

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

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**LENNY PAUL NITSIZA**

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**Transcript of the Decision delivered by the Honourable Justice  
K.M. Shaner, sitting in Yellowknife, in the Northwest Territories,  
on the 16<sup>th</sup> day of September, 2020.**

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**APPEARANCES:**

T. Johnson: Counsel for the Crown

B. Rattan: Counsel for the Defence

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Charges under s. 151 and 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*.

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**REASONS FOR DECISION**

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1           **(REASONS FOR DECISION)**

2           **THE COURT:**           Lenny Nitsiza pleaded guilty to sexual  
3                                assault earlier in these proceedings, and a conviction  
4                                was entered today. It is now my responsibility to  
5                                impose a sentence on him.

6                                As I noted earlier in these proceedings, there is  
7                                a publication ban respecting any information that might  
8                                identify the victim, and for that reason, I will not refer to  
9                                her by name in these reasons.

10                              The circumstances of the offence are set out in  
11                              an Amended Agreed Statement of Facts which was  
12                              placed on the record after being read into it. I am not  
13                              going to repeat that in its entirety, but I will provide a  
14                              summary for contextual reasons.

15                              The offence occurred on May 17, 2018.  
16                              Mr. Nitsiza was 27 years old, and the victim was 14.  
17                              The two knew each other, and they had been  
18                              communicating over social media earlier that day. At  
19                              some point, Mr. Nitsiza agreed to go over to the victim's  
20                              house and sell her cannabis. The victim was at home  
21                              alone when Mr. Nitsiza arrived.

22                              Mr. Nitsiza told her the price for the cannabis.  
23                              She told him that she did not have the money. She  
24                              approached Mr. Nitsiza and began to unzip his pants.  
25                              He understood that she was offering to perform oral sex  
26                              on him in exchange for the cannabis. He did not  
27                              immediately move to stop her, and he allowed her to

1 continue to unzip his pants.

2 As she finished unzipping his pants, and before  
3 any further sexual acts occurred, the victim's mother  
4 arrived home. The victim then ran to her room. Mr.  
5 Nitsiza ran out of the house as the mother was  
6 entering, zipping up his pants while he was doing so.

7 I am going to turn now to Mr. Nitsiza's  
8 circumstances. Most of the information before me  
9 about Mr. Nitsiza comes from the pre-sentence report  
10 which was prepared by Probation Services and  
11 augmented by Mr. Nitsiza's lawyer here today.

12 Mr. Nitsiza is a relatively young man. He is 29  
13 years old. He is Indigenous, and he grew up in Whatì,  
14 which is a small community in the Tłıchǫ, accessible by  
15 boat, plane or winter road. He continues to live there  
16 with his parents. According to the pre-sentence report,  
17 he was well cared for in a loving home with healthy  
18 parents. They did not abuse alcohol or drugs. He is  
19 connected to his family and his culture, participating in  
20 hunting and trapping, drum dances, and Dene hand  
21 games, among other things. He has taught younger  
22 community members how to play traditional hand  
23 games.

24 Unfortunately, while Mr. Nitsiza's family life  
25 was not directly affected by systemic disadvantages  
26 and issues that so often inflict Indigenous families such  
27 as food, water, and housing insecurity, addiction, and

1 violence, he was nevertheless a victim of a significant,  
2 violent nature by members of his community in 2014.  
3 He was beaten in the face with a bat. This resulted in  
4 him losing one of his eyes. Not surprisingly, this has  
5 had a serious, adverse effect on his mental health and  
6 his perception of himself.

7 He told the author of the pre-sentence report  
8 that he is embarrassed in social interactions and when  
9 looking for employment. When the pre-sentence report  
10 was authored, Mr. Nitsiza was living on disability  
11 income. Over the summer, however, he obtained  
12 employment and worked as a labourer for the  
13 Development Corporation.

14 He completed grade 10, and he completed a  
15 course called "Introduction to Mining" after leaving  
16 school. He now has plans to upgrade his skills in the  
17 near future.

18 Mr. Nitsiza has a criminal record. It is not  
19 extensive and it is relatively dated. The last entry was  
20 in 2013. Most of the convictions are for failure to  
21 comply with orders and directions of the Court. There  
22 are four convictions for simple assault. The last one  
23 was in 2013. Mr. Nitsiza received a custodial sentence  
24 of 10 months for that offence. While he has been on  
25 release awaiting the hearing in this case, Mr. Nitsiza  
26 has complied fully with the terms of his release and he  
27 has sought amendments ahead of time as the need

1 has arisen rather than making a unilateral decision.

2 Mr. Nitsiza says he drinks on special occasions  
3 and he uses cannabis regularly. There has been no  
4 suggestion that he has any sort of substance use  
5 disorder.

6 The *Criminal Code* sets out the principles and  
7 objectives of sentencing that provide a framework to  
8 guide judges in imposing a sentence that is just and  
9 appropriate. Those objectives are listed in section 718.  
10 Briefly, they are denunciation of the unlawful conduct,  
11 which is an expression of society's disapproval or  
12 abhorrence of a particular conduct; deterrence aimed  
13 both at the offender (specific deterrence), and the  
14 public at large (general deterrence); separating  
15 offenders from society where necessary; rehabilitation;  
16 reparation; and promoting a sense of responsibility in  
17 offenders and an acknowledgment of the harm done to  
18 victims and to the community.

19 The emphasize that should be placed on each  
20 of these objectives very much depends on what the  
21 offence is, the circumstances under which it was  
22 committed, and the circumstances of the offender.  
23 Where the offence involves a sexual assault of a young  
24 person under 18 years of age, and where the victim is  
25 vulnerable because of personal circumstances,  
26 including being Indigenous and female, the *Criminal*  
27 *Code* requires a sentencing judge to give primary

1 consideration to the objectives of denunciation and  
2 deterrence. This is borne out in case law throughout  
3 Canada.

4 The *Criminal Code* also sets out a number of  
5 principles to be applied in determining what is an  
6 appropriate sentence. The most important principle is  
7 that of proportionality. A sentence must be  
8 proportionate to the gravity of the offence and the  
9 degree of responsibility of the offender.

10 In determining what is a fit sentence, judges  
11 are guided by the principles of restraint and parity as  
12 well. The principle of restraint requires consideration of  
13 all available sanctions, other than imprisonment, that  
14 are reasonable in the circumstances, with particular  
15 attention to the circumstances of Indigenous offenders.  
16 Parity requires that there be similar treatment for like  
17 offences and offenders, bearing in mind that it does not  
18 call for identical sentences to be imposed for the same  
19 crime. Sentencing is a highly individualized process.

20 In imposing a sentence, the Court must take  
21 into account both aggravating and mitigating  
22 circumstances. Section 718.2 of the *Criminal Code*  
23 deems a number of factors to be aggravating, although  
24 that is not an exhaustive list. These include evidence  
25 that the offender abused a person who is under 18.

26 In sentencing, our law here differentiates  
27 between sexual assaults that are considered major and

1 those that are not. This is not to suggest that sexual  
2 assault is anything other than serious, regardless of the  
3 legal classification for sentencing purposes. Rather,  
4 this is a guidepost for sentencing, given that the  
5 definition of sexual assault captures a wide spectrum of  
6 circumstances which can form the offence.

7 There are a number of aggravating factors that  
8 arise out of the circumstances of this particular offence.  
9 First and foremost, the victim was only 14 at the time.  
10 Secondly, and related to this, there is a significant age  
11 gap between the victim and the offender. Mr. Nitsiza is  
12 nearly twice the victim's age. Third, the offence took  
13 place in the context of an illegal drug transaction where  
14 the victim had no money to pay for drugs.

15 With respect to Mr. Nitsiza's criminal record,  
16 criminal records are often considered aggravating, but  
17 in this case, I do not find it particularly so. That is not to  
18 say it is irrelevant, but as noted, the record is limited  
19 and it is dated. Although there are a number of  
20 convictions for failure to comply with court orders and  
21 directions, as I noted earlier, Mr. Nitsiza, since being on  
22 release, has demonstrated that he is willing and able to  
23 comply. Accordingly, I give the criminal record very  
24 little weight.

25 The most mitigating feature in this case is Mr.  
26 Nitsiza's guilty plea. As the Crown pointed out, it did  
27 not come at the first opportunity, but it did indeed come.



1 I agree with the Crown that it deserves significant  
2 weight. It has spared the victim and her family the  
3 stress of a trial, including having to give testimony  
4 about events which are highly personal and sensitive,  
5 and it has removed the element of uncertainty of  
6 outcome. It demonstrates above all that Mr. Nitsiza is  
7 taking responsibility for what happened.

8 The Crown is seeking a custodial sentence of  
9 nine months to be followed by probation of one year. It  
10 is the Crown's position that a custodial sentence in this  
11 range is necessary to achieve the objectives and  
12 principles of sentencing, particularly denunciation and  
13 deterrence.

14 The defence submits that the sentence should  
15 be in the range of three months of custody followed by  
16 probation for one year.

17 This case does not fall into the category of a  
18 major sexual assault, but, as I said, it must  
19 nevertheless be treated seriously. Sexual assault is all  
20 too common in the Northwest Territories, and sexual  
21 crimes against young people are particularly troubling.  
22 The consequences of sexual assault for victims can be  
23 profound and the Court must not lose sight of this. It  
24 must sentence accordingly. Denunciation and  
25 deterrence are, as noted, the most important  
26 objectives.

27 Mr. Nitsiza bears significant moral

1           blameworthiness for this offence. I have stated in  
2           previous decisions that children are in a weak position  
3           in relation to adults. Adults have all the power and they  
4           must act responsibly to do the right thing. Children  
5           have to be able to trust adults and they have to be able  
6           to rely on adults to conduct themselves in a manner  
7           that protects rather than victimizes children. We, as a  
8           society, have a significant interest in upholding this  
9           standard.

10                       Not surprisingly, what happened has had a  
11           negative effect on the victim. She stated in her Victim  
12           Impact Statement that she has lost her family's trust.  
13           She says that a lot of people in her community talk  
14           about what happened and this has upset her to the  
15           point of wanting to kill herself. She feels she cannot  
16           talk to anyone and that people look at her differently.

17                       I have considered Mr. Nitsiza's Indigenous  
18           status, as I am required to do under section 718.2(e) of  
19           the *Criminal Code* and the Supreme Court of Canada in  
20           *Gladue* and *Ipeelee* and other decisions. In particular, I  
21           must consider "Gladue" factors, those being the  
22           systemic factors such as poverty, addiction,  
23           undereducation, un- or underemployment, and  
24           violence. The goal of section 718.2(e) is, of course, to  
25           address the significant overrepresentation of  
26           Indigenous individuals in our correctional facilities. I am  
27           required to consider all available sanctions other than

1 incarceration that are reasonable in the circumstances  
2 and consistent with the harm done to the victim.

3 As I noted earlier, Mr. Nitsiza's family life was  
4 not directly affected by the systemic factors that are so  
5 often present in the lives of Indigenous offenders. Mr.  
6 Nitsiza has good parents and solid familial support.  
7 However, he was a victim of a significantly violent act in  
8 his community, which in and of itself is a Gladue factor.

9 Further, it does not take a great leap in the  
10 imagination to conclude that living in a small, isolated  
11 community has necessarily limited Mr. Nitsiza's access  
12 to formal education, employment and healthcare,  
13 particularly for his mental health. These are factors  
14 which can lead to someone being more vulnerable to  
15 coming into contact with the justice system and they  
16 have to be taken into account.

17 Although denunciation and deterrence are the  
18 primary objectives in sentencing in this case, the other  
19 objectives remain important and highly relevant.  
20 Rehabilitation is particularly important. Where it can be  
21 achieved, rehabilitation offers society and victims the  
22 very best protection against future crimes by the  
23 offender.

24 Mr. Nitsiza is young and he has spent his entire  
25 life in Whatì. There is nothing to indicate that he plans  
26 to leave there. It is a small place where everyone is at  
27 once safe from, yet vulnerable to, crime. Whatever

1 sentence I impose has to have a significant emphasis  
2 on rehabilitation so that Mr. Nitsiza can return to and  
3 continue to live in his community without jeopardizing  
4 the safety of others there.

5 The consequences have to be meaningful.  
6 When I say that, I mean that they have to resonate with  
7 Mr. Nitsiza in a way that allows him to learn from them  
8 and to fully rehabilitate. While I have no doubt that our  
9 correctional institutions offer programming to assist  
10 offenders with rehabilitation, for a person like Mr.  
11 Nitsiza, who is strongly connected to the land and to his  
12 traditions and culture, and who has the support of a  
13 stable family, putting an emphasis on community-based  
14 consequences is, in my view, more likely to achieve a  
15 lasting rehabilitative result than a period of  
16 incarceration.

17 Parity is also an important principle to bear in  
18 mind. This is, as the Crown pointed out, a very difficult  
19 case. To put it simply, the circumstances are ugly. As I  
20 said earlier, sexual assault, no matter where it falls on  
21 the spectrum, must always be treated as a serious  
22 offence, especially where the victim is a child. That  
23 said, the overall ugliness of the circumstances must not  
24 overshadow what actually happened. Examining this  
25 closely, it is undeniable that what happened falls at the  
26 less serious end of the sexual assault spectrum and  
27 this has to be reflected in the sentence.

1                   The sexual offence here was a sexual touching  
2                   which consisted of the victim undoing Mr. Nitsiza's  
3                   zipper while Mr. Nitsiza acquiesced. The zipper was  
4                   located over his genital area on his pants. Things may  
5                   well have gone further had the victim's mother not  
6                   come home unexpectedly. Had they gone further, I  
7                   expect I would probably be dealing with a sentencing  
8                   on a major sexual assault.

9                   The fact is, though, that things did not go  
10                  further. What I am dealing with is a sexual assault in  
11                  the form of the victim touching Mr. Nitsiza's genital area  
12                  over his clothing for a very limited period of time. In my  
13                  view, this would necessarily attract a sentence far  
14                  below what is suggested by the Crown, even taking into  
15                  account the victim's age and even without considering  
16                  the guilty plea. While Mr. Nitsiza bears significant  
17                  moral blameworthiness, the circumstances of the  
18                  offence, the gravity of the offence, cannot justify a  
19                  period of nine months incarceration. That would be  
20                  unfairly disproportionate to Mr. Nitsiza.

21                  Taking into account the circumstances of this  
22                  offence, Mr. Nitsiza's circumstances, including his  
23                  Indigenous status, the aggravating and mitigating  
24                  factors and the goals and objectives of sentencing, I  
25                  conclude that an appropriate sentence is one that has a  
26                  short period of incarceration followed by a longer period  
27                  of probation.

1 Lenny Paul Nitsiza, upon being convicted of  
2 sexual assault, and upon consideration of the  
3 circumstances and the nature of this offence, as well as  
4 your personal circumstances, I sentence you to a term  
5 of 60 days of incarceration, which will be followed by 18  
6 months of probation.

7 Now, before I finish here today, I will be asking  
8 the lawyers if you had served any time that would then  
9 be deducted from your incarceration. You can sit down  
10 now, and I will talk about your probation.

11 The terms of your probation will include, first,  
12 that you report to Probation Services within 72 hours of  
13 your release and thereafter as directed by your  
14 probation officer. You will have to attend counselling as  
15 directed by your probation officer, and you must have  
16 no contact with the victim. So among other things, that  
17 means that you have to not attend her workplace, her  
18 school, or her home. If you are out somewhere and  
19 you see her, you are going to need to leave.

20 The Crown also requested some ancillary  
21 orders which are mandatory. I will impose a 10-year  
22 firearms prohibition under section 109 and that will start  
23 to run after you are released. But, it is subject to an  
24 exemption for subsistence hunting under section 113,  
25 and Ms. Rattan, your lawyer, will be able to explain to  
26 you what you have to do to apply for the exemption.

27 There will also be an order for bodily fluids to

1 be taken from Mr. Nitsiza for DNA analysis, and an  
2 order requiring him to comply with the *Sex Offender*  
3 *Information Registration Act* pursuant to section  
4 490.012 of the *Criminal Code*, and that will be in effect  
5 for 20 years.

6

7 **(PROCEEDINGS CONTINUED)**

8

9 **CERTIFICATE OF TRANSCRIPT**

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

15

16

17 Dated at the City of Toronto, in the Province of Ontario, this  
18 15<sup>th</sup> day of October, 2020.

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Kim Neeson

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Principal

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