and got back in bed.
9 Mr. McLeod woke up and pulled her pants down,
10 she pulled them back up. He fell off the bed
11 and left the room. The victims' mother was not
12 at home at the time of the incidents referred to
13 and they were in the care of the boarder in the
14 home.

15 In September, 2009, staff at the victims'
16 school noticed that the victims were having
17 problems, and as a result of an interview with
18 them the victims disclosed what Mr. McLeod had
19 done to them. A police investigation was then
20 started.

21 Both victims provided victim impact
22 statements in which they speak of feeling
23 afraid of Mr. McLeod since these incidents
24 and feeling that they cannot trust their
25 relatives and other people. A. speaks of
26 having nightmares about what happened and
27 M. speaks of feeling dirty as a result of what

1 happened. Sadly, it appears that other children
2 know about what happened and they make cruel
3 comments to the victims about it, which is
4 understandably very upsetting to the victims.
5 I have to say that it is very disturbing, that
6 with the prevalence of sexual abuse of children
7 in our society and the publicity about it,
8 that other children would be so uncaring and
9 heartless, and I suspect perhaps simply unaware
10 of the psychological harm that actions like those
11 of Mr. McLeod invariably cause.

12 The Court has been provided with two
13 pre-sentence reports. Counsel for Mr. McLeod
14 had asked that the pre-sentence report that was
15 originally received be redone to address some
16 things in it that he felt did not necessarily
17 reflect his client's background and reaction
18 to the offences. With the consent of counsel
19 I have reviewed both the original and the second
20 pre-sentence report.

21 Those reports and the additional information
22 provided by Mr. McLeod's counsel indicate that
23 Mr. McLeod is a 23-year-old aboriginal man
24 who grew up and has lived in the small Delta
25 community of Tsiigehtchic. His father left the
26 family when Mr. McLeod was seven years old, and
27 although his father lives in Fort McPherson they

1 do not have a close relationship. Mr. McLeod
2 and his five siblings were raised by their mother
3 alone with little or no financial help from the
4 father.

5 It appears from the pre-sentence report
6 that Mr. McLeod considered his godfather like
7 a father and spent a great deal of time with him.
8 His godfather passed away in 2006. Mr. McLeod
9 dropped out of school in grade 7, and although
10 he made some attempts to get his grade 10 he was
11 ultimately expelled from school. He has worked
12 as a surveyor's assistant in the summers since
13 about 2007, as well as doing odd jobs in the
14 summers for the Band office in Tsiigehtchic.
15 Apart from that he is supported by his mother.

16 Mr. McLeod's counsel was able to provide
17 more information about the family after talking
18 to Mr. McLeod's mother, who is currently in
19 the hospital in Edmonton awaiting a kidney
20 transplant. That information is that the
21 mother's parents are both residential school
22 survivors, and the mother herself attended a
23 residential school for nine years. Mr. McLeod's
24 father also attended. The mother has said that
25 she has anger issues, which have affected the
26 family, and that there was violence in the home
27 when the children were growing up. She was

1 assaulted and threatened by the father, who
2 spent time in jail for his actions. Some of
3 this was witnessed by Mr. McLeod.

4 Apparently his mother was sufficiently
5 concerned about the affect on her children,
6 that after leaving the father she took the
7 children for counselling, but that was not
8 very successful in that the children were
9 reluctant to speak about these issues. She
10 reported that she feels that Brian McLeod
11 never understood why his father was not
12 present and that he was angry about that.
13 He was in counselling for anger management,
14 but it is not clear exactly when that was or
15 for how long.

16 Mr. McLeod's mother reported that he was
17 active in sports and has good marks at school,
18 although that seems to be contradicted by the
19 information in the pre-sentence report, unless
20 she is referring to his very early years in
21 school. She also reported a change in Mr. McLeod
22 after he returned from being away at school in
23 Inuvik. He would not listen to her, he got into
24 drugs and alcohol, was full of anger and did not
25 seem to care. He became quiet and reserved after
26 the death of his godfather.

27 The difficulty that Mr. McLeod has had in

1 dealing with his godfather's death was confirmed
2 by a brother and a long-time friend, who also
3 spoke to counsel for Mr. McLeod. It is also
4 confirmed by the observations of the author
5 of the pre-sentence report, who witnessed
6 Mr. McLeod's emotional reaction when he spoke
7 about the influence and presence of his godfather
8 in his life.

9 As I have said, the second pre-sentence
10 report was ordered at the request of counsel
11 for Mr. McLeod, and that was in part because
12 the first report was quite negative in that
13 it related that Mr. McLeod did not express
14 remorse for the victims and was not forthcoming
15 or cooperative. The second report describes him
16 as "hostile, argumentative and uncooperative."
17 Although it does relate that he said he was
18 sorry and that he was upset. It also relates
19 that Mr. McLeod feels that the sexual assaults
20 would not have happened if he had not blacked
21 out from drinking and smoking dope.

22 It is clear from the pre-sentence report
23 that Mr. McLeod was not willing to talk about
24 his thoughts or feelings or the effect of his
25 actions on the victims. Why that is I cannot
26 say, I am not a psychologist. But I have no
27 doubt that for Mr. McLeod to ensure that he does

1 not get drunk and commit more crimes, especially
2 more sexual assaults, he will have to come to
3 grips with what he has done and with what his
4 own problems are, that he has to be willing to
5 get help for that, and that usually means that
6 an offender has to be willing to talk to people
7 who can help him. So Mr. McLeod needs to change
8 the attitude that is reported in the pre-sentence
9 report, which is that he feels he does not need
10 programs or treatment.

11 Mr. McLeod has a record, although it
12 consists entirely of offences of failing to
13 comply with court process. He has five such
14 convictions, ranging from 2008 to 2009. Counsel
15 advised that the last two are in relation to the
16 sexual assault charges. The record indicates
17 a failure to abide by promises he has made to
18 the Court. He has, however, no prior record
19 of sexual or violent offences.

20 The mitigating factors in this case are
21 primarily the guilty pleas. They were not,
22 however, entered at an early date. A jury
23 trial had been scheduled in May, 2011, to
24 take place in November, 2011, and it was only
25 two weeks prior to the trial that the Court was
26 advised that Mr. McLeod would re-elect and plead
27 guilty. However, the two weeks notice did mean

1 that the Court did not have to travel to Inuvik
2 for this matter. Also, the preliminary inquiry
3 had been waived by Mr. McLeod, and since there
4 was no trial that meant the victims did not
5 have to testify at all. This Court is well
6 aware, and has seen in court, that testifying
7 about the experience of a sexual assault is a
8 traumatic experience for victims, and I have
9 no doubt that in this case it would have been
10 even more traumatic considering how young these
11 victims are. So I do give Mr. McLeod substantial
12 credit for the guilty pleas.

13 Mr. McLeod's age is also a somewhat
14 mitigating factor, as he is still relatively
15 young. I also take into account in mitigation
16 that Mr. McLeod did acknowledge to the police
17 that he had committed these crimes. Even if he
18 was not able or willing to discuss what happened
19 with the author of the pre-sentence report,
20 the fact that he acknowledged his guilt to the
21 police and that he has pled guilty does indicate
22 to me that he is taking responsibility for what
23 he did, which in itself is a form of remorse.
24 Finally, interviews conducted by the author of
25 the pre-sentence report with people who know
26 Mr. McLeod suggest that these crimes are out
27 of character for him.

1 I must also consider the aggravating
2 factors. The main aggravating factor is the
3 young age of the victims. They were and still
4 are children, and they are entitled to enjoy
5 their childhood before having to deal with the
6 troubles and anxieties that come with being a
7 teenager and an adult. Mr. McLeod has taken
8 that away from them and has changed their lives
9 forever.

10 It is also aggravating that in each
11 instance Mr. McLeod did not stop at one act
12 of sexual assault, but continued the assaults.
13 He persisted in assaulting the victims. Once
14 he got away with it with victim A. he tried
15 again with M., although there is no evidence
16 that the assault on her was as invasive as
17 the one on A; indeed no evidence that he did
18 anything other than take off M.'s pants and
19 panties.

20 It is also aggravating that the victims
21 were not just vulnerable because of their age
22 but because they were in their own bed asleep
23 during most of the assaults. This is not a
24 classic breach of trust situation, but I agree
25 with Crown Counsel that there is an element of
26 breach of trust involved. Mr. McLeod was invited
27 into the home of the victims, his young cousins,

1 and while there he took advantage of his status
2 as a guest to abuse them. They should have
3 been able to trust him as their older cousin,
4 but instead, as I said, he abused them.

5 The boarder, who was supposed to have been
6 looking after the victims, clearly should have
7 made Mr. McLeod leave the home after he had
8 been drinking instead of putting the children
9 entrusted to her care at risk, and I say that
10 simply as an observation. It was not something
11 that was pointed out on Mr. McLeod's behalf
12 or something that he is trying to rely on in
13 any way. But in the end the fault, the real
14 responsibility for what happened, lies at the
15 feet of Mr. McLeod.

16 The Criminal Code of Canada in Section 718
17 makes it clear that the fundamental purpose of
18 sentencing people who commit crimes, the reason
19 that we sentence people, is to ensure that people
20 respect the law, to make it clear what conduct
21 is against the law, to stop people from breaking
22 the law, to keep people away from the rest of
23 the community when that is necessary, to assist
24 in rehabilitating people who commit crimes,
25 to provide reparation to victims of crime
26 or the community, and to promote a sense of
27 responsibility in offenders and an acknowledgment

1 of the harm done to victims and to the community.

2 The Criminal Code also requires that a
3 sentence be proportionate to the gravity or
4 seriousness of the offence and the degree
5 of responsibility or blameworthiness of the
6 offender. In this case the offences are very
7 serious, especially the anal intercourse with
8 the one victim. Mr. McLeod bears a high degree
9 of responsibility. He went to the victims' home,
10 he got drunk to an extent that he says he blacked
11 out, he did not control himself, and he committed
12 horrible crimes against his little cousins. The
13 alcohol is not to blame, and that is something
14 that Mr. McLeod needs to understand. Alcohol
15 is not something that owes responsibility to
16 anyone. People owe responsibility to other
17 people, including members of their own family.
18 Mr. McLeod is to blame for drinking the alcohol,
19 for drinking too much of it, and for doing things
20 he likely would not have done in his normal state
21 of mind.

22 It has been said many many times by this
23 Court and others that the main objectives in
24 sentencing for sexual assault are denunciation
25 and deterrence, denunciation being society's
26 rejection of this conduct, and deterrence
27 meaning to stop both Mr. McLeod and others

1 from committing sexual assault. Although
2 Mr. McLeod has not committed this type of
3 offence before and although there is no reason
4 to think that he will commit this type of offence
5 in the future, sexual assault, whether it be
6 on children, adults or teenagers, is a huge and
7 seemingly unsolvable problem in the Northwest
8 Territories. I say that because over and over
9 again we see young men like Mr. McLeod who get
10 drunk and then sexually attack others. For a
11 few minutes of selfish gratification they change
12 their own and the victims' lives forever. So
13 because of the need to send a strong message
14 to serve both denunciation and deterrence the
15 sentence for this type of conduct is usually
16 one of jail for a number of years.

17 In Mr. McLeod's case the Crown takes the
18 position that the range reflected in the case
19 law for offences of this nature is four to six
20 years. Defence did not challenge that, and
21 I agree that that is the usual range. The
22 Crown seeks a sentence at the high end of that
23 range, that is five and a half to six years,
24 less credit for the approximately 12 months
25 Mr. McLeod has been in remand. Defence
26 says that a sentence of four years would
27 be appropriate less the remand time.

1 Clearly the sexual assault on A., in other
2 words the one involving anal intercourse, is the
3 most serious of the assaults, and in isolation
4 would warrant a more serious sentence. As I am
5 sentencing Mr. McLeod for his actions against
6 both victims I must bear in mind totality and
7 ensure that the total sentence is not too long.

8 In considering an appropriate sentence
9 I must also take into account that Mr. McLeod
10 is aboriginal, Gwich'in. Section 718.2(e) of
11 the Criminal Code directs that:

12
13 All available sanctions other
14 than imprisonment that are
15 reasonable in the circumstances
16 should be considered for all
17 offenders, with particular attention
18 to the circumstances of aboriginal
19 offenders.

20
21 In the Gladue case the Supreme Court of
22 Canada said that Section 718.2(e) must have
23 been intended by Parliament to redress in part
24 the documented overrepresentation of aboriginal
25 people in jails in Canada. Section 718.2(e)
26 was said by the Supreme Court of Canada to be
27 a direction to judges to inquire into the causes

1 of the problem and to endeavour to remedy it
2 to the extent that a remedy is possible through
3 the sentencing process by using a restorative
4 approach.

5 Gladue was decided in 1999. I think that
6 it is fair to say that sentencing judges have
7 not always found it easy to determine appropriate
8 ways of complying with Gladue. Once the sad
9 history and circumstances of aboriginal people
10 are acknowledged, how is a judge to translate
11 that into a different sentence than he or she
12 might otherwise impose?

13 The Supreme Court of Canada has addressed
14 this issue again in a decision released last
15 week in R. v. Ipeelee [2012] S.C.C. 13. The
16 Supreme Court of Canada has told us that:

17
18 In every sentencing case involving
19 an aboriginal offender, including
20 cases involving serious offences,
21 a judge must consider

22 (a) the unique systemic or
23 background factors which
24 may have played a part in
25 bringing the particular
26 aboriginal offender before
27 the court; and

1 (b) the types of sentencing
2 procedures and sanctions
3 which may be appropriate
4 in the circumstances for
5 the offender because of
6 his or her particular
7 aboriginal heritage or
8 connection.

9

10 That is at paragraph 59 of the case, and at
11 paragraph 60 the Court goes on to clarify that:

12

13 Judges must take judicial notice
14 of such matters as the history
15 of colonialism, displacement and
16 residential schools, and how that
17 history continues to translate
18 into lower educational attainment,
19 lower incomes, higher unemployment,
20 higher rates of substance abuse
21 and suicide, and higher levels
22 of incarceration for aboriginal
23 people.

24

25 In this case I am satisfied that with
26 the two pre-sentence reports and the extra
27 information provided by defence counsel, the

1 requirements in the Ipeelee case for extensive
2 information about the aboriginal offender before
3 the Court and the background factors that I have
4 referred to have been satisfied. In this case,
5 although I can, according to what the Supreme
6 Court of Canada has said in Ipeelee simply take
7 judicial notice of systemic factors such as the
8 residential school experience, I also have actual
9 information provided by defence counsel about
10 some of those factors.

11 So as I have already noted there is
12 information that the residential school
13 experience lived by Mr. McLeod's grandparents
14 and parents has had a negative impact on his
15 upbringing. There is information that leads
16 me to conclude that the residential school
17 experience and the other factors referred to
18 by the Supreme Court of Canada have translated
19 for Mr. McLeod into a family life marred by
20 alcohol and violence and neglect in the sense
21 of what I would describe as an abandonment by
22 Mr. McLeod's father. I can infer that these
23 factors have played a significant part in
24 Mr. McLeod's own drinking habits and no doubt
25 his outlook on the world.

26 In Ipeelee the Supreme Court of Canada
27 said also that systemic factors provide

1 the necessary context to enable a judge
2 to determine an appropriate sentence,
3 and it added:

4
5 This is not to say that those
6 factors need not be tied in
7 some way to the particular
8 offender and offence. Unless
9 the unique circumstances of
10 the particular offender bear
11 on his or her culpability for
12 the offence or indicate which
13 sentencing objectives can and
14 should be actualized they will
15 not influence the ultimate
16 sentence.

17
18 Although I do not consider that the
19 family background and the systemic factors
20 make Mr. McLeod less responsible for his
21 actions, they may explain to some degree
22 his apparent lack of insight into those
23 actions and his insistence to the author
24 of the pre-sentence report that alcohol
25 is the real problem. If alcohol abuse is
26 a significant factor in an individual's
27 childhood, and in combination with violence

1 seems like a normal way to live, then I would
2 expect that drinking until you black out and
3 then just living with whatever the consequences
4 are seems to Mr. McLeod like a normal way to
5 live and to see the world.

6 The more difficult question is whether or
7 how this should impact the sentence I impose.
8 The Supreme Court of Canada says that I must
9 consider sentencing options and sanctions that
10 are appropriate to Mr. McLeod because of his
11 aboriginal heritage. But realistically and
12 perhaps surprisingly, in light of the large
13 aboriginal population in the Northwest
14 Territories, there are very few such options
15 in the Northwest Territories. Essentially
16 there is jail, no jail, or jail and probation.

17 No one suggests that no jail would be
18 appropriate in this very serious case. Probation
19 means abiding by conditions, and Mr. McLeod has
20 shown in the past that he is not very good at
21 that. No particular programs that would be
22 available to him while on probation have been
23 identified, nor as far as I am aware is there
24 any intensive residential alcohol treatment
25 program available in any community in the
26 Northwest Territories, apart from the 28-day
27 program in Hay River. Sadly, from information

1 provided again and again in sentencing cases,
2 it seems like there is more access to remedial
3 programs in jail than anywhere else.

4 I conclude that there is no option, apart
5 from jail in this case, and the only issue
6 is the length of the jail sentence. I also
7 conclude that despite Mr. McLeod's difficulty
8 in expressing himself to and cooperating with
9 the author of the pre-sentence report he
10 has, by his actions, shown that he is taking
11 responsibility for what he has done.

12 As I have said, Mr. McLeod is young, 23
13 years old. To my eyes he looks even younger.
14 From his reactions to being interviewed as
15 related by the author of the pre-sentence
16 report I conclude that he is somewhat immature.
17 If he is sent to a penitentiary I have no doubt
18 that it will be a very frightening experience
19 and very difficult for him, and it is not an
20 exaggeration to say that he may end up a victim
21 of sexual assault himself. Because of his
22 youth and his lack of any related record
23 rehabilitation has to be a consideration in
24 sentencing Mr. McLeod. It is to be hoped
25 that he will come to understand how wrong
26 his actions were and that he has to ensure
27 that he never does anything like this again.

1 Another factor I have to consider is
2 Mr. McLeod's remand time. He has been in
3 remand since March 2nd, 2011. Although
4 I was not told why he was taken into custody
5 at that time, and the court record is not
6 altogether clear about that, I infer that
7 it was the result of the failure to appear
8 in February, 2011, that is listed on his
9 criminal record.

10 As this matter pre-dates the Truth in
11 Sentencing Act I have discretion in the amount
12 of credit to be given to the remand time. Crown
13 Counsel argued that because Mr. McLeod failed to
14 appear twice in the course of this matter credit
15 should be restricted to one-for-one. Defence
16 counsel did not suggest any other credit. I note
17 from the criminal record that on April 5th, 2011,
18 Mr. McLeod received a total of 30 days in custody
19 for the two convictions for failing to appear.
20 Therefore, as at the end of April or early May
21 he would have finished serving that sentence,
22 and for the next 10 months his time in remand was
23 solely related to the offences that I must now
24 sentence him for.

25 In R. v. Sabourin, 2009 NWTCA 6, the
26 Northwest Territories Court of Appeal cautioned
27 against reducing the pre-trial custody credit

1 by reason of conduct which is capable of being
2 prosecuted separately. Care must be taken
3 that duplication of punishment does not occur.
4 I conclude from that that I should not reduce
5 Mr. McLeod's pre-trial custody credit simply
6 because of the failures to appear. The reason
7 I should not do that is that he was prosecuted
8 separately for those failures to appear and he
9 was sentenced for them. So for the 10 months
10 remand I am going to credit him 18 months.
11 Stand please, Mr. McLeod.

12 In my view, Mr. McLeod, particularly in
13 light of your guilty pleas, the appropriate
14 sentences in this case are three and a half
15 years for the assault on A., that is Count 2
16 in the indictment, that is the assault that
17 involved anal intercourse; and one year
18 consecutive, in other words in addition,
19 for the assault on M., and that is Count 1
20 in the indictment. So that is a total of four
21 and a half years. With the credit for remand
22 time applied that leaves three years as the
23 sentence that you will start serving today.
24 You may sit down.

25 There will be a DNA order. There will
26 be an order that Mr. McLeod register under
27 the Sexual Offender Information Registration

1 Act and that he report pursuant to that Act
2 for a period of 20 years. There will also
3 be a firearm prohibition order in the usual
4 terms for 10 years. The victim surcharge
5 will be waived because of the jail sentence.

6 Now, Mr. McLeod, I am sure that you will
7 be offered help in jail. You will be offered
8 programs, you will be offered counselling. You
9 are looking like you are sneering there. You
10 better take the help that you are offered, you
11 better do something. I am not suggesting it is
12 going to be easy, I am not suggesting it is going
13 to be comfortable for you. It will probably be
14 very uncomfortable because you obviously do not
15 talk easily to other people. But you are going
16 to have to do something, because if your problems
17 and your background have contributed to the
18 situation that you are in, the only person
19 who can deal with those and make sure that
20 they do not overwhelm the rest of your life
21 is you. Other people have been in similar
22 situations, other people have been able to
23 do it. There is no reason why you cannot
24 do it, but you have to try. So I am going
25 to wish you good luck with that because you
26 are too young to look at spending the rest
27 of your life in jail.

1 I am going to have the clerk endorse the
2 warrant with a recommendation that Mr. McLeod
3 be permitted to serve his time in the Northwest
4 Territories. I take it there would be no
5 objection to that.

6 MR. BOCK: No, Your Honour.

7 THE COURT: That is fine. Is there
8 anything further then that I should deal with?

9 MR. BOYD: Not from the Crown, Your
10 Honour.

11 THE COURT: I want to thank counsel for
12 your work in this case. We will close court.

13 -----

14

15 Certified to be a true and
16 accurate transcript, pursuant
17 to Rules 723 and 724 of the
18 Supreme Court Rules.

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Joel Bowker
Court Reporter

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