R. v. T.(P.S.) 2012 NWTSC 86

S-1-CR2012000048

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

T. (P.S.)

Transcript of the Reasons for Sentence by The Honourable Justice K. Shaner, at Yellowknife in the Northwest Territories, on November 19th A.D., 2012.

APPEARANCES:

Mr. K. Onyskevitch: Counsel for the Crown

Mr. P. Fuglsang: Counsel for the Accused

An order has been made banning publication of the identity of the Complainant/Witness pursuant to Section 486.4 of the Criminal Code of Canada

Upon Direction of Presiding Justice, this transcript has been modified to identify Complainant/Witness by initials

THE COURT: We heard submissions on sentence for Mr. T. last week on November 15th. And today it is my job to impose a sentence on Mr. T. who has pleaded guilty to, and been convicted of, sexual assault. This is, as many judges have said before me, one of the most difficult jobs that a judge has.

The circumstances of this offence have been laid out in a Statement of Agreed Facts. This was read into the record on November 15th, 2012 and marked as an exhibit so I will not repeat the facts here in their entirety. I will, however, summarize them for the purpose of providing context for these reasons.

On December 17th, 2012, the victim, who was 16, was staying at her sister's home in Inuvik. Others in the home that night were Mr. T., who is the victim 's father; the sister; the sister's boyfriend P.F.; and their son.

That night the victim consumed enough alcohol to become highly intoxicated. She passed out on a couch in the livingroom. Also in that room was a bed upon which Mr. F. and the victim's sister, along with their son, were sleeping. The bed was about four feet

from the couch.

Mr. T. was in the livingroom watching television. He, too, had been drinking alcohol that night.

Shortly after going to sleep, Mr. F. was awakened by the sound of someone moving around in the room. He opened his eyes and observed Mr. T. sitting on the couch beside the victim who was on her back and unconscious. Mr. T. had one of his hands inside the victim's pants at the front in her crotch area. Mr. F. coughed and began to move around. Mr. T. then removed his hand and turned his attention back to the television. Subsequently Mr. F. heard more movement and opened his eyes to see Mr. T. with one of his hands under the victim's shirt, fondling her breasts. Mr. F. coughed again and Mr. T. removed his hand then looked at Mr. F. and grinned. Mr. F. closed his eyes for a few seconds but then opened them again to see Mr. T. this time with one of hands under the victim's shirt feeling her breasts. At this point, Mr. F. woke the victim's sister. She coughed and began to move around. Mr. T. then removed his hand from the victim's shirt. A couple of minutes later, Mr. F. again awoke the victim's sister. She saw Mr.

T. beginning to slide his hand into the victim's pants. She yelled at him (Mr. T. that is) that they were trying to sleep and to go upstairs. Mr. T. removed his hand from the victim's pants and went upstairs.

It was approximately 15 minutes from the time of the first touching until Mr. T. left the room. The victim was unconscious throughout and she has no recollection of this. She suffered no physical injuries.

Mr. T. was arrested on March 23rd, 2012 and has remained detained in custody since that time - for seven months and 28 days as of today.

Defence counsel provided information to the Court about Mr. T's background and circumstances.

Mr. T. is 48 years old and has a Grade 9 education. He is aboriginal. He has not worked since 1982. He spent four years in residential school at Grolier Hall. He was abused there. In 1982, he attempted suicide with a gun. He survived the suicide attempt but tragically, he shattered his leg bone and ultimately lost his leg.

Mr. T's parents both attended residential school as well and he grew up in a home where

alcohol use was rampant. According to his lawyer, Mr. T. is himself an alcoholic. He has never taken treatment for this, nor has he taken any treatment for his experience at residential school. He realizes now, however, that he must deal with this.

The Crown tendered Mr. T's criminal record. The defence took no issue with its accuracy. The criminal record is a lengthy one and dates back to 1982. It includes at least seven convictions for violent offences. Of particular relevance are a 2002 conviction for sexual interference and two convictions for sexual assault and sexual exploitation in 2006.

The 2002 conviction involved another one of Mr. T's daughters who was 12 at the time. He touched her breasts and he was drunk at the time. Mr. T. was sentenced to five months incarceration for this.

The 2006 convictions involved the same daughter who was the victim in the 2002 case, as well as another daughter (not the victim here). They were then aged 16 and 14 respectively. Mr. T. was sentenced to ten months incarceration for the sexual assault and six months incarceration for the sexual

exploitation charge. These were served concurrently.

The Criminal Code sets out principles and objectives of sentencing that provide a framework to guide judges in imposing sentence in a manner that is just and appropriate. The objectives of sentencing are listed in Section 718. They are:

Denunciation of unlawful conduct, which is an expression of society's abhorrence of particular conduct;

Deterrence aimed both at the offender individually and the public at large;.

Separating offenders from society where that is necessary;

Rehabilitation, reparation, and promoting a sense of responsibility in offenders, an acknowledgment of the harm done to victims and to the community.

The emphasis that is placed on each of these objectives very much depends on what the offence is, the circumstances under which it was committed, and the circumstances of the offender. Where the offence involves the abuse of a person under 18 years of age, as is the case here, the Criminal Code requires the sentencing Judge to give primary consideration

to the objectives of denunciation and deterrence.

In seeking to achieve these objectives and in placing the right emphasis on each of them in any given case so as to come up with a just and appropriate sentence, judges are guided by a number of principles. These, too, are set out in the Criminal Code.

The most important principle in sentencing is proportionality. This is articulated in the Criminal Code as follows:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This means, quite simply, that the sentence must be just - the punishment must fit the crime.

Another principle is that Judges must consider aggravating and mitigating factors and increase or reduce a sentence accordingly.

As pointed out by Crown counsel, Mr. Praught, in Section 718.2 the Code deems a number of factors to be aggravating, although this is not an exhaustive list. These include evidence that the offender abused a person under 18 years of age, as is the case here,

and that the offender was in a position of trust in relation to the victim. That too is a factor here.

In determining what is a fit sentence, Judges are also guided by the principles of restraint and similarity of sentence.

Similarity of sentence means simply that there should be similar treatment for like offences and offenders.

The principle of restraint means that imprisonment should be a measure of last resort. This requires consideration of all available sanctions other than imprisonment that are reasonable in the circumstances with particular attention to the circumstances of aboriginal offenders.

The importance of this principle was recently reaffirmed by the Supreme Court in R. v. Ipeelee. Mr. T. is aboriginal, and therefore I will take this into consideration.

There are a number of aggravating factors that arise out of the circumstances of this particular case.

The victim was passed out when the sexual assault occurred and she remained unconscious throughout. She was completely vulnerable. Mr. T. is the victim's father and when this

occurred she had just turned 16. It is aggravating that Mr. T. touched the victim four separate times, each time interrupted by either Mr. F. or the victim's sister, at first discretely by coughing and moving around, and then finally expressly when the older daughter told Mr. T. to go upstairs. Moreover, it seems that each time Mr. T. was interrupted, he stopped but then resumed the sexual touching when it appeared that once again everyone was asleep. Clearly, Mr. T. knew what he was doing was wrong. Yet, he persisted.

Mr. T's criminal record is aggravating too. This is especially so in light of the previous convictions for sexual crimes against his other daughters. Despite serving prison sentences of some significance for these crimes, he has yet again perpetuated a sexual crime against one of his children.

I find there is very little in the way of mitigation.

It is true that Mr. T. entered a guilty plea and thus he spared the victim and the other witnesses the requirement of attending a trial and testifying. And I do take that into account. The value of this is diminished,

however, because the guilty plea came only after a preliminary inquiry.

Mr. T. asked his lawyer to read in a letter on his behalf during sentencing submissions. In it he said he is physically and mentally handicapped from his experiences at residential school. He expressed remorse and said that he knows that he has to deal with his past. I have taken his expression of remorse into account in determining sentence and I am encouraged by his acknowledgment that he must deal with his problems. I believe that he is sincere.

The Crown seeks a custodial sentence of 30 to 36 months less credit for time spent in pre-trial custody on a one to one basis. It is the Crown's position that a custodial sentence in this range is necessary to achieve the objectives of sentencing, particularly denunciation and deterrence, which, as I noted earlier, must be given primary consideration because of the circumstances of this case and the requirements of the Criminal Code.

The defence submits that the sentence that I impose should be crafted to permit Mr. T. to attend some form of counselling and that the custodial part should be no longer than 18

months followed by a period of probation.

The circumstances of this case cry out for a significant custodial sentence and, in my view, three years is an appropriate length of time.

Sexual assault, in many forms, is all too common in the Northwest Territories and sexual crimes against children are particularly serious even if, as here, there is no physical injury to the child.

The consequences of sexual assault for victims are profound.

In the 1992 case of the Queen v. W.S.B., the Queen v. Powderface [1992] A.J. No. 60, Justice MacDonald of the Alberta Court of Appeal considered the effects of sexual abuse crime against children. He stated,

> When a man has assaulted a child for his sexual gratification, then even if no long lasting physical trauma is suffered by the child, it is reasonable to assume that the child may have suffered emotional trauma, the effects of which may survive longer than bruises or broken bones and may even be permanent.

Later he went on to say,

> From this information, it is abundantly clear that there is one salient fact which must govern the approach to be taken by the Courts in sentencing in cases of sexual abuse of children. That in every case of sexual abuse of a child, there is a very real risk of very real harm to the child. This cardinal fact can be relied upon even when there is no expert or nonexpert evidence called in the particular case to establish that the particular child, who is the victim, has suffered some specific traumatic effect or effects.
>
> Mr. T. bears a high degree of moral blameworthiness in this case.
>
> It has been said before that children are entitled to rely on their parents to love and to protect them. They are entitled to trust their parents and, in particular, to trust that their parents will not harm them or take advantage of their vulnerabilities. Mr. T. violated this trust in spades. He sexually assaulted his 16-year-old daughter while she

was passed out and at her most vulnerable. He did so blatantly and repeatedly in the presence of others. The victim was not even able to try and get help.

In her victim impact statement, which she requested be read in open court, she said,

"I was hurt in a few ways. First I cannot believe he can do that to me. Second, I got no dad anymore. It makes me feel lost. It makes me feel like I am the bad person but I am not. I can't bear to look at him as a father like I seen when I was young".

Defence counsel made a number of submissions in support of a more lenient sentence. It was indicated that there was no penetration, it was just fondling. It was also suggested that because Mr. T. molested his own daughters he is in a different category than individuals who prey on legal strangers.

In my view this does not make the crime any less serious, nor does it make Mr. T. any less dangerous. The fact that he is related to his victims does not make them any less entitled to the full protection of the law.

It was also suggested and pointed out that the victim did not suffer physical injuries and that she had no recollection of the event. These are not, in my view, mitigating. The fact that there was no physical injury is, at best, neutral. The fact that she had no recollection of the events because she was passed out is, on the contrary, aggravating.

Crown counsel submitted three cases, all of which address the appropriate length of sentence as well as sentencing principles and objectives in sexual assaults involving child victims. These are the Queen v. Epelon, the Queen v. K.D.B., and the Queen v. J.L.C. I have read and considered each of these.

The Epelon case, which is a decision of former Chief Judge Bruser of the Territorial Court of the Northwest Territories, bears many similarities to this case.

There, the offender entered a guilty plea. The sexual assault took the form of touching the victim's breasts, buttocks, and vagina. The offender had a criminal record with previous convictions for sexual assault. Unlike the case here, however, the victim was conscious and able to tell the offender to stop, which he did. Chief Judge Bruser

imposed a sentence of 30 months imprisonment.

The Queen v. J.L.C., which is a case out of British Columbia, involved sexual interference against two children. The offender was sentenced to a prison term of 36 months. The circumstances, again, were similar in that offender, a stepparent, was in a position of trust in relation to the children. The interference took the form of touching.

Finally, in the Queen v. K.D.B., which is a decision of the Saskatchewan Provincial Court, the offender received a sentence of 18 months imprisonment. There were several incidents of touching including digital penetration. Unlike the case here, however, there were a number of mitigating factors. There was also no criminal record and there was a low risk of further offences.

I have considered Mr. T's aboriginal status and his history. I am convinced that his life has been affected profoundly by his experience at residential school, as well as that of his parents. As I indicated earlier, I also believe he is sincere in wanting to get help for what he considers to be the drivers behind these offences, and this one in

particular.

Unfortunately in the circumstances, there are no reasonable alternatives to a longer period of incarceration.

Mr. T. did express a willingness and a desire to attend counselling through his lawyer but he has no plan, so I fail to see how his rehabilitation could be promoted effectively with a probationary order. Moreover, a sentence with a shorter period of incarceration followed by probation would not, in my view, achieve the important and mandatory objective of denunciation and deterrence.

Defence counsel also argued that Mr. T. should get time and a half credit for the time that he spent in custody so far.

The Criminal Code provides, in Section 719(3), that credit for time spent in custody awaiting trial is limited to a maximum of one day for each day spent in custody. However 719(3.1) allows the Court to grant credit at the rate of one and a half days for each day spent in pre-trial custody if the circumstances justify it.

The circumstances do not need to be exceptional in order to justify granting more

generous credit. Chief Judge Gorin reached this conclusion in the Queen v. Desjarlais. Nevertheless, there must be evidence presented to the Court, whether through affidavit, testimony or counsel's sentencing submissions, that will allow the Court to reach the conclusion that the circumstances justify additional credit.

The basis for the argument that Mr. T. should get time and a half credit as opposed to straight time credit for pre-trial custody is simply that he waived his right to a bail hearing and consented to remand. In my view, this is insufficient to give rise to a finding that there are circumstances justifying the increased credit and therefore, any credit will be limited to one day of credit for each day spent awaiting trial.

The Crown has asked that I impose a firearms prohibition order under Section 109 of the Criminal Code. That section provides for a mandatory prohibition where a person is convicted of an indictable offence in the commission of which the violence against a person was used, threatened, or attempted, and for which the person may be sentenced for ten years or more. The Crown's argument is that

sexual assault is inherently violent and thus I must impose a prohibition under Section 109.

I questioned this during submissions and subsequently Mr. Praught kindly provided case law demonstrating that this is an area where the law is in fact not consistent. The two cases that he submitted are Bossé v. The Queen, a 2005 decision from the New Brunswick Court of Appeal; and the Queen v. Lonegren, a 2009 decision from the British Columbia Supreme Court. The latter decision was appealed on the conviction; however, there was no appeal taken with respect to the finding on the interpretation of Section 109.

In Bossé, the Court adopted the interpretation of Section 109 set out by the Provincial Court of Newfoundland and Labrador in the Queen v. L.H. There, the Court held that a sexual assault upon a child will always involve violence in the form of a likelihood of material harm, whether physical or psychological, and that therefore it falls within Section 109.

The Court reached a different conclusion in Lonegren however. Mr. Justice Barrow there considered sexual interference, not sexual assault, however the circumstances of the

offence were very similar to the case at bar. Justice Barrow concluded that the wording of Section 109, as well as the authorities, support the proposition that it would be possible to commit sexual interference without violence, as that term is used in Section 109. At paragraph 42 of that decision he states the following:

> There are several reasons why I consider this to be an appropriate interpretation of the section. First, it respects the distinction between force, which is an essential element of assault, and violence, which is not. Second, it is preferable to determining the issue on the basis of the impact of the offence on the victim, as is suggested by some of the authorities and the dictionary references to which I earlier alluded. To approach the matter in that way could result in one offender being subject to a prohibition while another offender, guilty of the same very acts, would not if, by

happenstance, the victim in the former situation responded to the offence adversely and the victim in the latter did not. Next, it advances the purpose of the section,

[And by that I think he meant Section 109,]

in that the risk of future misuse of firearms must bear some relationship to the degree to which the conduct under consideration derogates from that which the law and society in general expects. Conduct that involves a violation of a child's bodily integrity in the manner posited is a significant derogation from those standards and thus a person who commits such acts may be considered sufficiently at risk to misuse firearms to warrant to warrant the imposition of the prohibition.

Finally, this approach is, in my view, practical.

I believe that Lonegren is the correct interpretation of the term "violence" in

Section 109. In this case, there was no actual or threatened violence as that term is used in Section 109 with respect to the victim. Accordingly, I find that there is no basis for the mandatory firearms prohibition.

In saying this, I emphasize that sexual assault is always very serious and it has profound effects on its victims regardless of the circumstances. I think that I have made this very clear early on in my decision.

It is also important to note that a finding of violence for the purpose of Section 109 will be fact-specific and the absence of physical injury certainly will not always be determinative. However, in this case there was no violence, as that term is understood, that accompanied the touching.

Mr. T., please stand.

Upon being convicted of sexual assault and upon consideration of the circumstances and the nature of the offence, as well as your own personal circumstances, I sentence you to a term of 36 months in prison.

This term will be reduced by the amount of time that you have spent in custody awaiting the disposition of your case on a one for one basis which, as of today, is seven months and

28 days.

Mr. T., you have expressed a desire and a willingness to address your personal problems that you see as being the root cause of your legal problems. You will no doubt be offered many opportunities in prison to take programming to help you in dealing with alcohol abuse and the trauma that you suffered. Please take advantage of these. You are in charge of yourself, and it is you who must decide to change and to do what you need to do to make your life better. People who are convicted of crimes can and do turn their lives around. You have told me that you know you need to do that, and I hope that you do. It's up to you now.

You can sit down.

There will also be an order for samples of bodily fluids to be taken from Mr. T. for DNA analysis, and an order that he comply with the Sex Offender Information Registration Act pursuant to Section 490.012 of the Criminal Code. The duration of that order will be for 20 years.

Finally, I will make the recommendation that Mr. T. be permitted to serve his sentence in the Northwest Territories which I would

hope would enable him to take advantage of programs that are more relevant to his cultural heritage.

Is there anything else, counsel?

MR. FUGLSANG: No, Your Honour.

MR. ONYSKEVITCH: Nothing from the Crown, Your Honour.

THE COURT: Thank you, for your submissions, Mr. Fuglsang, and please carry my gratitude back to Mr. Praught for his very helpful submissions. We are adjourned.

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

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Lois Hewitt,
Court Reporter