

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

M.S.J.

Transcript of the Reasons for Sentence delivered by The Honourable Justice K. Shaner, sitting in Hay River, in the Northwest Territories, on the 13th day of August, 2015.

APPEARANCES:

Ms. K. Lakusta: Counsel for the Crown

Mr. P. Harte: Counsel for the Accused

(Charge under s. 271 of the Criminal Code of Canada)

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s. 486.4 of the Criminal Code

THIS TRANSCRIPT HAS BEEN ALTERED TO PROTECT THE IDENTITY OF THE VICTIM PURSUANT TO THE DIRECTION OF THE PRESIDING JUDGE

1 THE COURT: It is my job today to impose a
2 sentence on M.S.J., who was found guilty of
3 sexual assault and also found guilty on two
4 counts of sexual interference by a jury on June
5 11th, 2015. A conviction for sexual assault was
6 entered and the other two counts were stayed.

7 Before describing the circumstances of the
8 offence, there are two issues that I will
9 address. First is with respect to the Victim
10 Impact Statement submitted by D.C., the mother of
11 the victim and, from what I understand, now
12 M.S.J.'s former spouse. The second issue is with
13 respect to the legal parameters surrounding my
14 interpretation of the jury's finding of fact.

15 With respect to the Victim Impact Statement,
16 the Crown and defence both pointed out that there
17 are certain statements contained in it which go
18 beyond what should be contained in a Victim
19 Impact Statement, and these include D.C.'s
20 speculation that her younger daughter may have
21 been sexually assaulted by M.S.J. and whether
22 this, in turn, may have caused her to question
23 her own sexuality and her gender identity. As
24 well, D.C. questions whether her marriage was a
25 ruse to gain access to a victim.

26 I fully agree with both counsel that these
27 statements cannot be considered in sentencing.

1 They go beyond describing the impact of the crime
2 on the victim and her family and extend into the
3 realm of speculation about whether there was
4 another victim.

5 The Victim Impact Statement is written using
6 very descriptive language. It describes feelings
7 of self-doubt, hurt, loss of self-confidence and
8 other things. It also describes what the
9 victim's mother observed in her daughter both
10 during and following the period over which the
11 actions comprising the sexual assault took place.
12 Those things are properly part of the Victim
13 Impact Statement and they will be considered in
14 addition to the other factors that are relevant
15 to sentencing.

16 I turn next to the interpretation of the
17 facts.

18 Defence counsel suggested that as the
19 sentencing judge, I cannot assume that the jury
20 accepted all of what the victim said in her
21 testimony and that I can only rely upon those
22 things which I find beyond a reasonable doubt
23 support the verdict. He stated that the victim's
24 evidence was equivocal and, accordingly, that
25 there could have been a single event upon which
26 the jury relied to reach its verdicts. He
27 suggested much of the victim's evidence was not

1 clear, pointing to certain inconsistencies
2 between her statement to the police, which
3 ultimately became her evidence in chief pursuant
4 to Section 713.1 of the Criminal Code, and what
5 she said on cross-examination. For example, in
6 her statement to the police, she said her father
7 kissed her stomach, and during the trial, she
8 said he kissed her abdomen and her thighs.
9 Defence counsel suggests this is inconsistent.
10 He also pointed out that the victim's evidence
11 that M.S.J. kicked her brother with a steel-toed
12 boot was contradicted by her brother when he gave
13 his evidence. He said the victim was hazy in her
14 recollection of when the events began and when
15 they stopped on their own in 2010. Moreover, he
16 says the events were not of such consequence as
17 to stop the victim from going to visit him in his
18 suite after he moved from the family home.
19 Defence counsel says this is because it goes to
20 the overall seriousness of the offence and,
21 consequently, it would have an impact on the
22 length of sentence ultimately imposed.

23 The issue of the sentencing judge's
24 interpretation of the jury's factual findings was
25 considered in the Supreme Court of Canada in R.
26 v. Ferguson, 2008 SCC 6 (CanLII), [2008] 1 SCR
27 96. In the Ferguson case, at paragraphs 17 and

1 18, the Court stated the law as follows:

2 Two principles govern the
3 sentencing judge in this
4 endeavour. First, the sentencing
5 judge "is bound by the express and
6 implied factual implications of
7 the jury's verdict": R. v. Brown,
8 1991 CanLII 73 (SCC), [1991] 2
9 S.C.R. 518, p. 523. The
10 sentencing judge "shall accept as
11 proven all facts, express or
12 implied, that are essential to the
13 jury's verdict of guilty"
14 (Criminal Code, s. 724(2)(a)), and
15 must not accept as fact any
16 evidence consistent only with a
17 verdict rejected by the jury:
18 Brown; R. v. Braun (1995), 95
19 C.C.C. (3d) 443 (Man. C.A.).

20 Second, when the factual
21 implications of the jury's verdict
22 are ambiguous, the sentencing
23 judge should not attempt to follow
24 the logical process of the jury,
25 but should come to his or her own
26 independent determination of the
27 relevant facts: Brown; R. v.
28 Fiqia (1994), 1994 ABCA 402
29 (CanLII), 162 A.R. 117 (C.A.).
30 In doing so, the sentencing judge
31 "may find any other relevant fact
32 that was disclosed by evidence at
33 the trial to be proven" ...

34 With respect, I do not find that the factual
35 implications of the jury's verdict are ambiguous
36 and, accordingly, the second principle from
37 Ferguson is not, in my view, engaged. The jury
38 did not return verdicts of lesser and included
39 offences, nor did it return inconsistent
40 verdicts. As pointed out by the Crown, to return
41 guilty verdicts on all three counts, the jury had
42 to have made a finding that there was more than

1 one incident of touching and that these incidents
2 occurred over a period of time, some years.

3 Essentially, I think what defence is asking
4 that I do is to make a determination of
5 credibility respecting the victim and to
6 substitute my own opinion on what evidence should
7 be accepted and what should be rejected for what
8 the jury may have found. In my view, the law is
9 clear that it is not open to me to make that
10 determination. This is something which is within
11 the exclusive ambit of the jury as the finder of
12 fact.

13 So with that, I will turn now to the
14 circumstances of the offence.

15 The victim is M.S.J.'s daughter, and during
16 her testimony she described how, from the time
17 she was very young, approximately five, and until
18 she was approximately 13, her father touched her
19 in various ways and in various places on her body
20 in a sexual manner, amounting to sexual assault.
21 It was limited to touching, but it happened very
22 frequently and consistently over a long period of
23 time. There was at no point any penetration.

24 Within the family unit, M.S.J. was primarily
25 responsible for caring for the children from
26 2002. He worked from time to time, but it was
27 their mother, his wife, who was the primary

1 breadwinner. It was thus M.S.J.'s responsibility
2 to see to the children's needs, including if and
3 when they awoke in the night. Indeed, their
4 mother slept in the basement of the house and the
5 children and M.S.J. in the upper part so the
6 mother could sleep through the night and go to
7 work in the mornings. According to the victim,
8 the children were forbidden to go to their mother
9 and wake her in the night.

10 For a variety of reasons, the victim often
11 wound up sleeping in the same bed as her father.
12 As a younger child, she often started out nightly
13 sleeping in his bed and she would be moved later
14 in the night to her own bed. As she got older,
15 she started out sleeping in her own bed, but she
16 might have had nightmares or other disturbances
17 which drove her to seek comfort from her father.
18 It was at these times that the touching most
19 often occurred. He would give her massages on
20 her back and legs, at times rubbing the insides
21 of her thighs and buttocks. During one such
22 massage when she was younger, he touched
23 her vagina. After she started wearing a bra,
24 M.S.J. would remove it from time to time, and she
25 described at one point he touched her breast.
26 They would often cuddle in a "spoon" position
27 with a sheet or blanket separating them. The

1 victim could from time to time feel M.S.J.'s
2 erect penis against her. Sometimes when the
3 family watched movies together, she would sit on
4 his lap and she could feel his erect penis
5 through his clothes. She described how M.S.J.
6 bathed her, using his bare hand to wash her
7 genital area.

8 Sentencing is a very complex process which
9 requires a sentencing judge to examine the nature
10 and the circumstances of the offence and the
11 circumstances of the individual offender and to
12 impose a sentence which ultimately reflects the
13 degree of responsibility of the offender. In
14 addition, the sentencing judge must take into
15 account the principles of parity (that is,
16 similar sentences are to be imposed for similar
17 offences in similar circumstances) and the
18 principle of restraint.

19 There are certain objectives that sentencing
20 should try and achieve and, in the case of sexual
21 crimes against children, deterrence and
22 denunciation are, statutorily, the two most
23 important objectives.

24 The Crown is seeking a sentence of between
25 three and three and a half years' incarceration.
26 Defence counsel suggests that a fit and proper
27 sentence is eighteen months to two years, which

1 is at the lower end of the range for sexual
2 assault against a child in this jurisdiction.

3 In addition to the information that M.S.J.'s
4 counsel provided about him this morning, I have
5 read the pre-sentence report prepared by
6 Probation Services which sheds some light on
7 M.S.J.'s circumstances and who he is.

8 M.S.J. is 50 years old and he is originally
9 from Cornwall, Ontario. He has lived in
10 Hay River since 1993. He holds two baccalaureate
11 degrees, one in biological sciences and the other
12 in education. He has worked as an adult
13 educator, but he became a stay-at-home father in
14 approximately 2002 and only worked from time to
15 time after that.

16 From the pre-sentence report, it appears
17 M.S.J. had a fairly stable and caring upbringing,
18 although it is indicated that his father's
19 alcohol abuse was an issue for him. He himself
20 has no reported problems with alcohol or drugs,
21 although he does report that he has an anxiety
22 disorder with which he has been diagnosed.

23 M.S.J. has no criminal record.

24 M.S.J. spent a lot of time attending to his
25 children's needs. He took lunches to school and
26 ate with them almost every day. He got them
27 involved in various sports and made sure to get

1 them to practices and to meets. He coached
2 swimming. One of the witnesses, a former
3 employee at the children's school, observed him
4 frequently and found him, in her opinion, to be
5 an excellent father.

6 There are a number of highly aggravating
7 circumstances in this case. The most aggravating
8 are that M.S.J. is the victim's father and thus,
9 he is in a position of trust in relation to her.
10 The victim is a child and, in accordance with
11 that, she had certain needs and vulnerabilities.
12 And, finally, it is very aggravating that the
13 sexual activity took place over such a long
14 period of time, a period of eight to ten years.

15 The victim herself did not provide a Victim
16 Impact Statement, but that of course does not
17 mean she has not been significantly affected by
18 the events that she described. There is a
19 plethora of case law in which courts across the
20 country have recognized the profound and lasting
21 effects that sexual crimes have upon children,
22 particularly when they are perpetuated by their
23 parents.

24 Defence counsel suggested that I should take
25 into account that notwithstanding the abuse she
26 described, the victim continued to have a
27 relationship with her father once the abuse

1 stopped in 2010 and once he moved out of the
2 family home. Indeed, she continued to visit with
3 him and to spend nights at his new home.

4 With respect, things are just not that
5 simple. Victims of sexual assault will not react
6 in the same way or necessarily in the way that we
7 expect them to act. M.S.J. is the victim's
8 father. She was young and, indeed, she suggested
9 during her testimony that it was relatively late
10 in the game when she started to realize that what
11 was happening to her was wrong, and even then, it
12 is not outside the realm of possibility that a
13 child abused by their parent will still need
14 love, affection, and approval from that parent
15 and that they will do things to fulfill that need
16 which might appear inconsistent with the abuse
17 having been visited upon them. Families are
18 complicated, people are complicated, and we
19 cannot assume that a young victim can simply cut
20 ties with a parent.

21 It is clear from D.C.'s Victim Impact
22 Statement that what happened has had a profound
23 and serious effect on the victim and on the
24 entire family. It does not take a great leap in
25 logic to reach the conclusion that this family is
26 going to have to spend a great deal of time
27 reconciling what happened and healing.

1 What happened caused D.C. to doubt herself,
2 her judgment, and her professional and parental
3 abilities. She also noted a significant impact
4 on the victim.

5 There are no legally mitigating factors,
6 although I note M.S.J. has no criminal record.
7 M.S.J. has indicated that he accepts that he has
8 been found guilty and that he accepts that there
9 will be a sentence imposed. He has not accepted
10 responsibility for what happened, however, nor
11 has he expressed remorse. Like anyone who is
12 accused of a criminal offence, M.S.J. was
13 entitled to have a trial. That he did not plead
14 guilty and that he does not now accept
15 responsibility or demonstrate remorse for what
16 happened is not aggravating. However, as the
17 Crown pointed out, what it means is that there
18 are no legally mitigating factors to be
19 considered in determining what is a fit and
20 proper sentence.

21 As I noted earlier, M.S.J. was observed to
22 be a very attentive father and there is no
23 dispute that he spent a lot of time with his
24 kids. In my view, however, that does not serve
25 as a mitigating factor. Many people found guilty
26 of this kind of crime are by all appearances
27 upstanding and decent members of society. The

1 fact is that these things do not happen out in
2 the open; they happen in secret, behind closed
3 doors and well beyond the view of neighbours,
4 friends, colleagues, or even other family
5 members.

6 The aggravating factors, breach of trust,
7 the age of the victim, and the lengthy period
8 over which the sexual abuse was sustained make
9 this to be what I consider a serious sexual
10 assault for which penitentiary time is justified.
11 The goals and objectives of sentencing, and in
12 particular denunciation and deterrence, will be
13 achieved by nothing less. Moreover, the moral
14 blameworthiness is very, very high.

15 The Crown filed several cases for me to
16 consider in determining what is the appropriate
17 range of sentence. In *R. v. Doll*, 2015 NWTSC 1,
18 the offender received 18 months for sexual
19 touching of a child of a relative to whom the
20 sentencing judge found he was in a position of
21 trust. Of note, however, is that the offender in
22 that case pleaded guilty and he apologized to the
23 victim, two things which were treated as
24 mitigating and justifying a shorter sentence.
25 Further, the abuse was not sustained over a
26 period of years as it is here.

27 In *R. v. Griffin*, 2013 NWTSC 80, what was

1 involved was a sustained series of sexual
2 assaults on a child over a period of years,
3 attracting a four-year starting point. The Crown
4 sought a sentence of three and a half years'
5 incarceration. The sentencing judge imposed this
6 sentence indicating, however, that she was
7 exercising considerable restraint in doing so.
8 One of the key factors was the relatively young
9 age of the offender.

10 I do note that there are some differences
11 between the circumstances in Griffin and here in
12 terms of the severity of the assault. However,
13 the assault here is -- the actions here took
14 place over a long period of time.

15 Finally, in R. v. D.(D.), 2002 CanLII 44915
16 and 2002 CarswellOnt 881, Justice Moldaver, who
17 was then of the Ontario Court of Appeal,
18 summarized the appropriate range of sentence, and
19 I agree entirely with what he said at paragraph
20 44:

21 To summarize, I am of the view
22 that as a general rule, when adult
23 offenders, in a position of trust,
24 sexually abuse innocent young
25 children on a regular and
26 persistent basis over substantial
27 periods of time, they can expect
to receive mid to upper single
digit penitentiary terms. When
the abuse involves full
intercourse, anal or vaginal, and
it is accompanied by other acts of
physical violence, threats of
physical violence, or other forms

1 of extortion, upper single digit
2 to low double digit penitentiary
3 terms will generally be
4 appropriate. Finally, in cases
5 where these elements are
6 accompanied by a pattern of severe
7 psychological, emotional and
8 physical brutalization, still
9 higher penalties will be
10 warranted.

11 M.S.J., please stand. M.S.J., I sentence
12 you to a period of incarceration of three years
13 for the crime of sexual assault. You can sit
14 down.

15 The Crown has also sought a number of
16 ancillary orders. I will grant an order that
17 M.S.J. must provide a sample of his DNA, and
18 there will be a SOIRA order in effect for 20
19 years. I decline to impose a firearms
20 prohibition because, while I do not wish to
21 understate the seriousness of the offence or the
22 psychological violence that these types of
23 offences can visit on victims, there was no
24 physical violence used in this case.

25 The Crown seeks an order under Section 161
26 of the Criminal Code to prohibit M.S.J. from
27 attending certain places that children frequent
28 or seeking or obtaining employment or volunteer
29 positions which involve interaction with
30 individuals under 16. As well, the Crown seeks a
31 provision under this section which would prohibit

1 M.S.J. from having any contact with or
2 communicating by any means with a person under 16
3 unless it is under the supervision of a person
4 the Court considers appropriate. I am going to
5 make that order. However, I recognize that
6 M.S.J.'s personal circumstances visa-à-vis his
7 family and certain of his children may change
8 and, accordingly, should those circumstances
9 change, he is free to apply to vary this term
10 under Section 161(3). That order will be in
11 effect for ten years. There will also be an
12 order under Section 743.21 that M.S.J. not
13 communicate in any way with the victim while he
14 is in custody.

15 Given M.S.J.'s pecuniary circumstances and
16 the time at which the offence took place, as
17 described in the PSR, the Victim of Crime
18 surcharge will be waived.

19 Finally, Mr. Harte, do you wish to make any
20 submissions on whether I should recommend that
21 M.S.J. be permitted to serve his sentence in the
22 Northwest Territories?

23 MR. HARTE: Yes, I do, Your Honour, and I
24 would ask the Court to make that recommendation.

25 THE COURT: All right. I will ask the
26 clerk to endorse the Warrant of Committal to
27 reflect this court's recommendation that M.S.J.

1 be permitted to serve the sentence in the
2 Northwest Territories.

3 Finally, Mr. Harte, I just wish to confirm
4 whether M.S.J. spent any time in pre-trial
5 custody.

6 MS. LAKUSTA: Yes, he has been in custody
7 now for 48 hours as part of the recognizance. So
8 I think that would be about three days of credit.

9 THE COURT: All right. The Warrant of
10 Committal -- do you wish to make --

11 MR. HARTE: I just -- my one concern with
12 respect to the order that the Court has made is
13 -- sorry. I don't want to interrupt. So the
14 reason I want to look at the Code is this, if
15 there is a prohibition in place pursuant to
16 Section 161, that may mean that M.S.J. can't have
17 any family visits in the event that either of his
18 children were able to make it to -- any of his
19 sons were able to make it to Yellowknife, he
20 wouldn't be permitted to see G. or Q. And the
21 other problem that might create is he wouldn't be
22 able to speak to them on the telephone.

23 THE COURT: He would not be able to do
24 either of those. That is why -- but I do not
25 have any information about what his circumstances
26 are, and I know that -- but from the submissions
27 that this is also -- the family matter is before

1 the Court as well. So it would be more
2 appropriate for -- the appropriateness of visits
3 to be worked out in the family proceedings and
4 then that can go before the Supreme Court under
5 161(2) or, sorry, (3); he can apply for a
6 variation.

7 MR. HARTE: I understand. I had
8 misunderstood Your Honour's comment. I thought
9 you were referring to upon release. In any
10 event, I understand. Thank you, Your Honour.

11 THE COURT: Finally -- sorry, Mr. Harte.
12 Did you have any submissions with respect to the
13 amount of credit?

14 MR. HARTE: It's three days in relation
15 to --

16 THE COURT: Three days? All right.

17 MR. HARTE: It's not going to make much
18 difference.

19 THE COURT: All right. So the Warrant of
20 Committal should reflect that M.S.J. is given
21 three days' credit for time spent in pre-trial
22 custody.

23

24 Certified Pursuant to Rule 723
25 of the Rules of Court

26 Jane Romanowich, CSR(A)
27 Court Reporter