R. v. Shatilla, 2017 NWTSC 25 S-1-CR-2015-000014

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

 IN THE MATTER OF:

 HER MAJESTY THE QUEEN

 - V -

 DENNIS SHATILLA

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 Transcript of the Reasons for Sentence by The Honourable

 Justice K. M. Shaner, sitting in Hay River, in the

 Northwest Territories, on the 10th day of April, 2017.

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 APPEARANCES:

 Mr. B. MacPherson: Counsel for the Crown

 Mr. M. Hansen: Counsel for the Defence

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 Charge under s. 271 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 of Canada

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 1 THE COURT: I am going to preface my

 2 remarks with this: Sentencing is the worst

 3 aspect of my job. It often means that I have

 4 to send somebody to jail, significantly disrupt

 5 their life and the lives of their loved ones,

 6 and I say this because it is important for you

 7 to know, Mr. Shatilla, that I have put a lot

 8 of thought into this. I have given a great

 9 deal of consideration to the circumstances

 10 of the case, the submissions of your lawyer,

 11 and the submissions of Mr. MacPherson.

 12 Mr. Shatilla was found guilty of sexual

 13 assault following a jury trial, which was held

 14 here in Hay River January 30th until February

 15 1st, 2017. There is a publication ban respecting

 16 information that could identify the victim in

 17 this case, and accordingly I will refer to her

 18 as the victim in these reasons and not by her

 19 name.

 20 The circumstances of the offence came out

 21 primarily through the evidence of the victim,

 22 and the circumstances are these:

 23 During the evening in the early part of

 24 2014 Mr. Shatilla was visiting the home of the

 25 victim's father. The victim was there. The

 26 two men were friends. As well, Mr. Shatilla

 27 was and continues to be the spouse of the

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 1 victim's cousin. The victim was 13 at the

 2 time and Mr. Shatilla was 19.

 3 The victim did not live at her father's

 4 home all the time; sometimes she lived with

 5 her grandmother. She said in her evidence

 6 that she went back and forth between the

 7 two houses and she did have a bedroom at her

 8 father's home. The victim also said that her

 9 father was drinking a lot during that period

 10 of time, and that evening the two men, her

 11 father and Mr. Shatilla, were drinking beer

 12 in the living room. The victim was in the

 13 living room with them. She was sitting in

 14 a chair playing a videogame.

 15 At some point her father fell asleep in

 16 the living room, although when he testified

 17 he said he had no recollection of any of the

 18 events of that evening. After the father fell

 19 asleep, Mr. Shatilla picked up the victim from

 20 the chair in which she was sitting and he carried

 21 her, as she described it, "like a groom carries a

 22 bride", into her bedroom. She said this made her

 23 feel nervous and scared and that she was afraid

 24 to call out to her father.

 25 Mr. Shatilla placed her on the bed in her

 26 bedroom and asked her if she wanted to do it.

 27 At first she said she did not answer, but then

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 1 she told him no. When he initially tried to

 2 pull her pants off she pushed his hands away

 3 and she pushed him to try and get him off of

 4 her. He pinned her to the bed with his weight,

 5 however, and proceeded to take her pants and her

 6 underwear off. He placed his hand over her mouth

 7 and he had sexual intercourse with her.

 8 The victim heard her father stir and she

 9 managed to push Mr. Shatilla off of her this

 10 time. Mr. Shatilla told her not to tell anyone

 11 what had happened. He got dressed and went back

 12 into the living room. The victim got dressed,

 13 and she left the home and went to her cousin's

 14 house.

 15 Much of the information that is before

 16 me about Mr. Shatilla comes from a pre-sentence

 17 report which was prepared by Probation Services

 18 following the trial. Mr. Shatilla is a young

 19 man, he is currently 22 years of age. He is

 20 indigenous and he grew up in Buffalo Narrows,

 21 in Saskatchewan. According to the pre-sentence

 22 report the only other place he has lived is Hay

 23 River, where his wife and her family are from.

 24 He was raised in what he describes in the

 25 report as a stable family. He got along well

 26 with his parents, who he indicated did not abuse

 27 alcohol and did not abuse or neglect Mr. Shatilla

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 1 and his siblings. Mr. Shatilla was diagnosed

 2 with attention deficit disorder and attention

 3 deficit hyperactivity disorder by the time he was

 4 eight years old. He struggled greatly in school,

 5 and it appears he did not progress beyond grade

 6 7. He told the author of the pre-sentence report

 7 that his learning difficulties led him to feel

 8 dumb and to have low self-esteem. Ultimately

 9 as a result he began to rebel. He received

 10 numerous suspensions and his parents finally

 11 took him out of school when he was 13 or 14.

 12 Mr. Shatilla has not sustained long-term,

 13 permanent employment. He worked for a year

 14 at a store in Buffalo Narrows when he was 15.

 15 He then worked for his parents who ran an RV

 16 park there. He started working in Hay River

 17 as a labourer on and off for businesses here

 18 when he was 18. He indicated to the report's

 19 author that he wishes to upgrade his education

 20 and skills and hopefully obtain his GED.

 21 It appears from the report Mr. Shatilla

 22 is a social drinker, and up to the point of

 23 his recent incarceration, he used cannabis on

 24 a daily basis. He had planned to curb his use

 25 in any event because it was a source of friction

 26 between him and his spouse. Mr. Shatilla and

 27 his spouse have two young children and another

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 1 child is due this month. They recently secured

 2 housing in Buffalo Narrows, Saskatchewan. His

 3 wife's family is here in Hay River.

 4 The Criminal Code sets out the principles

 5 and objectives of sentencing that provide

 6 a framework to guide judges in imposing

 7 a sentence that is just and appropriate.

 8 The objectives are these: Denunciation

 9 of unlawful conduct; deterrence, aimed both

 10 at the offender and at the public at large;

 11 separating offenders from society where it

 12 is necessary; rehabilitation; reparation;

 13 and promoting a sense of responsibility in

 14 offenders and acknowledgment of the harm

 15 done to victims and to the community.

 16 The emphasis that is placed on each of

 17 these objectives very much depends on what

 18 the offence is, the circumstances under which

 19 it was committed, and the circumstances of the

 20 offender. Where the offence involves the abuse

 21 of a person under 18 years of age, as is the

 22 case here, the Criminal Code requires the

 23 sentencing judge to give primary consideration

 24 to the objectives of denunciation and deterrence.

 25 The Criminal Code also sets out a number

 26 of principles to be applied in determining

 27 what is an appropriate sentence. The most

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 1 important principle in sentencing is that

 2 of proportionality. That is, a sentence must

 3 be proportionate to the gravity of the offence

 4 and the degree of responsibility of the offender.

 5 In determining what is a fit sentence judges

 6 are also guided by the principles of restraint

 7 and parity. The principle of restraint requires

 8 consideration of all available sanctions, other

 9 than imprisonment, that are reasonable in the

 10 circumstances, with particular attention to

 11 the circumstances of indigenous offenders.

 12 Parity of sentence means that there should

 13 be similar treatment for like offences and

 14 offenders, bearing in mind that it does not

 15 call for identical sentences to be imposed

 16 for the same crime. That is because no two

 17 cases are identical, no two offenders are

 18 identical.

 19 For many years this Court has followed

 20 the principles articulated by the Alberta Court

 21 of Appeal in R. v. S.(W.B.), which was filed by

 22 the Crown, (1992) 73 CCC (3d) 530; 1992 CanLII

 23 2761; R. v. Sandercock, [1986] 1 WWR 291; 1985

 24 ABCA 218 (CanLII); and more recently the case

 25 of R. v. Arcand, [2011] 7 WWR 209; 2010 ABCA

 26 363 (CanLII).

 27 The S.(W.B.) case, among other things,

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 1 sets out a four-year jail term as the starting

 2 point for a serious sexual assault on a child

 3 by a person in a position of trust or authority.

 4 It is also cited often as an articulation of the

 5 sad consequences of sexual assault on children.

 6 Sandercock stands for the proposition that for

 7 a serious sexual assault the starting point is

 8 three years jail, assuming a mature accused with

 9 no previous criminal record. Arcand confirms

 10 this, as well as articulating more thoroughly

 11 what constitutes a serious sexual assault. These

 12 are not, to be clear, minimum sentences. Judges

 13 must consider aggravating and mitigating factors

 14 and increase or reduce the sentence accordingly.

 15 Section 718.2 of the Criminal Code deems

 16 a number of factors to be aggravating, although

 17 it is not an exhaustive list. These include

 18 evidence that the offender abused a person

 19 under 18 years of age and that the offender

 20 was in a position of trust in relation to

 21 the victim.

 22 Now, with respect to whether or not

 23 Mr. Shatilla was in a position of trust in

 24 relation to the victim the Crown and defence

 25 disagree.

 26 In the case of R. v. G.L., 2011 NWTSC 36,

 27 Justice Vertes considered whether an offender,

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 1 who was a family friend and who had assaulted

 2 the victims in their home, was in a position of

 3 trust, thus elevating the starting point to the

 4 four years contemplated in S.(W.B.). He found

 5 the offender was not in a position of trust,

 6 stating:

 7

 8 For there to be a position of

 9 trust there must be some ongoing

 10 relationship, some status between

 11 the offender and the child, that

 12 is more than merely occasional

 13 or transitory.

 14

 15 In the circumstances here I am unable to

 16 conclude that Mr. Shatilla was in a position

 17 of trust as that term is contemplated in

 18 S.(W.B.), and therefore, it is the three-year

 19 starting point which should apply. That is not

 20 to say, however, that his status as a friend and

 21 relative and his being a frequent visitor to the

 22 home are not aggravating factors.

 23 There are a number of aggravating factors

 24 that arise out of the circumstances of this

 25 particular case. Mr. Shatilla is the husband

 26 of the victim's cousin, and at the time a

 27 friend, no doubt a trusted one. He was a

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 1 frequent visitor to the house. The victim

 2 was 13, the offender was 19 with a child and

 3 a wife and another child on the way at the

 4 time of the offence.

 5 I cannot be certain that the offence was

 6 premeditated, but it was certainly predatory

 7 and opportunistic. Mr. Shatilla seized on the

 8 opportunity to sexually assault the victim once

 9 her father fell asleep. He took advantage of

 10 her youth, her fear and her trust in adults.

 11 He pinned her down with his weight, held his

 12 hand over her mouth, and he raped her, and

 13 then he told her not to tell anyone. Clearly

 14 he knew what he was doing was wrong.

 15 In contrast, there is very little by way

 16 of mitigation. There is no evidence of remorse

 17 and there was no guilty plea. That Mr. Shatilla

 18 exercised his right to a trial is certainly not

 19 aggravating, but the mitigative effect of sparing

 20 the victim the need to testify is not available

 21 to him.

 22 The Crown is seeking a custodial sentence

 23 of four and a half to five years. It is the

 24 Crown's position that a sentence in this

 25 range is necessary to attain the objectives

 26 of sentencing, particularly denunciation

 27 and specific and general deterrence which,

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 1 as I noted earlier, must be given primary

 2 consideration. The defence submits that

 3 the sentence should be in the range of

 4 three to three and a half years.

 5 This is clearly and definitively a very

 6 serious sexual assault, and in my view the

 7 ends of justice cannot be achieved unless

 8 a significant custodial sentence is imposed.

 9 Sexual assault is all too common in the

 10 Northwest Territories, and sexual crimes

 11 against children are particularly disturbing

 12 and harmful, not only to the victims, but

 13 to our society generally. The consequences

 14 of sexual assault for victims are profound.

 15 In R. v. S.(W.B.), Supra Justice MacDonald

 16 of the Court of Appeal of Alberta considered

 17 the effects of sexual abuse crimes against

 18 children. He stated:

 19

 20 When a man has assaulted a child

 21 for his sexual gratification, then

 22 even if no long-lasting physical

 23 trauma is suffered by the child it

 24 is reasonable to assume that the

 25 child may have suffered emotional

 26 trauma, the effects of which may

 27 survive longer than bruises or

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 1 broken bones and may even be

 2 permanent.

 3

 4 He goes on to say:

 5

 6 From this information it is

 7 abundantly clear that there is

 8 one salient fact which must govern

 9 the approach to be taken by the

 10 Court in sentencing in cases of

 11 sexual abuse of children: that in

 12 every case of the sexual abuse of

 13 a child there is a very real risk

 14 of very real harm to the child.

 15 This cardinal fact can be relied

 16 upon even when there is no expert

 17 or non-expert evidence called in

 18 the particular case to establish

 19 that the particular child, who

 20 was the victim, has suffered

 21 some specific traumatic effect

 22 or effects.

 23

 24 Mr. Shatilla bears significant moral

 25 blameworthiness in this offence. Children

 26 are so vulnerable. They are in a weak position

 27 in relation to adults. Adults hold all of

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 1 the cards. Adults are supposed to protect

 2 children, not harm them. They are supposed

 3 to be responsible. Children should be able

 4 to trust them, particularly in that child's

 5 own home.

 6 In her victim impact statement the victim

 7 said she had to take counselling, she has taken

 8 antidepressants and, most disturbingly, she was

 9 hospitalized following a suicide attempt, which

 10 she relates to this event, and she is afraid to

 11 be alone.

 12 I have considered Mr. Shatilla's young

 13 age. He is a very young adult, and when this

 14 happened he was even younger, although as the

 15 Crown pointed out he was a mature young adult

 16 with a family. I believe he was mature enough

 17 to know that what he was doing was wrong. Being

 18 young, however, he has significant potential for

 19 rehabilitation and this militates in favour of

 20 a somewhat reduced period of incarceration and

 21 must be taken into account.

 22 I have considered Mr. Shatilla's indigenous

 23 status. Defence counsel agreed with the Crown

 24 that there are no systemic Gladue factors which

 25 have been identified. Mr. Shatilla, as I said,

 26 had a stable upbringing and a good home.

 27 However, his lawyer argued that Mr. Shatilla's

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 1 status should nevertheless be factored in and

 2 considered because he is still a member of

 3 a demographic group which has generally been

 4 subject to significant systemic challenges

 5 in this country.

 6 It may well be that there are cases where

 7 the fact that a person is indigenous may in

 8 and of itself serve to diminish his or her

 9 moral blameworthiness or otherwise lead a

 10 Court to impose a more lenient sentence.

 11 This is not one of those cases. This was

 12 a serious crime with substantial and prolonged

 13 consequences for the victim. The sentence

 14 must send a strong and unequivocal message

 15 to Mr. Shatilla, the victim and this community,

 16 that sexual assaults will not be tolerated

 17 and that those that commit these offences

 18 will be subject to serious consequences.

 19 Mr. Shatilla, can you please stand up.

 20 Dennis Shatilla, upon being convicted of

 21 sexual assault and upon consideration of

 22 the circumstances and nature of this offence,

 23 as well as your personal circumstances, your

 24 indigenous heritage and your age, I sentence

 25 you to a term of four years imprisonment. This

 26 term will be reduced by the amount of time you

 27 have spent in custody awaiting the disposition

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 1 of your case which, including the day of your

 2 arrest, is 70 days. On the basis of credit at

 3 a rate of 1.5 days for each day of pre-sentence

 4 custody that works out to 104 days that will

 5 be deducted from the four years you will serve.

 6 You can sit down.

 7 There were a number of ancillary orders

 8 that the Crown sought. I will impose the

 9 firearms prohibition under Section 109 of the

 10 Criminal Code, and you were seeking ten years,

 11 Mr. MacPherson?

 12 MR. MACPHERSON: Yes.

 13 THE COURT: That section provides for

 14 a mandatory prohibition on firearms where a

 15 person is convicted of an indictable offence

 16 in the commission of which violence against

 17 a person was used, threatened or attempted,

 18 and for which the person may be sentenced

 19 for ten years or more. In the event that you

 20 wish to seek relief, partial relief from this

 21 prohibition for the purpose of subsistence

 22 hunting, Mr. Shatilla can certainly make

 23 the appropriate application to the firearms

 24 authorities for that purpose.

 25 There will be an order for bodily fluids

 26 to be taken from Mr. Shatilla for DNA analysis,

 27 and an order requiring him to comply with the

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 1 Sex Offender Information Registration Act

 2 pursuant to Section 490.012 of the Criminal

 3 Code. Mr. MacPherson, the Crown is seeking

 4 that for 20 years?

 5 MR. MACPHERSON: Yes, Your Honour.

 6 THE COURT: That will be in effect for

 7 20 years. Were there any other ancillary orders?

 8 MR. MACPHERSON: No, thank you.

 9 MR. HANSEN: If I may, I just wish to be

 10 clear. The ancillary order, in answering that

 11 question, it seems to be inferred, but not stated

 12 explicitly, that a Section 113 exemption under

 13 the firearms is permitted?

 14 THE COURT: He has to make the

 15 application, it is not up to me to make

 16 the exemption.

 17 MR. HANSEN: As I understand it, it

 18 is an operation of law that there must be

 19 a statement that he can make an application

 20 under 113.

 21 THE COURT: Yes, he can make the

 22 application.

 23 MR. HANSEN: Yes, thank you.

 24 THE COURT: All I am saying is that

 25 I cannot guarantee the outcome of that

 26 application or direct it.

 27 MR. HANSEN: No, of course.

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 1 THE COURT: Finally, I will make a

 2 recommendation and ask that it be endorsed

 3 on the Warrant for Committal that Mr. Shatilla

 4 be permitted to serve his sentence at SMCC.

 5 That was what you were seeking?

 6 MR. HANSEN: Yes, Ma'am.

 7 THE COURT: However, that will be up

 8 to the Corrections authorities to make that

 9 determination. Is there anything else?

 10 MR. MACPHERSON: No, thank you.

 11 MR. HANSEN: No, thank you.

 12 THE COURT: Thank you.

 13 THE CLERK: Your Honour, is there a

 14 victim surcharge, a victim of crime surcharge?

 15 THE COURT: There is a victim of crime

 16 surcharge by operation of law, yes. Thank you.

 17 We will adjourn.

 18 -----------------------------

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 20 Certified to be a true and

 accurate transcript, pursuant

 21 to Rules 723 and 724 of the

 Supreme Court Rules.

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 24 Joel Bowker

 Court Reporter

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