

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

KEVIN KENNY

Transcript of Reasons for Sentence delivered by The Honourable Justice S. H. Smallwood, in Yellowknife, in the Northwest Territories, on the 2nd day of October, 2013.

APPEARANCES:

Mr. M. Lecorre: Counsel on behalf of the Crown

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

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Charge under s. 268 C.C.

1 THE COURT: Kevin Kenny has entered a  
2 guilty plea to an aggravated assault committed on  
3 April 21st, 2013. It is now my task to sentence  
4 him for this offence.

5 Both counsel for the Crown and the accused  
6 have proposed a joint submission on sentence  
7 requesting that I impose a period of imprisonment  
8 of anywhere from 20 months to two years less a  
9 day, to be followed by two years of probation.

10 Mr. Kenny has been in custody since the  
11 offence and counsel differ on the amount of  
12 credit that I should give for his presentence  
13 custody. Crown counsel says that I should give  
14 no more than one to one credit, whereas counsel  
15 for Mr. Kenny says that I should exercise my  
16 discretion and grant one and a half to one  
17 credit.

18 The facts of the offence are as detailed in  
19 Exhibit S1, an Agreed Statement of Facts.  
20 Briefly, on the evening of April 21st, 2013,  
21 Kirsten Yakeleya and her boyfriend Tyler  
22 Etchinelle were at Ms. Yakeleya's residence in  
23 Tulita, Northwest Territories. At approximately  
24 11:15 p.m., Mr. Kenny knocked at the door and  
25 Ms. Yakeleya answered it. Mr. Kenny asked to  
26 speak to her brother, to which she responded that  
27 he was not home and closed the door. About five

1 minutes later, Mr. Kenny knocked again and  
2 Ms. Yakeleya again answered the door. This time  
3 Mr. Kenny said that he wanted to return some DVDs  
4 that he had borrowed, and when she opened the  
5 door he forced his way into the house. Mr. Kenny  
6 produced a small knife and stabbed Ms. Yakeleya  
7 two times in the shoulder. Ms. Yakeleya fled,  
8 screaming, to a bedroom, where Mr. Etchinelle was  
9 located. Mr. Kenny followed her and forced his  
10 way into the bedroom. Mr. Kenny threw objects at  
11 the victims and yelled at Ms. Yakeleya that she  
12 had ruined his life. He lunged at Mr. Etchinelle  
13 and stabbed him several times. The victims  
14 struggled with Mr. Kenny and were able to get him  
15 into the living room. During the struggle, Mr.  
16 Kenny stabbed Mr. Etchinelle several more times.  
17 Mr. Etchinelle managed to get the knife away from  
18 Mr. Kenny and the victims then fled the  
19 residence.

20 Mr. Etchinelle was stabbed multiple times:  
21 three stab wounds to his abdomen/chest area, four  
22 stab wounds to the top and rear of his head, and  
23 stab wounds to his left arm and thigh. The most  
24 serious injury was a wound to the abdomen, which  
25 caused Mr. Etchinelle's intestines to protrude.

26 Ms. Yakeleya received two stab wounds to the  
27 left shoulder.

1           Victim impact statements were filed by the  
2           victims as well as Mr. Etchinelle's mother. It  
3           is clear that the assault committed by Mr. Kenny  
4           has had a significant impact on them. They speak  
5           of the bewilderment about why this happened to  
6           them, their fear during the assault, and the  
7           aftermath and how they are dealing with it. Mr.  
8           Etchinelle, who suffered the most serious  
9           injuries, wrote of the fear that he had that he  
10          would lose his girlfriend, how he tried to defend  
11          her, and the worry that he feels about if he had  
12          not been there to defend her. He also wrote  
13          about how he no longer feels safe in his  
14          hometown.

15                 Mr. Etchinelle's mother wrote about how she  
16          felt when she heard about the attack on her son  
17          and his girlfriend and her continuing fear about  
18          something happening, that she always has to make  
19          sure that the doors are locked, which is  
20          something that she had not done in the past.

21                 Ms. Yakeleya wrote about her fear since the  
22          assault. She says that she is scared all the  
23          time, afraid to open doors, and does not want to  
24          be alone. She has been unable to work at the job  
25          that she loved. She is also afraid of Mr.  
26          Kenny's family and crowds. She states:

27                         I lost everything, my security, my

1 health, my freedom. I had a life  
2 planned but now, it doesn't mean  
3 anything. If I had my way, I would  
4 hide from the world.

5 She also writes about her fear about when  
6 Mr. Kenny will return to Tulita and says that she  
7 will leave her hometown if he does.

8 Aside from the physical injuries, it is  
9 clear that Mr. Kenny's actions have had a  
10 psychological impact on the victims, and that is  
11 unfortunate because the physical injuries will  
12 likely heal but it may be that the psychological  
13 injuries never will.

14 The sentencing principles that are  
15 applicable in a crime of serious personal  
16 violence as stated in R. v. Sarasin, 2013 NWTSC  
17 46, are deterrence, both specific and general.  
18 Other sentencing objectives that are applicable  
19 are denunciation; where necessary, separation of  
20 an offender from society; rehabilitation;  
21 reparation for harm done to victims; promotion of  
22 a sense of responsibility; and an acknowledgement  
23 of harm done to victims. Those are all  
24 sentencing principles referred to in the Criminal  
25 Code and they are all applicable to some extent  
26 in this case.

27 Crown counsel provided two cases which are  
similar in the sense that they involve stabbings,

1 but there are also several differences in those  
2 cases. The cases are useful in that they help  
3 establish the appropriate range of sentence and  
4 refer to the sentencing principles which are  
5 applicable in cases like this.

6 In *R. v. Pascal*, 2012 NWTSC 40, the offender  
7 had entered a guilty plea to aggravated assault  
8 and uttering threats. The offender was  
9 aboriginal, 40 years old, and had been consuming  
10 alcohol with the victim and others. The offender  
11 was highly intoxicated and grabbed a knife and  
12 stabbed the victim in the chest. He was upset  
13 because he viewed the victim as being responsible  
14 for the death of his daughter a few years before.  
15 The offender's guilty plea happened after the  
16 preliminary inquiry but before trial. He had a  
17 criminal record which included prior convictions  
18 for violence, but there had been no convictions  
19 overall since 2003. The sentence that was  
20 imposed by the court was 19 and a half months,  
21 and the offender received credit for his remand  
22 time of approximately four months.

23 The other case that was provided was that of  
24 *R. v. Sarasin* where the offender plead guilty to  
25 aggravated assault. The offender in that case  
26 was aboriginal, 25 years old, and was under the  
27 influence of alcohol and crack cocaine when he

1 and a group of people had met the victim, who he  
2 did not know, on the street. An argument had  
3 ensued between the victim and the offender and it  
4 escalated to a physical confrontation. The  
5 offender then stabbed the victim in the stomach.  
6 In that case the offender had a significant  
7 criminal record, with one prior assault  
8 conviction. He had just been released from jail  
9 the day before and was on probation. The Court  
10 noted that the offender had a difficult  
11 upbringing and had problems with alcohol and drug  
12 abuse, but it also noted the offender's young age  
13 and his remorse. Justice Vertes noted at  
14 paragraph 19:

15  
16 Jurisprudence from this jurisdiction  
17 has indicated that there is a wide  
18 range of potential sentences for a  
19 stabbing where someone is wounded.  
Some of the cases referred to me  
have indicated a range from 30  
months to five years.

20  
21 The offender in Sarasin was sentenced to 30  
22 months and given 15 months credit for time  
23 served. He was also placed on probation for two  
24 years.

25 I agree that there is a wide range of  
26 potential sentences for a stabbing where someone  
27 is wounded. Sentences have been imposed of five

1 years. Others like Pascal are at the lower end  
2 of the range. Certainly where a sentence is  
3 going to fall within that range is going to  
4 depend on the circumstances of the offence and  
5 the individual offender.

6 There are a number of factors, both  
7 aggravating and mitigating, to consider in  
8 determining an appropriate sentence in this case.

9 Mr. Kenny is 19 years old and does not have  
10 a criminal record. That is to his credit that he  
11 has not previously gotten into trouble.

12 The presentence report and the letters filed  
13 on his behalf indicate that this assault was  
14 totally out of character for Mr. Kenny. The RCMP  
15 reported that they had no prior involvement with  
16 him before this incident. His teachers at the  
17 Chief Albert Wright School in Tulita, which Mr.  
18 Kenny was attending prior to his arrest,  
19 expressed their shock and surprise that Mr. Kenny  
20 committed this offence.

21 Mr. Kenny has entered a guilty plea and it  
22 should be considered an early guilty plea. He  
23 was arrested on April 21st, 2013, and sent for a  
24 psychiatric assessment shortly after. Following  
25 the assessment on his return to Territorial  
26 Court, he elected trial by Supreme Court judge  
27 alone, did not request a preliminary inquiry, and



1 consented to his continued detention. Once in  
2 Supreme Court, arrangements were made for Mr.  
3 Kenny to enter his plea and be sentenced on this  
4 matter, so he should receive full credit for his  
5 guilty plea.

6 Mr. Kenny has demonstrated his remorse as  
7 well for this offence and that is also to his  
8 credit. In discussing this offence with the  
9 writer of the presentence report, on several  
10 occasions he indicated his regret for what  
11 occurred. As well, in court today he also  
12 indicated his regret for what occurred.

13 In terms of the circumstances of the  
14 offence, an aggravated assault is a serious  
15 offence, one punishable by up to 14 years'  
16 imprisonment. When it comes to stabbings, the  
17 difference between a minor injury and a very  
18 serious injury, and that includes stabbings that  
19 have resulted in death, is often a matter of  
20 centimeters, sometimes even less than that, and  
21 almost always is simply a matter of luck. So Mr.  
22 Kenny is lucky, very lucky, considering the  
23 number of times that he stabbed the victims, that  
24 there were not more serious injuries and that he  
25 is not facing more serious charges today.

26 The assault itself was an unprovoked attack  
27 with a knife on two victims. Mr. Kenny went to

1 the Yakeleya house with the aim he said of  
2 returning DVDs and then forced his way into the  
3 residence and stabbed Ms. Yakeleya twice. When  
4 she fled, he pursued her and proceeded to stab  
5 Mr. Etchinelle several times. The assault itself  
6 only ended when the victims struggled with Mr.  
7 Kenny and got the knife away from him and then  
8 were able to flee the residence. And as I have  
9 stated, the victims have suffered both physical  
10 and psychological injuries as a result of Mr.  
11 Kenny's actions.

12 An explanation for why this offence occurred  
13 is difficult to determine. Unlike in Pascal and  
14 Sarasin, Mr. Kenny was not under the influence of  
15 drugs or alcohol - indeed I have heard that he  
16 rarely consumed drugs or alcohol - and hung out  
17 generally with a crowd that did not pursue these  
18 types of activities.

19 Mr. Kenny, in the presentence report and in  
20 the psychiatric assessment report, does not  
21 really provide an explanation for what occurred.  
22 Part of this is attributable to his lack of a  
23 concrete memory for what occurred. It seems that  
24 stress and anger may have played a part in  
25 causing Mr. Kenny to flip out, so this causes me  
26 some concern. While motive is often not relevant  
27 in a criminal case, there is nonetheless often an

1 explanation or partial explanation, whether it is  
2 intoxication, an argument that got out of hand,  
3 or another explanation, for why an offence  
4 occurred. That a serious offence like this - an  
5 attack with a knife on two unsuspecting victims -  
6 has occurred by someone for whom this type of  
7 behaviour is clearly out of character and there  
8 is no explanation causes me concern with respect  
9 to the safety of the victims and other members of  
10 the community.

11 There are indications in both the  
12 presentence report and the psychiatric assessment  
13 report that Mr. Kenny has heard auditory  
14 hallucinations in the past. He has also reported  
15 experiencing blackouts which are not related to  
16 alcohol or drug consumption. While Mr. Kenny  
17 apparently as a result of the psychiatric  
18 assessment process is now taking an antipsychotic  
19 drug, there is no indication that his mental  
20 state contributed to this offence occurring. So  
21 while Mr. Kenny's mental condition is not one  
22 where he is not criminally responsible, his  
23 mental health is still of concern and it is a  
24 factor in this offence.

25 Public safety and the safety of the victims  
26 has to be taken into account in sentencing Mr.  
27 Kenny and ensuring that he can be rehabilitated

1 and so that this type of offence does not occur  
2 again.

3 Mr. Kenny is an aboriginal person and  
4 section 718.2(e) of the Criminal Code must be  
5 considered "where all available sanctions other  
6 than imprisonment that are reasonable in the  
7 circumstances should be considered for all  
8 offenders particularly taking into account the  
9 circumstances of aboriginal offenders." The  
10 Supreme Court of Canada has given direction to  
11 courts in their interpretation of this section in  
12 the cases of Gladue and Ipeelee. I have  
13 considered the principles set out in those cases  
14 and the requirement to consider the unique,  
15 systemic or background factors which may have  
16 played a part in bringing Mr. Kenny before the  
17 courts and the types of sentencing procedures and  
18 sanctions which may be appropriate in the  
19 circumstances because of his aboriginal  
20 background.

21 In this case there is a presentence report  
22 that I have the benefit of and counsel's  
23 submissions which delve into Mr. Kenny's  
24 background as an aboriginal person and some of  
25 these unique systemic or background factors which  
26 may have affected Mr. Kenny.

27 The information I have is that Mr. Kenny's

1 parents attended residential school and were  
2 negatively affected by it. They abused alcohol  
3 while Mr. Kenny was a child and that appears to  
4 have had a negative impact on Mr. Kenny. To his  
5 credit, he has decided that he does not want to  
6 follow in his parents' footsteps and does not  
7 want to abuse alcohol.

8 Otherwise, it appears that Mr. Kenny's  
9 family is a close and supportive one. While he  
10 does not regularly partake of traditional  
11 activities and does not live a traditional  
12 lifestyle, it appears that he also participates  
13 in cultural and community activities, some of  
14 which are aboriginal based in the community of  
15 Tulita. So I have taken into account those  
16 factors in determining sentence.

17 With respect to pre-trial custody, the  
18 standard according to the Criminal Code is that  
19 credit is imposed on a one to one basis. Section  
20 719(3.1) states that if the circumstances justify  
21 it, I can grant up to one and a half to one  
22 credit for remand time.

23 Mr. Kenny has been in custody since his  
24 arrest on April 21st, 2013. The warrant of  
25 committal indicates that he consented to his  
26 detention, reserving his right to a show cause.  
27 A review of the file indicates that Mr. Kenny has

1 not sought his release.

2 The issue of what circumstances justify an  
3 increase of up to one and a half days credit for  
4 each day in custody has been previously  
5 considered by this Court. In the case of R. v.  
6 Green, 2013 NWTSC 20, at paragraph 77, the Court  
7 stated.

8  
9 ... the proper interpretation of  
10 this provision is that the  
11 circumstances that can justify  
12 enhanced credit do not have to be  
13 exceptional or occur only in rare  
14 situations. They do, however, have  
15 to be applicable to the specific  
16 accused who is before the court.

17  
18 It has also been determined that enhanced  
19 credit is not automatic and the onus is on the  
20 person being sentenced to show on a balance of  
21 probabilities that the circumstances justify  
22 enhanced credit being given. In this case  
23 counsel for Mr. Kenny has filed a letter from  
24 John Nahanni, who is the Deputy Warden of  
25 Programs and Sentence Administration at the North  
26 Slave Correctional Centre. He noted the  
27 following: Mr. Kenny's behaviour has met  
28 expectations, and there are no bad behaviour  
29 reports on his file. Mr. Kenny has been housed  
30 in general population, similar to other sentenced  
31 and remanded inmates. He's also been in a single

1 cell. Mr. Kenny has not been employed within the  
2 institution and is a general cleaner.

3 In terms of programing, I am advised by  
4 counsel for Mr. Kenny that he has not taken any  
5 programing. It is not clear to me, based on the  
6 record before me, what programs Mr. Kenny would  
7 have been able to take, although based on prior  
8 experience it seems that there is some programing  
9 available and educational upgrading that is also  
10 available to remand prisoners. So there is some  
11 information about Mr. Kenny's remand time but  
12 nothing in particular which speaks to whether he  
13 would have taken programs or earned remission had  
14 he been a serving prisoner. I expect, given the  
15 lack of problems with Mr. Kenny while he was on  
16 remand, that he would have earned remission.

17 The issue of remission is a relevant  
18 consideration in determining whether remand time  
19 should be granted on an enhanced basis. Again,  
20 it is not automatic and is subject to discretion  
21 based upon the specific circumstances of each  
22 case.

23 I also note that of his time in custody, Mr.  
24 Kenny would have also had time at the Alberta  
25 Hospital undergoing the psychiatric assessment.  
26 According to the assessment report, he was  
27 admitted to Alberta Hospital on May 24th, 2013,

1 and the report was dated July 9th, 2013. So Mr.  
2 Kenny could have spent up to a month and a half  
3 at the Alberta Hospital, although the exact time  
4 that he was there is not clear.

5 The assessment at the Alberta Hospital was  
6 an in-custody assessment and the report details  
7 that he was cooperative and pleasant while  
8 dealing with staff, but I do not have any  
9 information about the circumstances of Mr.  
10 Kenny's custody while undergoing the assessment.

11 Mr. Kenny has spent about 163 days in  
12 custody as of yesterday, which is about five  
13 months and one and a half weeks. In the  
14 circumstances, I am not satisfied that Mr. Kenny  
15 should receive enhanced credit.

16 Taking all of the circumstances into account  
17 for his time into custody on this charge, I am  
18 giving Mr. Kenny credit at the basis of  
19 one-to-one which for the purposes of his credit I  
20 will credit at five and a half months of remand  
21 time.

22 With respect to the ancillary orders that  
23 have been requested by the Crown, there will be a  
24 firearms prohibition order pursuant to section  
25 109 of the Criminal Code. It will begin today  
26 and end ten days [sic] after the release from  
27 imprisonment of Mr. Kenny.



1           As well, the aggravated assault is a primary  
2 designated offence so there will be a DNA order.

3           And also, given the sentence I am about to  
4 impose and given Mr. Kenny's lack of employment  
5 history, I am going to waive the victim of crime  
6 surcharge as I am satisfied that it would impose  
7 undue hardship on Mr. Kenny.

8           Can you stand up please, Mr. Kenny.

9           Taking into account the joint submission  
10 that has been presented by counsel, if it were  
11 not for your youth and your lack of criminal  
12 record and your early guilty plea I would have  
13 some difficulty in going along with it. But  
14 given those circumstances and the number of  
15 circumstances that are in your favour, I am going  
16 to go along with the joint submission made by  
17 your counsel and the Crown. So for the offence  
18 of aggravated assault, I sentence you to a period  
19 of imprisonment of 23 months. I am giving you  
20 credit of five and a half months for your  
21 pre-trial custody, which leaves a sentence of 17  
22 and a half months to be served.

23           Once you are released from jail you will be  
24 subject to a probation order for a period of two  
25 years. It will have the following statutory  
26 conditions, which are: You are to keep the peace  
27 and be of good behaviour, basically stay out of

1 trouble; to appear before the court when required  
2 to do so by the court; to notify the court or the  
3 probation officer in advance of any change of  
4 name or address; and promptly notify the court or  
5 the probation officer of any change of employment  
6 or occupation.

7 In addition to those required conditions I  
8 am also imposing some optional conditions. They  
9 are optional in the sense that I have the option  
10 to impose them, but you are still required to  
11 abide by them so they are not optional for you.

12 You are to report to your probation officer  
13 within five days of your release and thereafter  
14 as directed.

15 You are to take counselling as directed.

16 You are to have no contact with Tyler  
17 Etchinelle or Kirsten Yakeleya.

18 You are not to go to the residence or place  
19 of employment, wherever that may be, of Tyler  
20 Etchinelle or Kirsten Yakeleya.

21 You are to advise your probation officer in  
22 person or by telephone if you stop taking the  
23 medication that has been prescribed for you and  
24 you are to do so within 24 hours if you stop  
25 taking that medication. So if you stop taking  
26 your medication, within 24 hours you need to let  
27 your probation officer know.

1 Do you understand the conditions, Mr. Kenny?

2 THE ACCUSED: Yes.

3 THE COURT: Thank you, you may sit down.

4 All right, counsel, is there anything else  
5 we need to deal with?

6 MR. LECORRE: Your Honour, just to clarify  
7 one detail. The section 109 order will expire  
8 ten "years" as opposed to ten "days"?

9 THE COURT: I'm sorry, it was supposed to  
10 be ten years. It should be ten years, yes.

11 MR. LECORRE: Thank you, Your Honour.

12 Nothing further from the Crown.

13 THE COURT: Thank you.

14 Mr. Petitpas?

15 MR. PETITPAS: No, Your Honour, nothing from  
16 the defence. Thank you.

17 THE COURT: Thank you.

18 .....

19

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

23

24 \_\_\_\_\_  
Annette Wright, RPR, CSR(A)  
25 Court Reporter

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