*R v Gargan*, 2018 NWTSC 70 **S-1-CR-2018-000054**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**ERIC GARGAN**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of the Reasons for Sentence delivered by The Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 22nd day of October, 2018.

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**APPEARANCES:**

Mr. M. Fane: Counsel for the Crown

Mr. P. Falvo: Counsel for the Accused

(Charges under s. 271 of the *Criminal Code*)

**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***

1. THE COURT: Eric Gargan entered a guilty
2. plea to a charge of sexual assault, contrary to
3. Section 271 of the *Criminal Code*, on August 20th,
4. 2018. Sentencing was adjourned to today's date
5. for the preparation of a Pre-Sentence Report.
6. The facts of the offence are fairly
7. straightforward. On December 4th, 2016,
8. Mr. Gargan was drinking at the Gold Range with
9. his partner. The victim is the sister of
10. Mr. Gargan's partner at the time. M.A.G. met up
11. with them at the bar, and the three of them were
12. drinking. R.G. invited M.A.G. to stay the night
13. at Mr. Gargan's apartment, and she accepted that
14. invitation.
15. The victim was sleeping at Mr. Gargan's
16. apartment when she awoke at 5 a.m. to discover
17. that he had pulled down her pants and was
18. digitally penetrating her vagina. She pushed him
19. away, and Mr. Gargan locked himself in the
20. bathroom saying that he had not done anything.
21. In considering the impact on the victim, she
22. prepared a victim impact statement, and she also
23. spoke to the writer of the Pre-Sentence Report.
24. In the victim impact statement, she described the
25. effect that the incident had on her. It has
26. affected her ability to trust others. It has
27. affected her emotionally, financially, and
28. physically. It has affected her relationship
29. with her sister, as her sister maintained her
30. relationship with Mr. Gargan following the
31. offence; although, I am told that the
32. relationship has now ended.
33. In the Pre-Sentence Report, she described
34. how she knew Mr. Gargan for years, that she
35. trusted him and felt safe with him, and viewed
36. him as a brother. That trust was betrayed by Mr.
37. Gargan's actions, and the victim was left feeling
38. ashamed for what had happened to her. The impact
39. of this offence, it is clear, will be a
40. long-lasting one on her.
41. The other information before the Court: I
42. also have Mr. Gargan's criminal record, which was
43. filed. He has eight convictions on his criminal
44. record. He has two convictions for offences of
45. violence: an assault in 1994 and a sexual
46. assault in 1996, for which he received a sentence
47. of three-and-a-half years. Mr. Gargan's record
48. is brief and dated, but it does have a related
49. conviction on it.
50. Mr. Gargan is of aboriginal descent, and
51. this requires me to consider Section 718.2(e) of
52. the *Criminal Code*, as well as the other
53. sentencing provisions. Section 718.2(e) requires
54. the Court to give particular attention to the
55. circumstances of aboriginal offenders in
56. determining an appropriate sentence. What the
57. Supreme Court has said, in cases like *R. v*
58. *Gladue*, and later in *R. v Ipeelee*, is that a
59. sentencing judge must consider the unique
60. systemic or background factors which may have
61. played a part in bringing an aboriginal offender
62. before the courts and the types of sentencing
63. procedures and sanctions which may be appropriate
64. in the circumstances because of their aboriginal
65. background. In this case, I have the benefit of
66. a Pre-Sentence Report and I do not intend to
67. repeat everything that was in the Pre-Sentence
68. Report or what was said by counsel, but the
69. Pre-Sentence Report refers to Mr. Gargan's
70. circumstances and some of the factors that played
71. a role in bringing him before the Court today.
72. Mr. Gargan is 54 years old and is from
73. Fort Providence. The only information provided
74. in the Pre-Sentence Report was from Mr. Gargan
75. himself. It's unfortunate that he did not
76. cooperate and provide the names of his siblings
77. or other people from the community who might have
78. been able to provide some additional insight into
79. his background and circumstances. That would
80. have been helpful for the Court. But I do have
81. some information about Mr. Gargan that he
82. provided, and, as well, as I have heard from
83. counsel.
84. Mr. Gargan acknowledges that he has an
85. alcohol problem. Alcohol has been a factor in
86. his life for quite some time now and was present
87. in his life when he was growing up. His parents
88. and siblings consumed alcohol; and Mr. Gargan, to
89. his credit, has begun to take steps to address
90. his alcohol problems.
91. He also describes witnessing violence, as
92. well as experiencing violence himself while
93. growing up, and being the victim of physical and
94. sexual abuse. He attended residential school,
95. and his family lived a traditional lifestyle,
96. going out on the land and engaging in hunting,
97. trapping, and fishing.
98. Mr. Gargan, as well, has been employed
99. regularly throughout his adult life and has held
100. many long-term positions.
101. There are a number of sentencing principles
102. that are applicable in cases like this. The
103. purpose and principles of sentencing are set out
104. in the *Criminal Code*, and a fundamental principle
105. of sentencing is that a sentence must be
106. proportionate to the gravity of the offence and
107. the degree of responsibility of the offender.
108. The cases are clear that the paramount
     1. sentencing principles in sentencing for offences
     2. of sexual violence are deterrence and
     3. denunciation. The principle of denunciation
     4. means that a sentence should express society's
     5. and the community's condemnation of the conduct.
     6. And deterrence refers to general and
     7. specific deterrence, that a sentence should deter
     8. other individuals from committing this type of
     9. offence; and the sentence should also
     10. specifically deter Mr. Gargan from committing
     11. another offence.
     12. And the principles of deterrence and
     13. denunciation have been repeatedly emphasized in
     14. sentencing offenders in cases of sexual assault
     15. for many years in this jurisdiction. Sexual
     16. assault continues to be a serious problem in the
     17. Northwest Territories; and the rate of violence
     18. and particularly sexual violence, in this
     19. jurisdiction, continues to be one of the highest
     20. in the country. Sadly, many of the offences that
     21. we see are similar to what happened in this case,
     22. that a woman is sexually assaulted while sleeping
     23. or passed out.
     24. Turning to the factors that are applicable
     25. in this case, Mr. Gargan entered a guilty plea.
     26. The guilty plea occurred after a preliminary
     27. inquiry in which the victim testified. And
109. counsel for Mr. Gargan and Mr. Gargan himself
110. referred to the impact of hearing the victim
111. testify and accepting that what she said happened
112. did occur. And the Crown advised that, while the
113. victim had to testify, that she also found the
114. process cathartic.
115. Mr. Gargan has no recollection of the
116. incident himself as a result of intoxication, and
117. it may be that he needed to hear the victim and
118. the effect that the offence had on her to realize
119. that he did what she said he did.
120. Ultimately, it is a guilty plea, and it
121. provided certainty of an outcome and saved the
122. victim from having to testify in this matter
123. again, so it will be given credit.
124. The guilty plea and Mr. Gargan's words today
125. also demonstrate his acceptance of responsibility
126. for his actions. Mr. Gargan expressed his
127. remorse in the Pre-Sentence Report through the
128. submissions of his counsel and by his words to
129. the Court this morning. He takes responsibility
130. for the offence and expressed that he would
131. apologize to the victim if she had been in court.
132. The circumstances of the offence itself:
133. This was an assault on someone that Mr. Gargan
134. knew for a long time who trusted him. The victim
135. was the sister of Mr. Gargan's partner. She felt
136. safe with him and felt comfortable accepting an
137. invitation to stay the night at his apartment
138. when she was in town, when she -- after which she
139. had met up with Mr. Gargan and his partner at a
140. bar. The victim should have been able to trust
141. that Mr. Gargan would not take advantage of her
142. while she was sleeping.
143. This offence was also committed, as I
144. mentioned, while Mr. Gargan was under the
145. influence of alcohol, and he consumed alcohol to
146. the point that he does not recall the sexual
147. assault that morning.
148. The victim herself was asleep after having
149. been drinking. She was in a vulnerable position,
150. unable to defend herself from Mr. Gargan's
151. advances; and fortunately, she woke up during the
152. assault and was able to prevent him from
153. continuing.
154. The sexual assault is a major sexual
155. assault, as contemplated in *R v Arcand*, 2010 ABCA
156. 363. It involved the digital penetration of the
157. victim's vagina; and as well, Mr. Gargan, as I
158. mentioned, has a criminal record, which, while
159. dated, has a related conviction on it.
160. I have considered the submissions of counsel
161. and the sentences that have been proposed, as
162. well as the case that the Crown referred to; and
163. I agree that the range of sentence that has been
164. proposed by counsel is appropriate. There is a
165. difference between the position of the Crown and
166. of the defence; but, overall, when you take into
167. account all of the circumstances, that the
168. positions, as put forward, are within the range.
169. So please stand, Mr. Gargan. Taking into
170. account the circumstances, your circumstances,
171. the circumstances of the offence, and the
172. sentencing principles, I am satisfied that an
173. appropriate sentence for this offence is one of
174. 18 months' incarceration. There is no pretrial
175. custody to consider, so the sentence is one of
176. 18 months.
177. This will be followed by 24 months of
178. probation. There will be the statutory
179. conditions, as well as some additional
180. conditions: 1) that you report to a probation
181. officer within three days of your release and
182. thereafter when required to do so by the
183. probation officer; that you are to take
184. counselling as directed by your probation
185. officer, including any alcohol or drug
186. counselling, and attend any treatment programs
187. that you agree to participate in. I hope that
188. you will continue with your plans to attend
189. Poundmaker's because I think that would be of a
190. benefit to you.
191. You are to have no contact with the victim
192. unless with her prior, written permission. And
193. those are all of the conditions that I am going
194. to impose on you. I do not want to that make the
195. probation too onerous, and I think it is
196. important that you focus on your rehabilitation.
197. As well, there will be the ancillary orders
198. that were requested by the Crown. There will be
199. a firearms prohibition order as required. It is
200. mandatory pursuant to Section 109 of the
201. *Criminal Code*. It will begin today and end ten
202. years after your release from prison.
203. As well, there will be a DNA order as this
204. is a primary designated offence. And there will
205. be the SOIRA order, which is as well mandatory,
206. and it will be for life as this is a second
207. offence. There will be the victim of crime
208. surcharge imposed as well pursuant to the
209. regulations.
210. You can have a seat, Mr. Gargan.
211. All right. Is there anything else, counsel?
212. MR. FANE: Your Honour, I wonder, in
213. light of Mr. Gargan's comments, when he was
214. speaking to the Bench this morning, if a
215. 113 exemption would be appropriate? I don't -- I
216. know my friend hasn't requested it; but, given
217. the prior record, and --
218. THE COURT: Okay. Mr. Falvo, did you -- I
219. meant to address that, and it slipped my mind.
220. So, Mr. Falvo, did you want to make any
221. submissions with respect to that?
222. MR. FALVO: That's requested, Your Honour.
223. THE COURT: Okay. Okay. So there will be
224. the exemption pursuant to Section 113 so that
225. Mr. Gargan can make an application to the
226. competent authority in order to be able to hunt
227. or trap.
228. And as well, there will also be a
229. recommendation, as requested by counsel, that
230. Mr. Gargan be allowed to serve his sentence at
231. the South Mackenzie Correctional Centre. That
232. will be endorsed on the warrant of committal. It
233. is not mandatory for the correctional authorities
234. to comply with that, but it is a recommendation.
235. So hopefully, they will consider that and
236. that you will be able to serve your sentence
237. there, Mr. Gargan, and take the appropriate
238. counselling.
239. All right. Is there anything else?

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| 24 | MR. | FANE: | No, | thank you. |
| 25 | THE | COURT: | Mr. | Falvo? |
| 26 | MR. | FALVO: | No, | Your Honour. Thank you. |
| 27 | THE | COURT: | All | right. All right. Thank |

* 1. you, counsel, for your submissions, and we will
  2. adjourn court.
  3. THE COURT CLERK: All rise.

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5 **CERTIFICATE OF TRANSCRIPT**

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1. I, the undersigned, hereby certify that the
2. foregoing transcribed pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and
5. ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 13th day of November, 2018.

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1. Certified Pursuant to Rule 723
2. Of the Rules of Court

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1. Janet Belma, CSR(A), B.Ed.
2. Court Transcriber

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