

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

MORAN LEE NITSIZA

Transcript of the Reasons for Sentence by the Honourable
Justice S. H. Smallwood, sitting in Yellowknife, in
the Northwest Territories, on the 13th day of November,
A.D., 2013.

APPEARANCES:

Mr. R. Carrier: Counsel for the Crown
Mr. S. Petitpas: Counsel for the Defence

Charge under Section 151 Criminal Code of Canada
PUBLICATION BAN UNDER SECTION 486.4 CRIMINAL CODE

1 THE COURT: Moran Nitsiza pleaded guilty
2 on Tuesday to one count of touching for a sexual
3 purpose. The charge on the Indictment is that
4 on or between the 1st day of August, 2011, and
5 the 30th day of September, 2011, at Wha'ti, he
6 did for a sexual purpose touch J. B.,
7 a person under the age of sixteen years, directly
8 with his penis, contrary to Section 151 of the
9 Criminal Code. It is now my task to sentence
10 him for this offence.

11 Counsel for the Crown and defence have
12 presented a joint submission for 30 months
13 imprisonment. Details of the touching for
14 a sexual purpose are contained in the Agreed
15 Statement of Facts, Exhibit S-1.

16 Briefly, the offender was born in February,
17 1991, and was approximately 20 years and 5 months
18 old at the time of the offence. The victim was
19 born in June, 1996, and was approximately 15
20 years and 2 months old at the time of the
21 offence.

22 During the period of August 1st, 2011, and
23 September 30th, 2011, the offender and victim
24 had known each other for about one year. They
25 were on friendly terms and knew other people in
26 common, including each other's family members in
27 the community of Wha'ti.

1 During this time period the offender and
2 victim spent time alone together, as well as
3 in groups with other people. During this time
4 the offender convinced the victim to engage in
5 unprotected sexual intercourse with him on two
6 occasions. These two encounters happened within
7 a few days of each other. The sexual intercourse
8 happened outdoors in remote locations around
9 Wha'ti when the offender and victim were alone.

10 The victim gave her de facto consent to
11 engage in sexual intercourse with the offender
12 on both occasions. Because of her age the
13 victim was unable to legally consent to sexual
14 intercourse with the offender. The offender
15 did not take reasonable steps to find out
16 the victim's age prior to engaging in sexual
17 intercourse with her.

18 Exhibit S-4 reflects the views of the
19 victim. In it she speaks of the effect this
20 offence has had on her, and it is clear that
21 the offence had an impact on her and one that
22 may be a lasting one.

23 Mr. Nitsiza's criminal record has also
24 been filed as an exhibit, S-2. There are 34
25 convictions on his criminal record, and his
26 criminal record begins in 2005 and continues
27 through to earlier this year, September of 2013.

1 At the time that this offence occurred, sometime
2 in August and/or September of 2011, the offender
3 had 25 convictions on his criminal record. On
4 June 26th, 2012, the offender was convicted of
5 eight offences, and on September 3rd, 2013, the
6 offender was convicted of another offence.

7 The 25 convictions that were on the
8 offender's criminal record in August, 2011,
9 consisted of a number of offences from Youth
10 Justice Court, as well as offences in Adult
11 Court. Overall, there were 16 offences against
12 the administration of justice, five property
13 offences and four offences of violence, including
14 a sexual assault that the offender was convicted
15 of in 2006 when he was not quite 15 years old.
16 He received a sentence at that time of ten
17 months incarceration followed by five months
18 of community supervision.

19 On June 26th, 2012, the offender was
20 convicted of eight offences, five offences
21 against the administration of justice, one
22 property offence and two causing a disturbance
23 offences. He received a period of incarceration
24 at that time.

25 On September 3rd, 2013, the offender
26 was convicted of a sexual interference offence
27 following a jury trial, and at that time he

1 was sentenced to a period of imprisonment of 30
2 months. He was given credit for his pre-trial
3 custody of one year and 47 days. As well, he was
4 subjected to a SOIRA order for 20 years and a DNA
5 order.

6 I have been advised that Mr. Nitsiza has
7 continually been in custody since August 12th,
8 2012. When he was sentenced in September of
9 2013 he received credit for his pre-sentence
10 custody, and counsel for Mr. Nitsiza advises me
11 that he has been in custody since the fall of
12 2011 on other unrelated matters. Certainly it
13 appears that the offender has spent most, if
14 not all, of the last couple of years in custody.
15 The end result of these previous offences is
16 that there is no pre-trial custody for the Court
17 to consider in imposing sentence on Mr. Nitsiza
18 today.

19 Mr. Nitsiza is of aboriginal descent,
20 and this requires me to consider Section
21 718.2(e) of the Criminal Code, which requires
22 the Court to consider all available sanctions
23 other than imprisonment that are reasonable
24 in the circumstances for all offenders, and
25 particular attention should be paid to the
26 circumstances of aboriginal offenders.

27 The Supreme Court of Canada in Gladue and

1 Ipeelee have considered that section, and I have
2 considered the principles that have been set out
3 in those cases, and the requirement to consider
4 the unique systemic or background factors which
5 may have played a part in bringing an offender
6 before the Court and the types of sentencing
7 procedures and sanctions which may be appropriate
8 because of an offender's background.

9 Exhibit S-3 consists of three pre-sentence
10 reports that have been completed over the past
11 few years for Mr. Nitsiza. They are dated
12 July 31st, 2013, March 13th, 2012, and April
13 4th, 2011. They provide background into the
14 offender's personal circumstances. I also
15 have the Reasons for Sentence from September
16 3rd, 2013, and I have heard from counsel for
17 Mr. Nitsiza about his background and the Gladue
18 Ipeelee factors.

19 The information that I have does provide
20 a fairly complete picture of Mr. Nitsiza's
21 background and his aboriginal circumstances.
22 What I have heard is that the offender is
23 now 22 years old. He was born in Yellowknife
24 and raised in Wha'ti. He is of Tlicho descent,
25 he is single, has never been employed, and has
26 a grade 10 education. Prior to his arrest he
27 was attending upgrading in order to obtain his

1 GED, and he has been in custody on a number
2 of matters, I am told, since the fall of 2011.

3 His background has been unfortunate and
4 filled with dysfunction. His parents split
5 when he was five, and the relationship between
6 his parents was filled with substance abuse and
7 domestic violence. After his parents separated
8 his mother took the offender and his siblings
9 to live in Yellowknife. They lived there until
10 she lost her employment and they had to return
11 to Wha'ti. When he was seven his mother again
12 returned to Yellowknife, and this time she took
13 the offender, but not his siblings. She later
14 lost her job again, and later her home, and
15 succumbed to serious alcohol abuse.

16 The offender was eventually placed in
17 foster care where he became a permanent ward
18 of the Government until he became an adult.
19 Through most of his teenaged years, and as a
20 young adult, he has been in and out of jail,
21 on probation, in treatment, all of which is
22 reflected in the pre-sentence reports that
23 have been filed in this case. He was diagnosed
24 with FASD in 2005 and has himself abused alcohol
25 and marijuana in the past, which has been a
26 factor in some of his prior offences.

27 His mother now apparently lives on the

1 streets in Yellowknife, and the offender has
2 virtually no contact or relationship with his
3 father. His closest relationships have been
4 with his siblings, who have been supportive
5 and continue to be supportive of him. They
6 are apparently close and willing to provide
7 him with a place to live.

8 There are a number of sentencing principles
9 that are engaged in this case. The purpose and
10 principles of sentencing are set out in the
11 Criminal Code. I do not intend to refer to
12 all of them, but have considered the principles
13 enunciated in Sections 718 to 718.2. A sentence
14 must be proportionate to the gravity of the
15 offence and the degree of responsibility of
16 the offender.

17 Pursuant to Section 718.01, when sentencing
18 an offender for an offence that involves the
19 abuse of a person under the age of 18 years old,
20 a Court is required to give primary consideration
21 to the objectives of denunciation and deterrence.
22 The principle of denunciation involves denouncing
23 unlawful conduct and deterrence involves
24 deterring the offender and other persons from
25 committing offences. In this case the victim was
26 15 years of age, so deterrence and denunciation
27 are the primary considerations, followed by the

1 other applicable sentencing principles.

2 The Crown has filed four cases: R. v. King,
3 2013 ABCA 3; R. v. Bjornson, 2012 ABCA 230; R. v.
4 Feng, 2011 ABCA 172; and R. v. Pritchard, 2005
5 ABCA 240.

6 All of these cases deal with sentencing
7 for offences involving an offender having
8 consensual sexual intercourse with a person
9 who was not legally of age to consent. While
10 those cases provide guidance in sentencing
11 individuals convicted of similar offences
12 they do not definitively answer the question
13 of whether or not an adult who has had sexual
14 intercourse that would otherwise be considered
15 consensual were it not for the inability of the
16 victim to consent because of their age, whether
17 that person has committed a major sexual assault
18 as contemplated in R. v. Arcand (2010), 264
19 C.C.C. (3d) 134.

20 What can be gleaned from the cases is this:
21 The issue of de facto consent is not a mitigating
22 factor, but is to be considered the absence of
23 an aggravating factor. Similarly, the absence
24 of violence is as well to be considered as the
25 absence of an aggravating factor.

26 The degree of responsibility of the
27 offender and the gravity of the offence will

1 vary depending on a number of factors, some of
2 which include the age of the offender, whether
3 the offender is a mature adult or someone who
4 is somewhat closer in age to the victim, whether
5 the offender has promoted a sexual relationship
6 with a person he knew to be a child, whether
7 this was done through a ruse or through other
8 means of persuasion which involved preying on
9 the vulnerability of a teenaged girl, the nature
10 and extent of sexual contact, the number of
11 instances, and whether the victim was exposed
12 to the risk of pregnancy or sexually transmitted
13 diseases.

14 As well, where the offender is a mature
15 adult who is aware of the age of the victim,
16 the offender has the responsibility to ensure
17 that his actions do not cross the line to
18 illegal acts involving sexual intercourse
19 with an underaged victim no matter how willing
20 the victim may have been to engage in sexual
21 intercourse. Whether force is used or
22 persuasion, the offender has committed a
23 sexual assault on someone who cannot by law
24 give consent.

25 Turning to the factors that are applicable
26 in this case, Mr. Nitsiza has entered a guilty
27 plea. This guilty plea occurred after a

1 preliminary inquiry in which the victim was
2 required to testify. This matter was set for
3 a jury trial, which was scheduled to occur this
4 week. Counsel for the offender advised the Court
5 on October 18th of this year that the trial would
6 not be necessary. So while the guilty plea
7 cannot be characterized as an early guilty plea
8 it is not so late in the day that the Crown's
9 witnesses were required to attend court or a jury
10 panel was assembled. In the end, it is a late
11 guilty plea, but it has saved the victim from
12 having to testify, and does deserve some limited
13 credit.

14 As well, it is mitigating that the offender
15 has expressed his remorse for this offence
16 through his willingness to plead guilty, with
17 his apology to the victim, which was expressed
18 through counsel yesterday and was expressed to
19 the Court today.

20 There are also a number of aggravating
21 factors. It is statutorily aggravating pursuant
22 to Section 718.2(a)(ii.1) that the offender
23 abused a person under the age of 18 years.
24 The victim in this case was 15 years old, the
25 offender was 20. While there may have been de
26 facto consent the victim was not old enough to
27 consent, and the offender, as the adult in this

1 situation, was supposed to be the responsible
2 one and ensure that the relationship between
3 he and the victim did not cross the line.

4 Instead, the offender had unprotected
5 sexual intercourse with the victim on two
6 occasions. In terms of sexual contact,
7 engaging in sexual intercourse is obviously
8 more serious than sexual touching; for example,
9 touching the victim's breast or buttocks.
10 In engaging in sexual intercourse the offender
11 exposed the victim to the risk of pregnancy
12 and sexually transmitted diseases. So those
13 are all aggravating circumstances.

14 The victim impact statement demonstrates
15 the vulnerabilities that exist when a young
16 person is subjected to the sexual advances of
17 an adult. The victim speaks of the loss of her
18 reputation, that people had warned her about the
19 offender and she did not listen. She says that
20 she feels like the offender manipulated her mind,
21 and she says she feels stupid, disgusted and
22 used.

23 Turning to the offender's criminal record,
24 as mentioned now, this is the third sexual
25 offence that the offender has been convicted of.
26 The first offence was a conviction for a sexual
27 assault in 2006 while the offender was still

1 a youth. He received a custodial disposition
2 at that time followed by a lengthy period of
3 probation.

4 His next conviction is in September of
5 this year where he was convicted of sexual
6 interference and received a sentence of 30
7 months imprisonment less credit for one year
8 and 47 days of pre-sentence custody. At the
9 time of this offence the offender had not been
10 convicted of the September 3rd, 2013, sexual
11 interference charge. I am advised that for both
12 of these offences it is difficult to determine
13 which would have occurred first as there is some
14 overlap in the dates.

15 So the sentence of September 3rd, 2013,
16 cannot be considered aggravating, but the
17 sentence imposed does provide some guidance
18 in crafting an appropriate sentence for this
19 offence.

20 In that case the offender was convicted
21 following a jury trial. The offence in that
22 case occurred when the offender was 19 or 20,
23 and the victim in that case was 13 or 14. The
24 victim and offender engaged in six incidents of
25 sexual intercourse. The offender in that case
26 implored the victim to keep their relationship
27 a secret, and in that case the victim initially

1 lied to the offender about her age. It was not
2 clear whether the offender later found out about
3 the victim's real age or simply did not make the
4 inquiries that he should have to ascertain her
5 age.

6 There are similarities and differences
7 between that case and this case. The victim
8 in this case is somewhat older, but still
9 she is not able to legally consent to sexual
10 intercourse with the offender. The number of
11 incidents in this case were two incidents of
12 unprotected sexual intercourse, whereas in the
13 other case there were more incidents, at least
14 six occasions where the offender and victim
15 engaged in sexual intercourse.

16 The sentence that was imposed on the
17 offender occurred after a jury trial, whereas
18 in this case the offender has entered a guilty
19 plea. In the other case there was also the
20 element of secrecy, which suggests that the
21 offender was aware that there was something
22 wrong about the relationship he was pursuing
23 with the victim. In this case there has been
24 no suggestion that he told the victim to keep
25 quiet about the relationship.

26 In both cases it is clear that the offender,
27 at a minimum, did not make the inquiries that

1 he should have with respect to the victim's age,
2 and in both cases the offences involved sexual
3 intercourse.

4 The offender has been in custody for a
5 significant period of time over the last few
6 years. Mr. Nitsiza, you have a significant
7 criminal record for someone who is only 22,
8 and that causes me concerns about your ability
9 to stay out of trouble. I recognize that you
10 have challenges because of your FASD and your
11 background and that you have started off at
12 a disadvantage when compared to other people,
13 but what happens with you now and what you make
14 of yourself in the future largely depends on you.
15 I am glad to hear that you intend to pursue your
16 education and are working towards getting your
17 GED, and hopefully while you are in custody you
18 will also be able to address other issues.

19 Please stand, Mr. Nitsiza.

20 Taking into account the circumstances
21 and the applicable sentencing principles
22 I am satisfied that the joint submission is
23 an appropriate sentence. I sentence you to 30
24 months imprisonment on Count 2 on the Indictment,
25 touching for a sexual purpose. While ordinarily
26 the sentences would be consecutive I am concerned
27 that to do so in this case would offend the

1 principle of totality and impose a crushing
2 sentence on you. The 30-month sentence will
3 then be served concurrently to any other sentence
4 that you are serving. You may sit down.

5 As requested, there will also be a SOIRA
6 order for 20 years. As well, this offence is
7 a primary designated offence, so there will be
8 a DNA order. I agree with the submissions of
9 counsel that the amendments to Section 737 of
10 the Criminal Code, which came into effect on
11 October 24th, 2013, and eliminate the Court's
12 ability to waive the victim of crime surcharge,
13 is of prospective effect. In the circumstances,
14 considering the offender's lack of previous
15 employment and the sentence he will be serving,
16 I am satisfied that it would cause undue hardship
17 to impose the victim of crime surcharge.
18 Therefore, it is waived.

19 Is there anything else that we need to
20 address, counsel?

21 MR. CARRIER: No, Your Honour.

22 MR. PETITPAS: No, Your Honour.

23 THE COURT: Thank you, counsel, for your
24 submissions and your work towards resolving this
25 matter without the necessity of a trial. We will
26 adjourn court.

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

Joel Bowker
Court Reporter