*R v Lafferty,* 2023 NWTSC 15 S-1-CR-2019-000052

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

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**-v-**

**GARY LAFFERTY**

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**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**

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**APPEARANCES:**

B. Wun: Counsel for the Crown

E. McIntyre: 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*.**

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

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

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

E. MCINTYRE: Not for the defence.

B. WUN: No, thank you.

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

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

 I am going to now turn to the circumstances of the offence, and those circumstances are as follows. On or about May 21, 2016, the victim went to a party in the small community where she lived in the Northwest Territories. She had been drinking heavily to that point and by the time she arrived at the party, she was highly intoxicated. In her testimony she said that the last thing she remembers prior to waking up later that morning was entering the home where the party was held. When she awoke, she was on a couch. She has no memory of either consenting to or having sex. Mr. Lafferty and two others were in the home when she awoke.

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

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

 The *Criminal Code* and the common law sets out principles and objectives of sentencing that provide a framework to guide judges in imposing sentence. The objectives are listed in section 718, and they are: denunciation of unlawful conduct, which is an expression of society’s abhorrence of particular conduct, deterrence aimed both at the offender and the public at large; separating offenders from society where necessary; rehabilitation; reparation; and promoting a sense of responsibility in offenders and an acknowledgment of the harm done to the victims and to the community.

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

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

 In determining what is a fit sentence, judges are also guided by the principles of parity and restraint. And among the restraint provisions is section 718 of the *Criminal Code*, which provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered with particular attention to the circumstances of Indigenous offenders.

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

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

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

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

 Mr. Lafferty’s lawyer is not looking for a conditional sentence; however, he suggested that there have been two developments in the law which may justify departing from the three-year starting point. First, in making (“CSOs”) available to offenders convicted of sexual assault through Bill C5, Canadian Parliament has signalled that the floor for sentences for sexual assault has been lowered.

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

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

 The second development that Mr. McIntyre pointed out is the Supreme Court of Canada’s decision in *R v Parranto,* 2021 SCC 46, which considered starting points and confirmed they are not minimum sentences, nor do they relieve judges of the obligation to look at all of the relevant factors, principles and objectives and imposing sentences accordingly.

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

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

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

 Evidence about Mr. Lafferty’s background, including *Gladue* factors, were provided through a pre-sentence report, through Mr. Lafferty’s lawyer and Mr. Lafferty himself. These can be summarized this way: Mr. Lafferty is 38 years old, and he is a member of the Tlicho community. He grew up in a traditional log home without running water or electricity. He learned traditional skills growing up, including hunting food and how to survive on the land. He has retained his Indigenous language, being fluent in Tlicho, and he also speaks English.

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

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

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

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

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

 This said, when I consider all of the circumstances, I am unable to conclude that his background reduces his moral blameworthiness in these circumstances. In my view Mr. Lafferty bears significant moral blameworthiness. The victim, as I said, was highly intoxicated. She was in a house where she knew people, including Mr. Lafferty. She was in her own community where she grew up and had a reasonable expectation of personal safety. She was highly vulnerable. Mr. Lafferty by contrast testified he had only one shot of vodka the entire period of time and was sober throughout the evening and in the early hours of the morning when the sexual assault took place.

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

 Mr. Lafferty, can you please stand up. Gary Lafferty, upon being convicted of sexual assault and upon consideration of the circumstances and the nature of this offence as well as your personal circumstances, I am sentencing you to a term of five years in prison. The term will be reduced by the amount of credit you have earned while in custody awaiting the disposition of your case, being the equivalent of 265 days based on a rate of 1.5 days’ credit for each day in presentence custody.

 Mr. Lafferty, you can sit down. I will also impose the ancillary orders that are requested by the Crown. I impose a lifetime firearms prohibition under section 109 of the *Criminal Code*. There will be an order that bodily fluids be taken for Mr. Lafferty for DNA analysis and an order requiring him to comply with the *Sex Offender Information Registry Act* for the duration of his life.

 There will also be a no-contact order prohibiting Mr. Lafferty from contacting the victim for the duration of his sentence up to and including warrant expiry. Finally, I will make a recommendation that Mr. Lafferty be permitted to serve his sentence in the Northwest Territories; however, it will ultimately be up to the Correction authorities. Is there anything else?

E. MCINTYRE: I think that’s it.

THE COURT: Okay. Thank you very much, counsel, for your submissions.

E. MCINTYRE: Thank you

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

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Veritext Legal Solutions, Canada, 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 11th day of May, 2023.

Veritext Legal Solutions, Canada

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