*R v Bertrand,* 2020 NWTSC 14**S-1-CR-2018-000143**

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**PETER BERTRAND**

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**Transcript of the Reasons for Sentence of the Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 9th day of March, 2020.**

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**APPEARANCES:**

M. Fane: Counsel for the Crown

L. Moore: Counsel for the Defence

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Charge under s. 271 of the *Criminal Code*

**There is a ban on the publication, broadcast or transmission of any information that could identify the complainant pursuant to s. 486.4 of the *Criminal Code***

**I N D E X**

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THE COURT: I am going to give my decision now. My more usual practice is to take some time to write and try to explain my decisions in a bit more detail. But I think in this case it probably is more important that this matter be completed today so that there is no more waiting for the outcome of this case.

 I said it just last week how sad it is how often this Court has to impose sentence on people for the crime of sexual assault.

 In this particular case, the victim of the offence was a young person. I am going to direct that a copy of the Agreed Statement of Facts be appended to the transcript, and I am ordering a transcript, because I do not want to repeat those facts now, but that way it will be clear to anyone reading my decision what the admitted facts were.

 Adults are responsible for making sure that they take all reasonable steps to determine someone’s age if there is any possibility that the person may not be of age to give lawful consent to sexual contact.

 The facts here are, as far as I understood from the submissions of counsel, somewhat deliberately vague in the sense that there is no detail about how the sexual contact really came to be. There is some equivocation on Mr. Bertrand’s part in the pre-sentence report that suggests to me that he at the time viewed this as something consensual. The problem, of course, is if a person does not have the legal capacity to consent, the fact that they may have ostensibly consented is not a mitigating factor.

 I am not going to repeat what I said in *R v Lafferty*, 2019 NWTSC 38 a few months ago, but in that case I did talk about the principles that govern sexual assault of young persons when the facts are that there was ostensible consent. In other words, the young person appeared to be going along with what was taking place. In that decision, I followed *R v Hajar*, 2016 ABCA 222, a decision from the Alberta Court of Appeal.

 For today’s purposes, I adopt what I said in my decision on *Lafferty.* The main point is that it is not a mitigating factor because at the end of the day, the adults are the ones who bear the responsibility in these matters.

 That case also stood for the proposition that the starting point in these kinds of cases should be three years. I should say that the debate in *Hajar* was whether ostensible consent was a mitigating factor. I am saying all of this despite the fact that in this case it is not actually alleged that there was ostensible consent; the facts are just silent on that point. But even if there was, it is not a mitigating factor.

 Another important principle in this matter is that counsel have presented a joint submission. It is said frequently in our courts because joint submissions are presented on a fairly regular basis. The law that governs joint submissions is that the courts are required to follow them unless a judge thinks that the joint submission is completely unreasonable.

 This joint submission, in my view, is not unreasonable because although the starting point is three years and although this is a very serious offence, there are also mitigating factors. The guilty plea is extremely mitigating. Guilty pleas are more mitigating when they happen sooner because that means that the victims do not live for months and months thinking they will have to testify in front of a jury, as was the case here.

 In this case, the victim actually testified by videoconferencing at the preliminary hearing, but

 I heard from the Crown that the cross-examination at the preliminary hearing was mostly on peripheral matters. She did not have to answer questions about the details of what actually happened, the sexual act between her and Mr. Bertrand. So it sounds as though it was a cross-examination that would have been perhaps less difficult than what we sometimes see in preliminary hearings. It is never an easy thing to testify about these things, but as with everything else, there are degrees.

 She also lived with the belief that she would have to testify in front of a jury, which must have caused her a lot of anxiety. But as I said last week in another sentencing hearing, for having seen many witnesses of all ages testify in sexual assault trials in front of juries and sometimes in front of the judge, sitting alone, I know very well that sparing someone from having to do that is sparing them a lot because it is an exceedingly difficult thing for most people to have to talk about these kinds of matters in a public courtroom.

 And by pleading guilty, despite perhaps his initial equivocation about who was responsible, Mr. Bertrand has spared this young woman that ordeal, and that is mitigating, I agree.

 The other factor that has to be considered by this Court is that Mr. Bertrand is Indigenous. I will not try to summarize or paraphrase the pre-sentence report because it is a very thorough report and it would not do it justice for me to try to summarize it, but I will say only that it is a very sad read inasmuch as it relates to Mr. Bertrand’s circumstances growing up. The account of his being taken away to residential school and seeing, as the plane flew away, his grandmother crying on the riverbank is heartbreaking. The description of the effect that this had on him is also very sad.

 This is something we hear about in the courts from time to time, and it is part of why the Supreme Court of Canada has said that this and other systemic factors that have affected Indigenous people in this country must be taken into account when imposing sentence. It does not excuse criminal behaviour, but it is something that is relevant to people’s blameworthiness, and when someone’s moral blameworthiness is reduced, that has an impact on what sentence should be imposed because a sentence should be proportionate to the seriousness of an offence and the blameworthiness of the person who committed it.

 The guilty plea and Mr. Bertrand’s personal circumstances are reasons why I find that the joint submission is reasonable in this case.

 A two year less a day sentence, especially for a man who spends a lot of time out on the land and probably feeling more free than many others do when he is doing that, is not an insignificant sentence. I expect for someone who is used to spending a lot of time on the land, two years less a day, or whatever time it ends up being in jail, is going to be very difficult. And it does not make me happy to have to impose that type of a sentence to anyone and certainly does not make me happy to have to impose it to you, Mr. Bertrand.

 But what you did was very serious. Young people need the protection of adults, and the adults are the ones who have to know better and who have to be extremely cautious, alcohol or no alcohol. And so that is why the sentences for these types of crimes are fairly severe.

 I am going to also impose the various orders that the Crown has sought because they are mandatory. There will be a 20-year requirement to comply with the *Sex Offender Information Registration Act*, and a DNA order. A firearms prohibition order is mandatory as well, but it is obvious to me that the exemption should be included in it so that when you do regain your freedom, Mr. Bertrand, you are able to apply to have that firearm prohibition lifted so that you can go back to your camp and you can lead what sounds to me is a very healthy lifestyle for you. I hope that you are able to find someone to close up your camp and look after things until you can return.

 I will also impose a three-year probation order. It will be supervised probation. Mr. Bertrand, you will have to report to a probation officer within 48 hours of your release and thereafter as directed. I hope and expect that that probation officer will take into account where you are living and what your circumstances are to not make this reporting a burden but more something to help you.

 I will include a condition that you take counselling as recommended because that may assist you. You do not sound like you have had a major problem with alcohol, but it certainly sounds like it has the potential of taking all your judgment away, if I can put it that way. So that condition is there in the hopes that it will help you.

 There will be a condition that you have no contact with this young woman for the duration of the probation order.

 I am not going to make an alcohol abstention condition. I think it is better to leave that up to you. It does not sound like alcohol is necessarily a frequent problem, but it also sounds like it is not a great thing for you. But I will not include that specific condition because at your age, I think you can make those choices. In light of what has happened, I think you know better than anyone that it is not a good idea.

 I will include a condition that you not be alone with a person under 16 unless there is another sober adult present. Based on everything I heard, it does not sound like that is going to be a problem. If it becomes a problem, there are ways to get probation orders amended, and Mr. Moore can tell you how to do that, but if there is ever a need to change this condition because it has become too difficult with family members or things of that nature, you can contact Legal Aid and arrangements can be made to bring it back before a judge to decide. But the condition will be included for now.

 I will also make an order that exhibits be returned to their rightful owner if that is appropriate, and if not, they can be destroyed. But this should be at the expiration of the appeal period if no appeal is brought.

 Mr. Bertrand, I wanted you to know that I would accept the joint submission, but I should have asked you, before I started giving this decision, if there was anything that you want to say. You get the last word or almost the last word in these proceedings. Mr. Moore has spoken on your behalf very well. If there is something you want to say, this is your chance. If you do not want to say anything, you do not have to.

 Is there anything you would like to tell me?

THE ACCUSED: It’s hard for me to express myself, express my regrets.

THE COURT: Okay. Thank you.

THE ACCUSED: This is going to have a big impact on my family, especially my mom. She’s an elderly lady, and she is living alone. And once in a while when I come into the Fort Liard area I stay at her place and I help her, keeping the house warm, washing the dishes, and just doing whatever I can for her and I usually supply, like fish and --

THE COURT: Food.

THE ACCUSED: -- you know, rabbits and -- it’s going to have a big impact on her.

THE COURT: I understand. And I have a feeling that for you, that is the worst punishment. I hope that others can chip in in the community of Fort Liard to help her and help you get your camp closed up.

 It was mentioned in the pre-sentence report, and Mr. Moore said it again this afternoon, that one of the things that you struggle with is the perception that people have of you now, that that perception may have changed. And that is probably true, that people’s perceptions have changed. But you will be back in your community at the end of your sentence, and I hope that you are able to gain that respect back. You have done a lot of things in your life that commanded the respect you had of people before. I believe that most people understand that we make mistakes. This was a very bad one, but I hope that when you return to your community you are able to build on everything you have done in your life up to that day and regain that respect and be a role model for people.

 There are not that many people who lead a traditional lifestyle and have the skills that you have. I am sure you can help teach others, and there are a lot of positive things you can do in your community after you return. So this does not have to be the end of that contribution you have been able to make to your community.

 This is a long sentence for you, I know. But I hope that you will be able to pick up where you left off when you return and that you will succeed.

 Is there anything, Madam Clerk, that I have omitted?

THE CLERK: The pre-sentence report, do you want that marked as an exhibit?

THE COURT: Yes, we will mark the pre-sentence report as exhibit S-2. Thank you for reminding me.

EXHIBIT S-2: PRE-SENTENCE REPORT

THE COURT: Is there anything I have overlooked, counsel?

M. FANE: No, Your Honour, not on this matter.

**(OTHER MATTERS SPOKEN TO)**

THE COURT: Anything more, Mr. Moore? Anything else --

L. MOORE: Nothing further.

THE COURT: Okay. So just to confirm, I am ordering a transcript. Initials should be used for the complainant’s name. The publication ban should be noted on the cover sheet, and it should be brought to me for review. This will not be my most organized sentencing decision, but I felt it important to give it now so that we can complete this matter today.

 So I wish you luck, sir, and I hope that things work out all right for you.

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 2nd day of April, 2020.

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Kim Neeson

Principal

