

S-1-CR2011000098

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

SHAOMEK BERNHARDT

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Transcript of the Reasons for Sentence by The Honourable  
Justice V. A. Schuler, at Inuvik in the Northwest  
Territories, on July 11th A.D., 2013.

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APPEARANCES:

Ms. S. Aitken: Counsel for the Crown

Mr. Shaomek Bernhardt: Appeared on his own behalf

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Charge under s. 434 Criminal Code of Canada

1 THE COURT: Mr. Bernhardt, who  
2 represented himself at the trial of this  
3 matter and has represented himself on  
4 sentencing, was convicted after trial on  
5 Count 1 in the Indictment, that he did, on or  
6 about March 12th, 2011, here in Inuvik, cause  
7 damage by fire to a motor vehicle belonging to  
8 Archibald Frank Sittichinli who, in his  
9 testimony, indicated that he is commonly known  
10 as Frank Edwards. That offence is contrary to  
11 Section 434 of the Criminal Code.

12 The evidence at the trial was that on the  
13 morning of March 12th, 2011, Mr. Bernhardt  
14 said to Rene Edwards that he was looking for a  
15 jerry can to burn her car. The car that she  
16 drove at that time actually belonged to her  
17 father, Frank Edwards. It was parked outside  
18 Mr. Edwards's home.

19 At about 11:30 a.m. on the date in  
20 question, Mr. Edwards was looking out his  
21 window and saw Mr. Bernhardt behind the  
22 vehicle with a jerry can and about five  
23 seconds later, as Mr. Edwards had walked over  
24 to look out another window, he saw flames  
25 coming out the back of the vehicle and Mr.  
26 Bernhardt walking away. Mr. Edwards and his  
27 son Tommy Edwards, who also saw Mr. Bernhardt

1 dump the contents of the jerry can on the back  
2 of the vehicle and use a lighter to set it on  
3 fire, used fire extinguishers on the flames.  
4 The local fire department and the police  
5 received calls at about 11:40 a.m. but the  
6 fire was out when they arrived on the scene.  
7 Mr. Edwards' son estimated that it took about  
8 seven minutes to put out the fire.

9 Rene Edward testified that the night  
10 before, Mr. Bernhardt had made some advances  
11 to her but unsuccessfully. And as I indicated  
12 in my reasons at the trial, I think it is a  
13 reasonable inference that Mr. Bernhardt was  
14 angry and that may have been the motive for  
15 the offence.

16 Mr. Bernhardt did not testify at trial.  
17 He maintained his innocence to the probation  
18 officer who prepared the pre-sentence report,  
19 so there is no evidence about what Mr.  
20 Bernard's motive was other than what was  
21 before the Court at the trial.

22 Mr. Edwards, the owner of the car, did not  
23 complete a victim impact statement but he did  
24 tell the probation officer, as is set out in  
25 the pre-sentence report, that he feared for  
26 his life and the life of those living nearby.  
27 The majority of whom are elders.

1           Since Mr. Edwards did not have enough  
2 money to have the vehicle repaired, he has  
3 done without a vehicle so he has been put to  
4 inconvenience because of that.

5           As I have just indicated, the Court does  
6 have the benefit of a pre-sentence report. It  
7 is a very thorough report and I want to thank  
8 the probation officer for that.

9           Mr. Bernhardt is 35 years old. He is of  
10 Inuvialuit descent. He is a single parent to  
11 an 11-year-old son of whom he has had custody  
12 since the child was four years old.

13          Mr. Bernhardt does have a criminal record,  
14 albeit a limited one. He has a conviction for  
15 uttering threats in 2008. He was given a  
16 suspended sentence for that but according to  
17 the pre-sentence report did not do very well  
18 because he did not obey the non-contact  
19 requirement in the probation order. Crown  
20 counsel has advised, however, that there is no  
21 record that Mr. Bernhardt was convicted of any  
22 breaches. There is also a conviction for  
23 failing to appear in court that was entered  
24 after the arson offence, in May of 2012, and  
25 for which Mr. Bernhardt received a fine.

26          The pre-sentence report discloses that Mr.  
27 Bernhardt has a close relationship with

1 members of his family and that they are  
2 supportive of him. His parents are separated  
3 and his mother is not well and requires  
4 constant care. Mr. Bernhardt resides with her  
5 and helps her when he is at home, and it is  
6 said by family members that he respects her  
7 and will not go to the family home when he is  
8 under the influence of alcohol. He  
9 contributes to her support.

10 Mr. Bernhardt has a Grade 10 education.  
11 He works in his father's welding business here  
12 in Inuvik and operates a variety of heavy  
13 machinery and equipment. He has worked with  
14 his father since age 16. His father reports  
15 that he is a hard worker and gets along well  
16 with his co-workers other than one stepbrother  
17 who also works in the business.

18 Mr. Bernhardt began to drink at the age of  
19 13 and his alcohol consumption is said to have  
20 been a problem in the past, however in recent  
21 years he has cut down. He has been on  
22 conditions to abstain from the consumption of  
23 alcohol since the offence and he and family  
24 members report that he has abstained. He also  
25 used drugs at one time but he has not done so  
26 for the past three years.

27 Turning to the offence itself, Section 434

1 of the Criminal Code provides that it is one  
2 for which an offender may be sentenced to a  
3 maximum of 14 years in jail. There is no  
4 minimum sentence prescribed in the Criminal  
5 Code.

6 As is noted in some of the cases filed by  
7 counsel for the Crown, arson is viewed as a  
8 very serious offence because of the terrible  
9 consequences that can result from it. Fire is  
10 unpredictable and no matter what the person  
11 setting the fire may actually intend, fire can  
12 easily get out of control and lead to terrible  
13 consequences that were not foreseen or  
14 intended. Setting a fire, especially in an  
15 area where people live close by, or to a piece  
16 of property that could explode, puts the lives  
17 of people at risk. It puts the lives of  
18 firefighters and others who attempt to  
19 extinguish the fire at risk, and obviously in  
20 this case Frank and Tommy Edwards fall into  
21 that category. So that is why the offence is  
22 treated so seriously.

23 As a mature individual, Mr. Bernhardt is  
24 well aware of the potential risks of what he  
25 did and must have been aware at the time that  
26 he did it. I do note that in this case one  
27 factor that is different than some of the

1 cases submitted by the Crown is the time of  
2 day when the fire was set. In some of the  
3 cases there was even more potential for harm  
4 to people because the fires were set at a time  
5 of night or early morning when most people  
6 would be asleep in bed. In this case,  
7 according to the evidence, the fire was set at  
8 around 11:30 a.m., at a time when most people  
9 would be up and alert, although there is no  
10 question that harm could have still resulted  
11 to those in the area, especially elders who  
12 might not be able to escape quickly.

13 There is no evidence that it was anything  
14 more than good luck that Frank Edwards was  
15 looking out the window and saw the fire and  
16 that he and his son were able to deal with it  
17 so quickly. In other words, that cannot be  
18 attributed to Mr. Bernhardt who simply left  
19 the scene after setting the fire.

20 Some of the cases also involve accused or  
21 offenders who were intoxicated. I have  
22 reviewed the evidence that was heard at the  
23 trial. By the time the police located Mr.  
24 Bernhardt, according to their testimony he had  
25 been drinking. They observed signs of that.  
26 But that was at approximately 2 o'clock in the  
27 afternoon. So the evidence really is unclear

1 as to what his condition was at the time that  
2 he set the fire.

3 As with any sentencing, mitigating and  
4 aggravating factors must be taken into  
5 account.

6 Mr. Bernhardt exercised his right to a  
7 trial. He was entitled to do that, and he is  
8 not to be punished more harshly for having  
9 exercised that right. It does mean, however,  
10 that he does not get the mitigation; in other  
11 words, the benefit, of a guilty plea.

12 Nor has there been any expression of  
13 remorse, although Mr. Bernhardt did say  
14 yesterday that he would pay the damage claim  
15 he was presented with. So I take that as an  
16 acknowledgment of some responsibility or at  
17 least recognition of the Court's verdict. If  
18 there had been a guilty plea, if there had  
19 been a clear expression of remorse, these  
20 would be mitigating factors. But since they  
21 are absent in this case, they do not help Mr.  
22 Bernhardt.

23 I find that there is some mitigation in  
24 Mr. Bernhardt's background although, as I have  
25 said, he has a limited criminal record. He  
26 appears to have been a hard working person,  
27 helpful to his family, and taking

1 responsibility for his son. He has also taken  
2 steps to ensure that alcohol does not dominate  
3 his life. So all of that is to Mr.  
4 Bernhardt's credit. He was also able to abide  
5 by conditions of release for approximately two  
6 years save for the incident of failing to  
7 appear.

8 As for aggravating factors, it is  
9 aggravating that the vehicle was set on fire  
10 when it was in close proximity to residences  
11 and also another vehicle. It is also an  
12 aggravating factor that Mr. Bernhardt simply  
13 left the scene, leaving the vehicle to burn.  
14 There is also an element of premeditation in  
15 this case because Mr. Bernhardt told Rene  
16 Edwards that he was going to burn the vehicle.  
17 He looked for, and he obviously obtained, a  
18 jerry can of gas and he then went to Frank  
19 Edwards' house and set the vehicle on fire.  
20 So this was something that he did give some  
21 thought to.

22 Some of the cases that were filed by the  
23 Crown refer to there being different types of  
24 arsonists - different categories of people who  
25 set fires. There are people who are mentally  
26 disturbed. There are people who do it for no  
27 special reason or because they have a grudge.

1           There are people who do it simply as  
2           vandalism. And there are people who do it for  
3           financial gain; for example, for insurance  
4           money. That last example is considered  
5           generally to be the most blameworthy form of  
6           arson.

7           In this case, as I have noted, on the  
8           evidence the only reason or the possible  
9           reason for Mr. Bernhardt's actions that arises  
10          is that he was angry at Ms. Edwards. There is  
11          certainly no indication in the pre-sentence  
12          report that he is mentally disturbed. This  
13          does not appear to be a case of simple  
14          vandalism, in other words just going out to  
15          wreck property no matter whose it is, nor is  
16          there any question of financial gain. So in  
17          this case, Mr. Bernhardt does not fall into  
18          the most blameworthy category which, as I  
19          said, is usually said to be when the arson is  
20          committed for financial gain.

21          Mr. Bernhardt is of Inuvialuit heritage  
22          and that means that the Court has a  
23          responsibility under Section 718.2(e) of the  
24          Criminal Code to consider all available  
25          sanctions other than imprisonment that are  
26          reasonable in the circumstances.

27          The cases of Gladue and Ipeelee decided in

1 the Supreme Court of Canada have interpreted  
2 this as meaning that the Court has a  
3 responsibility to approach sentencing of  
4 aboriginal offenders in a way that recognizes  
5 the disadvantages that aboriginal people have  
6 historically suffered and the systemic factors  
7 that, in many cases, contribute to their  
8 coming into conflict with the law. The  
9 Supreme Court of Canada has said that Courts  
10 should try to craft a sentence that is best  
11 suited to an aboriginal offender considering  
12 those background factors.

13 As is noted in one of the cases filed by  
14 Crown counsel, the Cootes case, 2011 BCCA 398,  
15 Section 718.2(e) was intended, in part, to  
16 recognize systemic problems in a criminal  
17 justice system, where aboriginal offenders  
18 make up a disproportionate percentage of the  
19 inmates in jail, by encouraging sentences  
20 other than imprisonment whenever appropriate.  
21 It is not a direction that aboriginal  
22 offenders be given more lenient sentences, but  
23 a recognition that other forms of sentence can  
24 sometimes achieve the goals and principles of  
25 sentencing equally if not more than  
26 imprisonment.

27 In Mr. Bernhardt's case, the pre-sentence

1 report indicates that although alcohol has  
2 played a role in his life, as it has in the  
3 lives of so many aboriginal people, it has not  
4 led to the devastating consequences that are  
5 often seen. His family life and upbringing  
6 appear to have been steady and supportive.  
7 There were some issues in the family with  
8 alcohol abuse by the parents; however, they  
9 still seem to have been able to provide a  
10 supportive homelife for their children. Mr.  
11 Bernhardt is involved in the family business  
12 which also provides employment for other  
13 family members. He has been able to make a  
14 good income. Although his parents went to  
15 residential school, that does not appear to  
16 have had the pronounced negative effect on  
17 family life that sometimes results from that  
18 experience. And Mr. Bernhardt himself has  
19 taken his parental responsibilities seriously  
20 from what is in the report. So from all of  
21 this, it does not appear to me that Mr.  
22 Bernhardt has come into conflict with the law  
23 due to systemic factors.

24 The law is also clear that while Mr.  
25 Bernhardt's aboriginal heritage is a  
26 consideration, other principles of sentencing  
27 must also play a role, especially in a case

1 where public safety has been put at risk.

2 The fundamental principle of sentencing is  
3 that the sentence must be proportionate to the  
4 gravity of the offence and the degree of  
5 responsibility of the offender.

6 For the reasons that I have already  
7 explained, the offence in this case is  
8 serious. Based on what he said to Ms. Edwards  
9 before setting the vehicle on fire, Mr.  
10 Bernhardt obviously thought about it. As I  
11 said, he got the gas, he went to the residence  
12 where the vehicle was parked, so there was  
13 some premeditation. He also left it to burn  
14 and created a situation that could have had  
15 tragic consequences to members of the public.  
16 And in fact, and I hope Mr. Bernhardt will  
17 think about this, if that fire had got out of  
18 control, he could be here on much more serious  
19 charges, including charges for causing the  
20 death of someone. Fortunately that didn't  
21 happen; fortunately nobody was actually hurt  
22 in the fire.

23 Denunciation and deterrence are also  
24 important principles of sentencing and the  
25 sentence that I impose must signal to both Mr.  
26 Bernhardt and others that this behaviour will  
27 have a serious consequences; that society, the

1 community, rejects and condemns this  
2 behaviour. And again, obviously, that is  
3 because it can have such devastating  
4 consequences.

5 So all of those principles have to be  
6 balanced in order to come to an appropriate  
7 sentence.

8 I have reviewed the cases that were  
9 submitted by Crown counsel. All cases and all  
10 offenders are different. There are never any  
11 two that are exactly the same. What is clear  
12 is that Courts generally have imposed a jail  
13 term for the offence of arson. Mr. Bernhardt's  
14 aboriginal status does not mean in this case  
15 that the Court should approach this case  
16 differently. In other words, it doesn't mean  
17 the Court should automatically approach the  
18 case differently. His status may have an  
19 affect on the length of the sentence that is  
20 imposed. And so, again, that is where it may  
21 be relevant.

22 Crown counsel has submitted that a jail  
23 term of nine months would be appropriate in  
24 this case and that does appear to be within  
25 the range of the sentences imposed in the  
26 cases for this type of offence. Those cases  
27 indicated a range from nine months up to three

1 years.

2 Any sentence of less than two years can be  
3 made conditional. In this case Crown counsel  
4 opposes a conditional sentence, and I have to  
5 note obviously as well that the pre-sentence  
6 report indicates that Mr. Bernhardt's family  
7 would be supportive of him if a conditional  
8 sentence was made. However, it also indicates  
9 that Mr. Bernhardt told the probation officer  
10 that he feels he would not do well on a  
11 conditional sentence order or probation order  
12 and that he would prefer custody and that he  
13 has in fact made arrangements for his son's  
14 care anticipating that the sentence would be  
15 one of custody.

16 Here in court yesterday, when I asked Mr.  
17 Bernhardt about that, he said that he does not  
18 like to be stuck at home, he does not like to  
19 have to be in town, he feels he cannot keep  
20 appointments because of the work he does which  
21 requires him to be out of town on short  
22 notice.

23 A conditional sentence generally does  
24 include quite restrictive terms, often things  
25 like house arrest, a curfew, reporting  
26 conditions. It is very clear that a  
27 conditional sentence is not the same as

1           probation. It is meant to be a more severe  
2           type of sentence. It is a jail sentence but  
3           it is served in the community.

4           So I have given consideration to whether a  
5           conditional sentence could or should be  
6           imposed in this case. But in light of Mr.  
7           Bernhardt's remarks, I have come to the  
8           conclusion that a conditional sentence would  
9           not be appropriate and, in fact, it might just  
10          be setting Mr. Bernhardt up for failure  
11          because any conditional sentence, in the  
12          circumstances of this case, would have to  
13          include quite strict conditions.

14          I want to be clear that I am not saying  
15          that a conditional sentence would be  
16          appropriate for this offence if it were not  
17          for Mr. Bernhardt's comments. But because of  
18          Mr. Bernhardt's attitude towards it, I have  
19          decided that I need not go on to consider it  
20          any further, that it would not be appropriate  
21          because of his attitude and reaction to it.

22          So as I have said, Crown counsel is  
23          seeking a sentence of nine months imprisonment  
24          plus probation. Mr. Bernhardt did not make  
25          any submissions as to the length of an  
26          appropriate sentence.

27          I want to deal with the ancillary orders

1 first. First of all, the Crown is requesting  
2 an order for the taking of a sample from Mr.  
3 Bernhardt for purposes of DNA analysis.

4 Arson is a secondary designated offence  
5 for purposes of Section 487.0511 of the  
6 Criminal Code and so I have a discretion  
7 whether to make that order. To decide whether  
8 to make it, I must consider Mr. Bernhardt's  
9 criminal record, the nature of the offence,  
10 the circumstances surrounding its commission,  
11 and the impact on Mr. Bernhardt's privacy and  
12 security.

13 Mr. Bernhardt indicated that he does not  
14 oppose a DNA order but he pointed out that no  
15 DNA was found at the scene of this offence. I  
16 do not believe that there was any discussion  
17 about whether DNA was sought or could have  
18 been present in this particular case, however,  
19 DNA is generally a useful investigative tool  
20 for the police. For example, in a case where  
21 there are no witnesses, items such as Kleenex  
22 or a cigarette may be discarded and that may  
23 provide DNA. So I take that into account.

24 I take into account that this is a serious  
25 offence for the reasons that I have said.  
26 Although Mr. Bernhardt's record is dated, the  
27 seriousness of the offence, its potential for

1 harm to people, in my view is a significant  
2 consideration.

3 The taking of DNA has been referred to by  
4 courts, for example in the case of R. v. Briggs,  
5 2001 O.J. No. 339 from the Ontario Court of  
6 Appeal, as not involving an undue incursion on  
7 an individual's privacy and security.

8 In weighing all of those factors,  
9 considering that Mr. Bernhardt indicated that  
10 he was not opposed, I am satisfied that it is  
11 in the best interests of the administration of  
12 justice to make that order and I do so.

13 The Crown also seeks a firearms  
14 prohibition order under Section 110(1)(b) of  
15 the Criminal Code as this was an offence  
16 involving an explosive substance, being  
17 gasoline. Again, this is a situation where  
18 the Court may make such an order. It is not  
19 required to.

20 Although what Mr. Bernhardt did created a  
21 risk to the public, there is no evidence that  
22 he actually intended to harm any person. Nor  
23 is there any indication that Mr. Bernhardt is  
24 likely to repeat this behaviour. At his age,  
25 and without any indication that he has done  
26 this before, there is no evidence that this is  
27 anything other than an isolated incident.

1           The substance used was gasoline. It is a  
2 substance that is commonly used for legitimate  
3 purposes, and it would be of use to someone  
4 going out in the bush or being on the water.  
5 And so since those are fairly significant  
6 aspects of Mr. Bernhardt's life, since he does  
7 not have any record for this offence and he  
8 does not have any record for actual violence  
9 against a person, I have considered but have  
10 decided that I will not impose a Section 110  
11 firearm prohibition order.

12           In connection with that, I do note that in  
13 two of the cases that were submitted by Crown  
14 counsel where a firearm prohibition order was  
15 made, for example Dervishaj, 2009 BCPC 0094,  
16 the motive for arson was financial, which is  
17 considered to be the most blameworthy example  
18 of the offence, and the order was made in that  
19 case. In the Montgomery, 2002 ABPC 36, where  
20 the order was also made, the accused had a  
21 substantial criminal record with multiple  
22 related convictions, including assault. So  
23 those are elements in those cases that are not  
24 present in this particular case.

25           There was also reference to the victim  
26 surcharge. Mr. Bernhardt earns a good income.  
27 The pre-sentence report indicates that he

1           earned \$80,000 in 2012. So as a result of  
2           that, I am not going to waive the victim  
3           surcharge.

4           Stand up, please, Mr. Bernhardt.

5           As to the sentence itself, the nine months  
6           that is being sought by the Crown I note is  
7           the sentence that was imposed in Makinaw case,  
8           2002 ABPC 193. In that case, the fire was set  
9           in a hotel so there was a greater proximity of  
10          people to where it was and in fact a large  
11          number of people, greater than in this case.  
12          Similar to this case, the fire was quickly  
13          extinguished. Similar to this case, the  
14          damage was not extensive in the way that is  
15          seen in some of the other cases, although  
16          there serious damage in this case. In the  
17          Makinaw case there was a guilty plea which is  
18          not present in this case. But in Makinaw, the  
19          offender was found to be at a substantial risk  
20          to reoffend. So there is some differences,  
21          some similarities, but having given it a lot  
22          of thought, in my view that is an appropriate  
23          sentence in this case. So Mr. Bernhardt, I am  
24          sentencing you to nine months. It will not be  
25          a conditional sentence.

26          I am also going to place you on probation  
27          for a period of one year after your sentence.

1 I am doing that in large part because there  
2 are some conditions that I think should be  
3 imposed, and I can only do that by way of a  
4 probation order.

5 The probation will be for one year. There  
6 will be the statutory conditions that you keep  
7 the peace and be of good behavior, in other  
8 words don't get into trouble. You will appear  
9 before the Court when required to do so by the  
10 Court. And you will notify the court or the  
11 probation officer in advance of any change of  
12 name or address and you will promptly notify  
13 the Court or the probation officer officer of  
14 any change of employment or occupation. You  
15 are to, during that one year, have no contact  
16 directly or indirectly with Frank Sittichinli,  
17 in other words Frank Edwards, Tommy Edwards  
18 and Rene Edwards. You are to pay restitution  
19 to the clerk of the court. It will be payable  
20 to Frank Sittichinli but through the clerk of  
21 the court in the amount of \$1,702.89. And  
22 that is to be paid within the year of your  
23 probation, in other words before the probation  
24 expires. The reason that I have decided on  
25 that figure is because there is no evidence  
26 before me of the \$3000 figure that was  
27 referred to. But because the documentation

1 was presented to you for the \$1702 figure, I  
2 have decided that that is the appropriate  
3 amount of restitution.

4 I am not going to require, Mr. Bernhardt,  
5 that you report to a probation officer. I am  
6 not ordering that you take any sort of  
7 counselling.

8 I have thought about that. You are a  
9 mature man. From having seen you, observed  
10 you, and in what I have seen of you before the  
11 court, what I read in the pre-sentence report,  
12 I think that you are probably quite stubborn,  
13 quite independent. You have shown in the last  
14 two years that you can abstain from drinking,  
15 and I am going to take that as meaning that  
16 you have shown that you can learn from your  
17 mistakes. I think that this is a case where  
18 focusing on your employment, focusing on your  
19 son, and focusing on your family support are  
20 really the things that are going to be best  
21 for you. I have some concerns that if I were  
22 to order counselling, there are just going to  
23 be problems with you not being able to make  
24 the appointments. So instead, as I say, I am  
25 going to rely on the fact that you have shown  
26 that you can deal with your issues -- over the  
27 past two years, and I am going to rely on you

1 to continue dealing with your issues.  
2 Obviously you need to work on your temper and  
3 not letting it get out of control and not  
4 letting it lead you to do things that are  
5 against the law. So I am hoping that things  
6 will work out for you and that we will not in  
7 fact see you back before the court again.

8 You may sit down.

9 Is there anything further?

10 MS. AITKEN: No, Your Honour.

11 THE COURT: All right, thank you, then  
12 for your submissions. Thank you, Mr.  
13 Bernhardt, for the way that you dealt with the  
14 case. I think that you were quite reasonable  
15 in terms of the way that you dealt with the  
16 trial and we will close court then.

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20 Certified to be a true and  
21 accurate transcript pursuant  
22 to Rules 723 and 724 of the  
Supreme Court Rules,

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Lois Hewitt,  
Court Reporter