R. v. Nitsiza, 2013 NWTSC 73 S-1-CR-2012-000051

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 delivered by The Honourable Justice K. Shaner, in Yellowknife, in the Northwest Territories, on the 3rd day of September, 2013.

APPEARANCES:

Ms. J. Porter: Counsel on behalf of the Crown

Mr. S. Petitpas: Counsel on behalf of the Accused

Charge under s. 151 C.C.

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pursuant to Section 486.4 of the Criminal Code

THE COURT: Today I have to impose a sentence on you, Mr. Nitsiza. You were convicted of sexual interference under section 151 of the Criminal Code following a jury trial in Behchoko held on June 11th to June 13th this past summer, 2013.

The first matter I want to deal with is the matter of pretrial and presentence custody for Mr. Nitsiza and in particular the credit that he should receive for that. Specifically, the question is whether he should receive enhanced credit of 1.5 days for every day served in presentence custody or the straight one-to-one credit or a combination of the both of those.

Both the Crown and defence agree that Mr. Nitsiza has been on remand since August 12th, 2012. Mr. Petitpas provided some information from correction officials that except for the months of February and March of 2013, when Mr. Nitsiza displayed some behavioural problems, he would have received full remission had he been a sentenced prisoner. Based on that, I am urged to grant enhanced credit for the entire period of time that Mr. Nitsiza spent in presentence custody.

Section 719(3.1) of the Criminal Code allows the court to grant credit at the rate of up to

one and one-half days for each day spent in presentence custody if the circumstances justify it. In using the word "justify" it is clear that Parliament did not intend that the circumstances have to be exceptional; however, it is also clear that the circumstances have to justify it and they have to be individual to the accused. That was the conclusion reached by the Manitoba Court of Appeal in R. v. Stonefish, which is cited at 2012 MBCA 116 and which has been applied and used by this court in the past.

To show that the circumstances that justify enhanced credit are individual to the accused, there has to be evidence of those circumstances, whether that is through affidavit, live testimony or, as here, counsel's sentencing submissions. In my view, however, it not enough to simply submit that a prisoner on remand would have earned remission had he or she been a serving prisoner, and I agree with the Crown that to adopt that argument would defeat entirely the amendments to the Criminal Code which created the general rule that credit should be granted on a one-to-one basis unless justified in the circumstances. Remission is something that is open to all serving prisoners so it is difficult to see how it could be seen as a circumstance

that is individual to Mr. Nitsiza. That said, in some circumstances the decision to seek a presentence report and the delay that is necessarily entailed with that is a circumstance that is considered individual to the accused and one which justifies enhanced credit.

A presentence report is a very useful tool for the court in determining an appropriate sentence. It allows the court to have insight into the accused - who they are, their family, their education, their health and, perhaps most helpful, the potential to benefit from certain types of sentences. But it does take time to prepare presentence reports and during that time the accused may otherwise have been serving their sentence and earning remission.

I pause to emphasize that waiting for a presentence report will not always or in every case be a circumstance that justifies enhanced credit. In this case, however, I find that it is.

Mr. Nitsiza will get enhanced credit at a rate of 1.5 days for each of the 92 days that he served from June 14th, 2013, until today, and that works out to 138 days of credit at the 1.5 rate. The remaining time, that is the 274-day period from August 12th, 2012, until June 13th,

2013, will be credited on a one-to-one basis. The total presentence credit will therefore be one year and 47 days.

I now turn to the circumstances of the offence, which I am just going to summarize.

The victim is currently 15 years old. When she was 13 or 14, she and Mr. Nitsiza, who was then 19 and 20, had a sexual relationship.

At the trial she described six specific incidents where she and Mr. Nitsiza engaged in sexual intercourse. The victim testified that Mr. Nitsiza discussed with her the need to keep their relationship a secret. The evidence was clear that they met surreptitiously. On one occasion he asked her to hide her face when they were together among other people, and on another occasion he gave her a sweater to wear it seemed for the purpose of hiding her identity.

Initially, the victim lied to Mr. Nitsiza about her age. She told him either on the telephone or through Facebook that she was 16 or 17. She said she wanted him to like her. However she did say during her testimony that she told Mr. Nitsiza what her real age was during their relationship.

It is possible that the jury believed that the victim told Mr. Nitsiza her real age. It is

also possible that the jury found that Mr. Nitsiza did not make the inquiries he ought to have to determine her real age and accordingly he ought to have known her real age. Ultimately, however, what the jury found on that point does not make a difference. The element of the offence is made out either way by the evidence, and that is beyond a reasonable doubt.

At one point when the victim expressed that she did not want to see Mr. Nitsiza, he threatened to kill himself.

The Crown suggested that Mr. Nitsiza used the victim solely for his own sexual gratification. While that is certainly a possibility, I am unable to draw that conclusion, that that was his sole purpose in his relationship with her. The evidence focused on the sexual relationship between the two of them, but there was very little, if any, evidence about the emotional side of the relationship.

I am also unable to conclude beyond a reasonable doubt that the victim and Mr. Nitsiza had sexual intercourse on ten or more occasions. The evidence about the six specific incidents was very detailed, however the victim was equivocal in her testimony about incidents other than those. She seemed also uncertain about the

number of times they had intercourse. It could have been ten, it could have been 15. So while there may be a strong possibility that the two of them had sex on more occasions than what was described by the victim, it was not in my view proved beyond a reasonable doubt and thus I do not rely on that as a fact in this sentencing.

Mr. Petitpas provided very valuable information to the court about Mr. Nitsiza's background and circumstances.

I have also had the benefit of reading a very thorough set of presentence reports that were prepared for this hearing. They have a great deal of helpful information in them about Mr. Nitsiza's background.

He is 22 years old and he was born in Wha'Ti and lived there until he was five. At that point his parents separated and he moved with his mother to Yellowknife. She eventually lost her job and her housing due to substance addiction. She was a residential school survivor, as is Mr. Nitsiza's father. Consequently, Mr. Nitsiza wound up living in a number of foster homes, which is never an optimal family situation. He was separated from his family, from his community, from his language, and from his culture. He did not complete high school and

given his circumstances I am not surprised by that. In 2005, when he was 14, he was diagnosed with FASD.

Despite his young age, Mr. Nitsiza has a very lengthy criminal record that includes convictions both as a youth and as an adult for very serious crimes. Among these are convictions for sexual assault, robbery, and uttering threats. The record also has some 30 convictions against the administration of justice and several property offences. There is really no break in the record either, it is continual, and the convictions have been sustained over a long period of time, relatively speaking.

Sentencing is a highly individualized process, and the principles and objectives of sentencing are set out in the Criminal Code. The emphasis that is placed on any particular objective or any particular set of objectives will vary with the nature of the offence, the circumstances of the offender, the circumstances of the victim, and any particular requirements of the Criminal Code or the common law respecting that particular offence.

Where the offence involves the abuse of a person under 18 years of age, as is the case here, the primary considerations are the

objectives of denunciation and deterrence, both specific and general. There are principles to guide the court in imposing sentence and the emphasis that is to be placed on each of those objectives. The primary principle is proportionality, which means that the punishment imposed must suit the crime and must be proportional to the moral blameworthiness of the offender. The judge also has to consider the mitigating and aggravating factors and the sentence is to be increased or reduced accordingly. Evidence that the victim was a person under 18 is specifically deemed to be an aggravating factor.

Judges are also bound to recognize that there should be similar treatment for like offences and offenders and that prison is a last resort.

In the case of aboriginal offenders, the courts must consider all available sanctions other than imprisonment that are reasonable in the circumstances. The purpose of this is to recognize and address the overrepresentation of aboriginal people in our correctional system and to craft sentences that will ultimately address this.

In this case there are a number of

aggravating circumstances:

It was not an isolated incident; the sexual intercourse took place over the course of several months.

There is a significant difference between the age of the victim and the age of Mr. Nitsiza, and the victim was very young.

Mr. Nitsiza's criminal record, which I spoke of earlier, is also aggravating.

As I spoke of earlier, the meetings and the acts were arranged and carried out in secret and the two of them discussed the need to keep the relationship hidden. This can only lead to the conclusion that Mr. Nitsiza was completely aware of what he, as an adult, was doing with a 13- to 14-year-old victim and that it was wrong.

There are also some mitigating factors however. Among them are this morning when Mr. Nitsiza stood up and apologized for his actions and took responsibility for what he did.

As well, Mr. Nitsiza, you are very young. I agree with the Crown's submission that moral culpability is perhaps lower when one lacks the wisdom that comes with hindsight and the hindsight that comes with age.

I also agree with Crown that someone youthful is more amenable to rehabilitation, but

I am also cognizant of the point that Mr. Nitsiza's record does not readily reflect that he is gaining wisdom or is amenable to rehabilitation.

The Crown seeks a custodial sentence of two-and-a-half to three years, and the defence suggests that a sentence of 14 to 18 months is more appropriate.

I have considered Mr. Nitsiza's aboriginal status and his history, and I have given serious thought to whether the objects of denunciation and deterrence can be achieved through a jail term along the lines of what the defence proposes or some combination of incarceration and probation.

It is an understatement to say that Mr. Nitsiza's life has not been easy. The instability of his family and home life coupled with having a brain injury in the form of FASD, means that he has not realistically had the same opportunities as others to make the right choices. His life and circumstances have been shaped directly by the experiences of his parents and the residential school system and the sadness, displacement, addictions, and all the other fallout from that.

The author of the presentence report

recommends against a probationary sentence and she expresses the view that Mr. Nitsiza would benefit from the opportunity to participate in intensive programming in the areas of sexual offending, anger management, family counselling, and substance abuse. Presumably, Mr. Nitsiza would have access to this type of programming at his fingertips in a correctional institution, but it might not be so available in a community, even one as large as Yellowknife. The opinion expressed in the presentence report is of course not binding on me, but I share the author's view. Mr. Nitsiza's record reflects that he's been incapable of complying with the requirements of a community-based sentence and that is borne out in 30 some odd convictions for offences against the administration of justice.

The sentence in this case also has to give priority to the objectives of denunciation and deterrence and those objectives cannot be achieved in these circumstances with a community-based sentence, nor can they be achieved by a shorter period of incarceration.

Sexual crimes against children (and the victim in this case was a child) are particularly serious. They are vulnerable, and they rely on adults to nurture them, to protect them, and to

ensure that their needs are met. They rely on adults to guide them and, above all, they rely on adults to do the right thing. It falls on adults to respect this vulnerability and reliance, and the law accordingly takes a very dim view of conduct that fails to respect these things and the boundaries that go along with them. Those who commit offences against children bear an extremely high degree of moral blameworthiness. This case is no exception.

I have reviewed the cases submitted by defence counsel. There are facts in Bjornson and Feng that make them very different and somewhat less helpful in this case than in the case of R. v. King. As pointed out by the Crown in the Feng case, the accused was operating under a mistake of law for example. There are also features in R. v. King, however, that distinguish it from the circumstances here. Among them the age difference was greater and the offender was far older than Mr. Nitsiza. Nevertheless, I find that that case falls very close to the situation that we have here, particularly the planning that went into the meetings and the very deliberate secrecy and deceit that was demonstrated by the offender. In all of the circumstances, a longer period of incarceration is warranted.

Mr. Nitsiza, can you please stand up.

Upon being convicted of sexual interference and upon considerations of the circumstances and the nature of the offence as well as your own personal circumstances and your past, I sentence you to a term of incarceration of two years and six months. That time will be reduced by the time of credit to you in your presentence custody which, as I said earlier, is one year and 47 days.

You can sit down, Mr. Nitsiza.

There will also be an order for bodily fluids to be taken from Mr. Nitsiza for a DNA analysis as well as an order requiring him to comply with the Sex Offender Information Registration Act pursuant to section 490.012 of the Criminal Code and that will be in effect for 20 years.

As requested by defence, I agree that there should be no victims of crime surcharge.

Mr. Nitsiza, do you understand the sentence?

THE ACCUSED: Yes.

THE COURT: Mr. Nitsiza, I want you to know that you are not doomed by your past, you are not doomed to a life of crime, but you have to take steps to help yourself and become rehabilitated. You have some very specific

issues, including FASD, and if you take steps to deal with that, that will help you to make choices so that you can live a productive life and you are not going to spend a whole bunch of time in your future in jail. You are not doomed to a life of crime; you can make choices.

When you go to jail there will be all kinds of programs available to you to help you. Do not just pay them lip service and do not just use them to pass time. Get involved, ask for as much help as you need, and ask for the help that you need so that you do not need to come back. And when you are released, ask for help from Probation Services, ask them to help you set up supports so that you do not re-offend. You need to do that. You are very young, you are capable of change. Everyone is capable of change.

Is there anything else, counsel?

MS. PORTER: No, Your Honour.

MR. PETITPAS: No, Your Honour.

THE COURT: As I said, thank you very much for your very helpful submissions.

Mr. Nitsiza, I do wish you the best. Work hard.

Thank you.

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

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Annette Wright, RPR, CSR(A)
Court Reporter