

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HIS MAJESTY THE KING

-v-

GARY LAFFERTY

Transcript of the Reasons for Sentence held before the Honourable Justice K.M. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 25th day of April, 2023

APPEARANCES:

B. Wun:	Counsel for the Crown
E. McIntyre:	Counsel for the Defence

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*.

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1 **(PROCEEDINGS RECONVENED AT 2:01 PM)**

2 THE CLERK: All rise. Court is reconvened. Please be
3 seated.

4 THE COURT: Good afternoon. Anything before I give
5 my decision and reasons, counsel?

6 E. MCINTYRE: Not for the defence.

7 B. WUN: No, thank you.

8 THE COURT: Okay. Thank you. Gary Lafferty was
9 found guilty of sexual assault by a jury on October 25,
10 2022. Today, it is my responsibility to impose a
11 sentence on him. Just before I start, there are a couple
12 of items I want to go over.

13 First, there is a publication ban respecting
14 any information that can identify the victim, and
15 accordingly throughout these reasons I will be referring
16 to her as “the victim,” rather than by her name or
17 initials. Second, it is not clear from the record because
18 of the events that transpired immediately following the
19 trial if a conviction was formally entered, so I am going
20 to request that the clerk do that now.

21 I am going to now turn to the
22 circumstances of the offence, and those circumstances
23 are as follows. On or about May 21, 2016, the victim
24 went to a party in the small community where she lived
25 in the Northwest Territories. She had been drinking
26 heavily to that point and by the time she arrived at the
27 party, she was highly intoxicated. In her testimony she

1 said that the last thing she remembers prior to waking
2 up later that morning was entering the home where the
3 party was held. When she awoke, she was on a couch.
4 She has no memory of either consenting to or having
5 sex. Mr. Lafferty and two others were in the home
6 when she awoke.

7 The victim had pain in her genital area,
8 and she said in her testimony she was injured. She left
9 the home and was shortly thereafter flown to
10 Yellowknife where a sexual assault examination kit was
11 completed. The results showed DNA in her rectum and
12 vagina. These were sent for analysis. There was no
13 match at the time.

14 Two years later, however, in 2018 a DNA
15 warrant was executed in a separate proceeding against
16 Mr. Lafferty, and the DNA that was gathered from
17 Mr. Lafferty provided a match. The victim and
18 Mr. Lafferty knew each other, and they had been
19 friends. As I said, these events occurred in a small
20 community in which both parties were living.

21 The *Criminal Code* and the common law
22 sets out principles and objectives of sentencing that
23 provide a framework to guide judges in imposing
24 sentence. The objectives are listed in section 718, and
25 they are: denunciation of unlawful conduct, which is an
26 expression of society's abhorrence of particular
27 conduct, deterrence aimed both at the offender and the

1 public at large; separating offenders from society where
2 necessary; rehabilitation; reparation; and promoting a
3 sense of responsibility in offenders and an
4 acknowledgment of the harm done to the victims and to
5 the community.

6 The emphasis that is placed on each on
7 each of these objectives very much depends on what
8 the offence is, the circumstances under which it was
9 committed and the circumstances of the offender. In
10 sexual assault cases the Court has to give primary
11 consideration to the objectives of denunciation and
12 deterrence. That is mandated by the *Criminal Code*.
13 And in cases as here where the victim is an Aboriginal
14 woman, section 718.04 requires me to give primary
15 consideration to denunciation and deterrence as well.

16 The *Criminal Code* also sets out a
17 number of principles to be applied in determining what
18 is an appropriate sentence. The most important
19 principle is proportionality; that is, a sentence must be
20 proportionate to the gravity of the offence and the
21 degree of responsibility of the offender.

22 In determining what is a fit sentence,
23 judges are also guided by the principles of parity and
24 restraint. And among the restraint provisions is section
25 718 of the *Criminal Code*, which provides that all
26 available sanctions other than imprisonment that are
27 reasonable in the circumstances should be considered

1 with particular attention to the circumstances of
2 Indigenous offenders.

3 Parity of sentence means there should be
4 similar treatment for like offenders and offences,
5 bearing in mind that it does not call for identical
6 sentences to be imposed for the same crime. No two
7 cases are identical, and sentencing is a highly
8 individualized process.

9 For many years this Court has followed
10 the principles articulated by the Alberta Court of Appeal
11 in the *R v Arcand*, 2010 ABCA 363. *Arcand*, among
12 other things, sets out a three-year jail term as a starting
13 point for a major sexual assault as well as articulating
14 what constitutes a major sexual assault.

15 In this case, as I said, the victim said she
16 was sore and injured in her genital area, and the
17 evidence gathered during the examination at the
18 hospital in Yellowknife found Mr. Lafferty's DNA in both
19 her rectum and her vagina. It is therefore, in my view,
20 beyond doubt that this falls into the category of a major
21 sexual assault.

22 The three-year starting point is not, a
23 minimum sentence. Judges must consider aggravating
24 and mitigating circumstances, including the offender's
25 personal circumstances, and increase or reduce a
26 sentence accordingly.

27 Mr. Lafferty's lawyer is not looking for a

1 conditional sentence; however, he suggested that there
2 have been two developments in the law which may
3 justify departing from the three-year starting point.
4 First, in making (“CSOs”) available to offenders
5 convicted of sexual assault through Bill C5, Canadian
6 Parliament has signalled that the floor for sentences for
7 sexual assault has been lowered.

8 He points to the reasoning in *R. v.*
9 *Friesen*, 2020 SCC 9, in which the Supreme Court of
10 Canada pointed to Parliament’s decision to increase
11 the penalty for sexual interference and said in respect
12 to this that the Courts should generally impose higher
13 sentences than in the past. Using that same reasoning,
14 Mr. McIntyre suggests Courts could look at departing
15 from the three-year starting point and consider
16 imposing sentences which are less harsh in light of the
17 availability of CSOs.

18 Respectfully, I do not agree that allowing
19 Courts to impose CSOs signals that Courts may depart
20 from the three-year starting point for major sexual
21 assaults. In my view, it simply gives another option to
22 the Court in appropriate circumstances for sentencing.
23 The maximum penalty for sexual assault remains
24 unchanged.

25 The second development that
26 Mr. McIntyre pointed out is the Supreme Court of
27 Canada’s decision in *R v Parranto*, 2021 SCC 46,

1 which considered starting points and confirmed they
2 are not minimum sentences, nor do they relieve judges
3 of the obligation to look at all of the relevant factors,
4 principles and objectives and imposing sentences
5 accordingly.

6 In my view *Parranto* confirms the proper
7 role of a starting point and how it should play out in the
8 process, but it does not fundamentally change
9 anything. All this to say the three-year starting point
10 should continue to be applied, and I will apply it in this
11 case.

12 The most significant aggravating factor in
13 this case is the victim's obvious high level of
14 intoxication. It left her in a very vulnerable state. Also
15 aggravating is Mr. Lafferty's criminal record. I note that
16 the record is not extensive; however, he has a previous
17 conviction for sexual assault for which he was
18 sentenced to three years and five months incarceration.

19 There is little in the way of mitigation.
20 There is no evidence of remorse and no guilty plea.
21 That Mr. Lafferty exercised his right to a trial is certainly
22 not aggravating, but the mitigative effect of a guilty plea
23 is not available to him.

24 Evidence about Mr. Lafferty's
25 background, including *Gladue* factors, were provided
26 through a pre-sentence report, through Mr. Lafferty's
27 lawyer and Mr. Lafferty himself. These can be

1 summarized this way: Mr. Lafferty is 38 years old, and
2 he is a member of the Tlicho community. He grew up
3 in a traditional log home without running water or
4 electricity. He learned traditional skills growing up,
5 including hunting food and how to survive on the land.
6 He has retained his Indigenous language, being fluent
7 in Tlicho, and he also speaks English.

8 Despite this, however, Mr. Lafferty's
9 background includes many systemic and other
10 personal factors which have had a profound effect on
11 his life. Both of his parents were in residential school,
12 and they abused alcohol throughout Mr. Lafferty's
13 childhood and his adolescence. Mr. Lafferty suffered
14 physical and emotional abuse at the hands of his
15 parents, and he himself began to use alcohol and drugs
16 at a young age, which has continued. He attributes his
17 involvement with the criminal justice system largely to
18 this.

19 Mr. Lafferty's mother passed away
20 recently from an alcohol-related illness, and
21 Mr. Lafferty's father has dementia and is currently
22 homeless. Mr. Lafferty was bullied in school, and it was
23 in part what led him to leave school without finishing.
24 He managed to get to grade 9 in the traditional school
25 system. He has been unemployed or underemployed
26 for most of his life. I think the only word to describe his
27 childhood is tragic.

1 The Crown is seeking a custodial
2 sentence of five years. It is the Crown's position that a
3 custodial sentence in this range is necessary to achieve
4 the objectives of sentencing, particularly denunciation
5 and specific and general deterrence which, as I said
6 earlier, have to be given primary consideration.
7 Defence counsel submits that the sentence should be
8 three years.

9 This is a very serious sexual assault, and
10 in my view the ends of justice cannot be achieved
11 unless a significant custodial sentence is imposed. I
12 am certainly not the first member of this Court to say
13 that sexual assault is an insidious and serious problem
14 in the Northwest Territories. The consequences of
15 sexual assault for victims are profound. A major sexual
16 assault, as in this case, represents a most serious and
17 significant violation of the victim's bodily autonomy.
18 Victims of sexual assault have to live with the effects of
19 that violation every day.

20 I have considered Mr. Lafferty's
21 Indigenous status and his very tragic childhood,
22 particularly the role it may have played in his
23 involvement in the justice system. I believe him when
24 he says that his background has played a large role in
25 shaping his life, including bringing him here.

26 This said, when I consider all of the
27 circumstances, I am unable to conclude that his

1 background reduces his moral blameworthiness in
2 these circumstances. In my view Mr. Lafferty bears
3 significant moral blameworthiness. The victim, as I
4 said, was highly intoxicated. She was in a house where
5 she knew people, including Mr. Lafferty. She was in
6 her own community where she grew up and had a
7 reasonable expectation of personal safety. She was
8 highly vulnerable. Mr. Lafferty by contrast testified he
9 had only one shot of vodka the entire period of time and
10 was sober throughout the evening and in the early
11 hours of the morning when the sexual assault took
12 place.

13 The Court cannot undue what happened
14 or its effects, but it can impose a sentence which within
15 the parameters of sentencing principles and objectives
16 reflect the seriousness of this major sexual assault and
17 its effect on the victim and the community at large.
18 People have a right to feel, and to be, safe in their
19 community. If they have too much to drink or they have
20 taken too many drugs, they have the right to expect
21 their disadvantaged position will not lead to
22 opportunistic crimes being committed against them,
23 especially by people they know and trust. There must
24 be clear and unequivocal messages sent to the
25 offender and to the public at large that this conduct is
26 unacceptable, and when it happens, the consequences
27 are serious.

1 for your submissions.

2 E. MCINTYRE: Thank you

3 THE CLERK: All rise. Supreme Court is now closed.

4 **(PROCEEDINGS CONCLUDED)**

5

6 **CERTIFICATE OF TRANSCRIPT**

7 Veritext Legal Solutions, Canada, the undersigned, hereby
8 certify that the foregoing pages are a complete and accurate
9 transcript of the proceedings transcribed from the audio
10 recording to the best of our skill and ability. Judicial
11 amendments have been applied to this transcript.

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14 Dated at the City of Toronto, in the Province of Ontario, this
15 11th day of May, 2023.

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18 *Veritext Legal Solutions, Canada*

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