IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

ANTOINE MOUNTAIN

Transcript of the Reasons for Judgment of His Honour Judge R. M. Bourassa, sitting at Yellowknife, in the Northwest Territories, on Friday, February 9th, A. D. 1990.

APPEARANCES:

MS. S. AITKEN — On behalf of the Crown

MS. S. MAC PHERSON — On behalf of the Defence

(Charge under Section 271 CC)

THE COURT: This matter was set over for sentencing: The accused is charged with the offence of sexual assault, contrary to Section 271 of the Criminal Code. The agreed statement of facts indicates that, after consuming a significant amount of alcohol, and going to bed, the accused got up, left his room during the night and went downstairs and sexually assaulted a six-year old child, whom he believed to be sleeping on the floor. The accused was a guest in the residence, drinking with the child's parents and residing there.

The sexual assault consisted of one touch to the thigh, moving to the pubic area, over the child's jeans. The accused stopped and left. The issue is, of course, what sentence should be imposed for this offence.

The Crown attorney suggests a jail sentence. By way of aggravation, the Crown argues the age of the victim, that there was an element of trust, and that the offence occurred in the victim's own home where she was entitled to feel secure. Finally, that it has proceeded by indictment, thus setting the range to a maximum of ten years imprisonment for this type of offence.

Defence argues in mitigation that the sexual assault is minimal on its facts; the accused ceased the assault of his own volition and left; he has pleaded guilty; he is remorseful; he is, on his own, addressing his problem of alcohol abuse; and finally that the accused has no criminal record. But for this incident,

he is of good character. In support of the latter contention, Defence relies on what is, by any scale, a positive pre-sentence report.

Crown counsel has submitted a number of cases to this Court in support of her position that a jail sentence should be imposed. Implicit in her argument is that jail sentences are the norm for this level of sexual assault, and from those cases, she asserts, or submits, that there was an element of trust in this case, which is an aggravating factor.

The case of Her Majesty the Queen and Norman Boise involved a nine-year old girl who was beckoned, or invited, as it were, to come to a shed by the accused. Inside the shed the accused committed a sexual assault on her, fondled her, touched her posterior, her genitals with his hands and his penis. Before doing that he had taken her pants off. He had a previous record for an identical offence, and was awaiting trial on an identical offence in respect of the same victim. On that charge, he received six-months imprisonment. I think the facts in that case differ significantly from the facts in this case, simply in that the facts are removed from what is before me as I have given them.

Another case relied upon by the Crown is Her Majesty the Queen and Nungutsituk, where the victim of the assault was a 17-year old crippled girl. She was followed home by the accused, she locked her door,

but the accused managed to gain entry to her house by another door. He confronted he while she was almost asleep in the room, he tried to remove her panties. He touched her in the groin area and the legs, but was unable to remove her clothing. She struggled and resisted. The accused threatened he would kill her if she didn't make love to him. She cried and she screamed, and when she did so, he said he would hit her. This sexual assault continued for approximately two hours, and when it desisted, the accused said he would kill her if she told anyone. The accused had a lengthy criminal record. None of these aggravating factors are present in the case before me.

The aggravating afactors found by the Court of Appeal, were that the young girl was forced to undergo a confinement of two hours duration in her own home. That the sanctuary of her own home was violated by the accused coming in uninvited, that there were threats, that she struggled and resisted. He received a term of imprisonment, on appeal, of six months. Again the factual situation there is significantly different than the one before me.

Another case relied upon by the Crown is Her Majesty the Queen vs Joannie Tagak, where a young girl was dragged by the leg and the arm from the living room to the bedroom. The accused stated to the young girl that he wanted to rape her, if he didn't, he wanted to

kill her. He pulled her pants and clothing off, rendering her completely naked. He then proceeded to touch her thigh, at which time third parties intervened, and the assault was discontinued. The accused, in that case again, had a significant criminal record. The aggravating factors were there, of course, the threats and the physical violence above and beyond the actual sexual assault. The accused in that case was sentence to nine months in jail.

The Crown also submits the case of R vs R. R. W., an offence where there were two sexual assaults on young girls aged eight and nine - two separate incidents. The assault was described in the report as being comprised of fondling the genitals and nothing more than that. There is no indication in the case as to the extent of the so-called fondling. In any event, the accused, while not having a criminal record, was in terrible condition as a result of drinking and drug abuse. Apart from that, the accused had positive antecedents, and in that case an intermittent sentence of 30-days imprisonment followed by three years probation was imposed. Again, that case, in my view, is distinguishable on the facts - two assaults were involved - and there is significant difference in the elements that were before the Court as are before me.

Then there is the case of Her Majesty the Queen va Lafferty, where an accused, after drinking heavily, went into an apartment occupied by the victim

and her husband. The victim and her husband were totally unknown to the accused. He found her in bed naked with her husband, and is described in the case citation as "touching her private parts". The accused had a considerable record for criminal convictions, including break and enter and offences related to the abuse of alcohol. The Court, in that case, commented that people are entitled to be at home without being molested. That women are entitled to be left alone without being approached by a complete stranger. In this case I am dealing with an accused, I would infer from the facts, who was not a complete stranger. He was an invitee in the house. In the Lafferty case, the accused received three months imprisonment.

Those are the cases submitted by the Crown. In each case that was submitted, the facts are more aggravating and there is a presence of aggravating factors that are simply not present in this case.

Cases closer to the factual situation before me appear to indicate that jail sentences are the exception for this level of sexual assault. In this regard, I would refer to R vs C., a decision of the Yukon Territory Supreme Court, where a 15-year old girl was the victim. The accused placed his hand on her thigh rubbing it towards her groin over her clothing. There was no record, and a fine of $350 was upheld on appeal with the Appeal Court commenting that this was at the low

end of gravity of offence.

Also R vs P. G., a Newfoundland Trial Division case, a driving teacher stroked the leg and the genitals of a 17-year old driving student over her clothing. He received a period of 14 days imprisonment. The factor of breach of trust was reflected in that sentence, according to the appeal decision.

R vs B. N. G., an Ontario District Court appeal, dealing with a police constable who investigated an incident, and while interviewing a woman witness, touched her breasts. A short time later apologized. The Defence said it was out of character, a momentary lapse. He was given a conditional discharge with 40 hours of community service work.

In R vs L. J. K., another case from the Newfoundland Trial Division, a parish priest was convicted of sexual assault after having been found to rub a number of altar boys on the legs and the genitals. He was given a suspended sentence and probation for two years, which was increased to four months on appeal, with the Appeal Court again referring to the fact that there was a substantial element of trust involved.

In R vs K. S. B., a decision of the Ontario District Court, the accused pushed the victim onto a bed, touched her vaginal area through her clothing. She yelled for help, and a third party, at this time, intervened. There was a related record, related to

sexual assault. The accused received two months.

In R vs W. B. C., a decision of the Ontario District Court, a minister kissed a boy on the mouth and on his penis on two occassions, and was fined $500 on each count, together with an order of probation.

In R vs J.V. W., an eight-year old foster child on one occassion had her vagina rubbed while the accused believed she was sleeping. The accused, a high school teacher, was remorseful, had obtained counselling, and there were no adverse effects on the victim. The accused received a suspended sentence and two years probation.

In R vs R. D. C., a decision of the Alberta Provincial Court in 1987, by Judge Ayotte, formerly of this court, there was a sexual assault on the accused's stepdaughter who was ten. While naked, she was touched o on her vagina, and a suspended sentence and probation was imposed. The accused was brought back by the Crown, pursuant to Section 664, a few monthys later, as a result of conviction for a further offence, and received six months imprisonment.

Finally, as far as this jurisdiction is concerned, while those cases may be useful in terms of seeing what other courts have done in similar circumstances, the case of R vs P. T. and S., a decision of the Alberta Court of Appeal, sets as a guideline sentencing the range to be involved. According to that decision, this offence

is a marginal sexual assault.

It is clear, at least from my understanding of the law, that jail sentences first begin to appear when elements of trust, such as with a teacher, a student, a priest, violence, criminal record, or other of the commonly accepted aggravating factors are present. I can't find those elements present in this case. The Crown argues that there was trust involved. If there was, it is extremely marginal, in my view. The accused was, apparently, a welcome guest and resident in the house. This situation, in terms of aggravating factors, can not be considered on all fours where someone is assaulted by the accused who comes into the house in the middle of the night.

In R vs Angottitauraq, a five day jail sentence involving fondling was termed, given all the circumstances before the Appellate Court, described as superfluous.

My obligation is to impose a sentence according to law and legal principles, and the law, as I find it, does not mandate a jail sentence in this case. In coming to this conclusion, in addition to the aforementioned cases, I have considered that there was no planning or deliberation; there was no breach of trust; his background and attitude is positive; there is no criminal record; and that the criminality is marginal. That there will be an impact on the accused by virtue of the very court process that he is

part of today, and the adverse publicity that he will receive. He is branded as a sexual offender. People, I doubt, will bother to look into the details of the offence; he will simply be branded as a sexual offender. This is a deterrence in itself. There was no violence; there was no associated crime with the sexual assault such as a break and enter, the presence or use of weapons or threats, or intimidation, and I note as well that the accused, while having problems with alcohol, apparently on his own, prior to this case being determined, is taking steps to do something about his alcohol problem.

Any sentence involves a question of balance, and a fair balance between the interests of society and the interests of the accused. In attempting to find that balance, the goals are deterrence and rehabilitation, as well as denunciation, or more recently, as suggested by the sentencing commission, respect for the law. Revenge and vengeance is not part of the process. In the Ontario Court of Appeal decision of R vs Montello, Justice Mckinnon stated, "In sentencing it is always necessary to balance the interests of society against those of the individual. It seems to me, apart from punishment, which satisfies society's deep need for the expression of its revulsion for the type of crime committed, and which acts as a deterrent, society's interests are not advanced by the unecessary detention of an individual who no longer presents a danger to them."

If I am in error in my review of the applicable legal principles which bind me, or in their application, or alternatively, if the Crown is seeking to lower the threshold for incarceration, then I trust this matter will receive appellate consideration. While this Court may, and has on occassion, increased sentences generally within an existing range (such as was done in Yellowknife years ago where the Territorial Court increased sentences for impaired driving generally from a level of $400 to $500 and now $700 to $800, and recently in Baker Lake in jail sentences for sexual assault), a decision to change the range by lowering the threshold for jail sentences is a policy one, and in my view should properly be made at the appellate level.

I conclude, on what is before me, that the accused is open to rehabilitation, and has taken the necessary first step in that process, and that the whole court process will be a deterrent to him, including the process he has been involved with, and the publicity that will follow, in my view, will also achieve a general deterrence appropriate to this particular offence.

I point out to Mr. Mountain that the offence is a sordid one with nothing positive that can be said about it. It is downright disgusting to approach any person, adult or youth, in a drunken stupor and commit a sexual assault upon them. I point out as well to Mr. Mountain, that if he is ever convicted of this kind of

offence again in the future, he can probably expect a jail sentence. I don't think there is any question about it. Stand up, Mr. Mountain.

There will be a fine of $900, in default of payment, three months in jail. In addition to that, I am placing you on probation for 18 months. You are to keep the peace and be of good behaviour. You are to report to the probation worker once a month, or more often if directed. You are to attend alcohol abuse counselling, when and as directed by the probation worker. There will be a surcharge of $100. Do you need time to pay the fine and surcharge?

THE ACCUSED: Yes.

THE COURT: How long do you need?

MS. MACPHERSON: Four months, Your Honour.

THE COURT: Four months to pay. Have your client wait and sign the probation order, Ms. MacPherson.

MS. MACPHERSON: Yes, sir.

THE COURT: Thank you.

Certified a correct transcript,

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Loretta Mott, Court Reporter