2008 NWTTC 017 T-3-CR-2008-000473

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

RICHARD EPELON

Transcript of the Reasons for Sentence delivered by The Honourable C/Judge B.A. Bruser, in Yellowknife, in the Northwest Territories, on December 11, 2008.

APPEARANCES:

Ms. D. Vaillencourt: Counsel on behalf of the Crown

Mr. P. Cashman: Counsel on behalf of the Accused

Charges under ss. 145(2)(a) C.C., 151 C.C., 271 C.C. and 733.1(1) C.C.

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Pursuant to Section 486.4 of the Criminal Code

THE COURT: I have had some time overnight to think about this, as I have done, but I could not complete the thought process because defence submissions were still outstanding and the Crown had to complete one aspect of her submissions. I hesitate to reserve to a later date on this. This offender has been in remand now since early August. The time period has been four months and a week. He deserves to know today what the Court is doing about his future.

Mr. Epelon is 37 years of age. He has pled guilty to the following charges: On one Information, he committed a sexual assault on the ten-year-old (at the time) complainant. When he did so, he was on a probation order. A statutory term required him to keep the peace and be of good behaviour. The second charge on that three-count Information is that he did not obey the probation order because by reason of the sexual assault he failed to keep the peace and be of good behaviour.

The Crown withdrew Count 1 of the three-count Information.

The other Information contains one count. It is failing to appear in court. He pled guilty to it some time ago.

Mr. Epelon, I am giving you significant

credit for the pleas of guilty, in particular for the sexual assault. A preliminary inquiry was not required, and a trial was not required. I am in agreement with the submissions made by Mr. Cashman on your behalf, that you have spared this young victim the "ordeal" of having to come to court and testify.

There is no victim impact statement that I have been provided with. Nevertheless, it is a reasonable inference that for somebody so young it would be an ordeal to have to testify about what you did.

What did you do to her? What you did is included in the agreed statement of facts entered as an exhibit. In summary, the young girl was in your care at the time you sexually assaulted her. This is how it came about:

On March 10th, five days before the offence, the child, along with her mother and yourself, flew to Inuvik from Fort Good Hope in order for the child to have surgery on her ear. You had been living at the time with the family. The family trusted you. The time period you had been living with them as at March was about a month. Not only had you been living with the family but you were a friend of the father of this child.

At Inuvik, a hotel room was taken. The plan

was to remain there for a while until the surgery was cleared up. The surgery had to be postponed for a day, and before it, the mother of this child learned that her sister, that is the mother's sister, was in a hospital in Edmonton suffering from a serious condition. The mother asked you to stay in Inuvik with the child, again placing a huge responsibility and a heavy dose of trust in you. After the surgery was concluded, the mother left Inuvik for Edmonton to see her sister.

It was at the hotel where the offence occurred. The two of you were in the same room, and this had been the plan. She went to sleep. She felt something moving on her after she had gone to sleep. She awoke. You were on top of her. You were wearing a pair of pants at the time. She noted the time to be 1:45 a.m. You were touching her breasts with your hands, you touched her buttocks, and her vagina. You used your hands and you did this under her clothing, including under her underwear. She told you to get off her, and you did.

Fortunately for you, I am not dealing with the aggravating feature - that is something that makes it worse - of you having persisted after she told you to get off her. This does not make

what you did better, but what I am emphasizing is I do not have an extra aggravating factor.

She was obviously - and I can say this without a victim impact statement - fearful, because paragraph 13 of the agreed facts shows that she ran into the bathroom where she stayed out of fear. She waited until you went to sleep and then she went back to her bed.

For two days after this, she was with you. One can only begin to imagine her distrust and other fears that she might have had during that period, although I have not been provided with details of them. I cannot sentence you based on imagination, but I think it common sense to remark that it could not have been an easy, trusting, happy, carefree period of her stay in Inuvik.

After returning to Fort Good Hope she disclosed the incident to family members. The police were advised. You were then arrested.

It is said on your behalf today that you had a relatively small amount of alcohol. This is apparent from paragraph 18 of the agreed facts. You admitted to having consumed a relatively small quantity. It cannot be said that you were heavily intoxicated at the time.

Those are the facts of what occurred.

The failure to appear is that on or about May 20th you did not show up in court in Inuvik. Inuvik is the place you had to be in court because that is where the offence occurred. You were free on the sexual assault. You were free apparently on a recognizance. The recognizance allowed you to have your freedom. One of the things you had to do was go to court. You did not show up. Fortunately, I am not dealing with the aggravating factor of a failure to appear on a preliminary hearing date or on a trial date or on a sentencing date. Instead, it was the first date in the Territorial Court for this to be addressed in some way.

The probation order which you were bound by and which I have remarked upon, required you to keep the peace and be of good behaviour, took effect after a period of imprisonment.

This takes me to some remarks about your record.

The record is an exhibit. I make it clear to you, sir, that I am not sentencing you again for what you have done in the past. That is not what this is about. But, the record does show some obvious things. First of all, you cannot claim to be a first-time offender. Second, the record shows something about your attitudes and

your behaviours over the past several years, in fact going back 16 years. The record is entirely an adult record, therefore there is no component to it which is to be treated in a different way had part of it been in the former Youth Court, which is now the Youth Justice Court.

Mr. Cashman on your behalf has said that because on the last occasion for having committed a sexual assault you received 15 months' imprisonment, it would be appropriate for there to be a step up, but it should not be too great a step. It should not be a huge jump. It is interesting to note, however, that the 15 months you were given was in July 2004. The previous sexual assault before that was in 1998. At that time you were given 22 months. So the 15 months was a step down from what you had received on a previous occasion. I do not know what the facts of those two offences were. Again, I am not sentencing you for them, but I am using the record to try to assist me in understanding your behaviour, your attitude, and also in appreciating to some extent whatever risk you may pose to the public after you are released, because you will be released at some point in time.

The record also permits me to give you a

very clear warning. This is the third time you are being sentenced for a sexual assault. The day may come, Mr. Epelon, when the Crown prosecutor will make application to have you declared to be a long term offender or a dangerous offender. You could find yourself spending much of the rest of your life, if not all of it, in prison.

The record also shows the Court that in addition to your previous convictions for sexual assault, there are other crimes of violence. Sexual assault is very much a crime of violence; there are offences in other categories, too.

The people at the back of the courtroom are going to have to stop talking, because right behind where the accused is by a few rows, and when I look at him I look at you and I find it rude, distasteful, and terribly distracting for me. If there is any more conversation back there between the two of you, and you know who you are, you will be immediately removed from the courtroom by the sheriff and not welcome to return.

The record has the following on it, to get into the specifics of it:

1992 - break and enter and theft. Theft is very much a crime of dishonesty.

1996 - there is a different category. It is for a drug offence.

1998 - another break-in. And then later on that year, the first of the sexual assaults. Twenty-two months was the sentence for the sexual assault which, as I understand the record, arose in Cambridge Bay. You were sentenced in Yellowknife, but the police file indicates that it was a Cambridge Bay matter.

In December 2000, you were given a rehabilitative sentence by way of a suspended sentence for an assault.

In 2002, there was another assault along with a fail to obey an undertaking. The failure to obey the undertaking takes you into another category not yet identified; that is, a crime against the administration of justice. The failure to appear today and the failure to obey the probation order both fit the latter category of offence.

The following year, 2003, there was a sentence of imprisonment for an assault causing bodily harm. Once again, you were revisiting the category of violence against people.

On the same date as the sentence for the assault causing bodily harm, you were imprisoned for three months for failing to obey a probation

order. Of course one of the three offences that I am dealing with is exactly that kind of offence.

The following year you were sentenced for the second of the sexual assaults, to 15 months' imprisonment along with a three year probation order. It is that three year probation order which gave rise to the failure to obey the probation order when you committed the sexual assault on March 15th, this year. Along with the sentence for the sexual assault was a sentence for failing to obey a probation order, and you were given three months concurrent for it.

This is a nasty record. It does not bode well for your ability or your willingness to behave in lawful ways when you regain your freedom again.

It appears from the record that you are at a high risk of re-offending unless the sentence today is not viewed by you as being overly lenient. In other words, the focus today has to be on the need to discourage you. We call this primary deterrence, or specific deterrence to use another term. There has to be a strong message sent out to others. This kind of an offence where people take advantage of other people who are sleeping or otherwise vulnerable is common

throughout this jurisdiction - this is a factor that I have come to identify over decades of experience in this jurisdiction. There has to be a need to reflect denunciation. This means, sir, the disapproval of the public through the Court of what you did. This is not about revenge. This is not what I mean by denunciation. It is disapproval.

The Crown prosecutor has asked that there be a sentence of 24 to 30 months, along with a mandatory firearm prohibition order, a mandatory DNA order, and a life registration under the Sex Offender Information Registry. I have already dealt with the last of these; the registration will be for life because of the prior order made in another case.

The defence says that there should be a lesser period in the range of 18 months' imprisonment. The defence, as I pointed out earlier, regards this as a step up. I disagree with this submission because it fails to take into account that you received 22 months for a similar crime in 1998. But yes, it is a step up from the more recent of the two sexual assaults. In that context only, Mr. Cashman is correct.

There are provisions in the Criminal Code that assists the court in the difficult task of

sentencing. This kind of a case is never an easy one for sentencing. The Criminal Code provisions begin at section 718 and they continue, for my purposes today, to 718.2. I begin with section 718.

Section 718 sets out the fundamental purpose of sentencing. The fundamental purpose is to contribute to respect for the law. From your record, I conclude that you have little respect for the rights of others, and little respect and little concern for the law and for the maintenance of a just, peaceful, and safe society. These are factors that are of little, perhaps even of no concern to you, but they are of concern to me.

It is said that you take full responsibility for what you did. I accept this. I have no reason to believe that you did not take full responsibility back in 1992 or 1996 or 1998 or 2000 or 2002 or 2004.

The sentence has to be a just one. It must not be overly harsh. There must also be a measure of restraint. I am attempting to be as restrained as possible.

The purpose under section 718 considers the following objectives:

(a) to denounce unlawful conduct. I have

already commented upon this.

(b) to deter the offender and others. I have already commented upon this.

(c) to separate offenders from society, where necessary. It is necessary to incarcerate you. You have to be separated from society. You and freedom do not appear to dance in tune.

(d) The sentence should assist in rehabilitating you. I have this in mind, but your rehabilitation is not the foremost principle. Deterrence of the two forms and denunciation are, but rehabilitation is a factor.

I note, however, that you have done well in prison. You have taken full advantage of what has been available to you. You are improving upon your education. You are working towards your grade equivalency diploma, commonly called the GED, and you are taking occupational training in prison to be a camp cook. You have been addressing your rehabilitation in some ways.

If the sentence is of a certain extent, if it is over two years, there cannot be a probation order. A probation order is generally intended for rehabilitative purposes. It can have other purposes but rehabilitation is a key component, as is reintegration.

(e) Another section 718 objective is to provide

reparations, that is redress, for the harm done to victims. You are not able to pay this victim by means of a sentencing proceeding any monetary amount. As for reparations, I do not know what can be done.

(f) Finally, under section 718 is the need to consider promoting a sense of responsibility in offenders. I have remarked upon the submission made on your behalf that you take full responsibility. Once again, I accept that you do.

There is also the objective as a component of the promotion of a sense of responsibility, an acknowledgement of the harm done to victims. I have not heard a great deal about your acknowledgement of the harm apart from the submissions made by Mr. Cashman.

This takes me back to the credit I am giving to you for pleading guilty thereby sparing the victim from a very difficult courtroom experience. So in that sense there has been an acknowledgement of the harm done to her and what could happen thereafter.

The fundamental principle of sentencing is set out in section 718.1; I am going to go right to that, then return to section 718.01.

The fundamental principle is that the

sentence must be proportionate to the gravity of the offence. This was a very serious offence. Defence counsel says it was not a major sexual assault. I am leaving that concept alone because it is fraught with hazard. But what is clear, and which is beyond dispute, is that it was an assault, it was sexual in nature because you violated the sexual integrity of your victim; and because of the breach of trust, the circumstances that I have already referred to, and her young, vulnerable age, there is in my view a characterization of this as a serious sexual assault. It cannot be viewed otherwise. The offence, then, is grave in nature and in its circumstances.

The other component of the fundamental principle is the degree of responsibility of the offender. Here, you bore a large degree of responsibility. It cannot be said to be otherwise.

As indicated, I am going back now to section 718.01.

Section 718.01 has to do with offences against children. This sexual assault is in such a category. Section 718.01 provides that when a court imposes a sentence for an offence that involves the abuse of a person under the age of

18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct. This offence squarely fits within section 718.01. This is not a case where I am to consider as a primary consideration denunciation and deterrence, but rather parliament has said I must so consider it. Denunciation and deterrence, therefore, are very much in the driver's seat. Rehabilitation, while in the vehicle, is in the back seat.

Section 718.2 has to do with other sentencing principles; I have taken from it what is applicable here. Again, one of the factors is the young age of the victim. Another is an abuse of trust. These are within section 718.2. These "shall be deemed to be aggravating circumstances". It is not a case where they might be viewed that way, but they must be viewed that way. It can be argued that those factors could be rebutted because of the use of the word "deemed", but I do not have to consider this since there is no basis to rebut the breach of trust and the young age of the victim.

Also under section 718.2 there is a direction that a sentence should be similar - not must be but should be, which is something less than "must" - to sentences imposed on similar

offenders for similar offences committed in similar circumstances. But therein lies the difficulty, because every offender is unique, every victim is unique, every young child is unique. No two sets of circumstances are identical in every way. Hence the use of the word "similar" because that is as close as one can be expected to go.

If I impose consecutive sentences today, Mr. Epelon, that is, one on top of the other of the three, the combination must not be unduly long or harsh. This is what we often call in shorter form, the principle of totality. The total effect must not be unduly long or harsh.

I am skipping over another condition because it requires that a person not be deprived of liberty, if less restrictive sanctions may be appropriate. There is nothing less than a lengthy period of incarceration in this case that would be appropriate.

Finally under section 718.2 is a provision that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. But because you are aboriginal, particular attention must be paid to your circumstances. This is not a blanket "particular

attention" which applies to every aboriginal offender in every circumstance. Generally speaking, the more serious the case, particularly where violence is involved, aboriginal offenders should be expected to receive a sentence similar to those that non-aboriginal offenders would receive. There also needs to be for that provision to be applicable a connector between your aboriginal status and some systemic factors that point to a disadvantaged situation of some sort.

This aspect of sentencing has been referred to in tab 4, R. v. R.K. from our Supreme Court. In paragraph 9 the Court said:

> I must, of course, take into consideration the fact that the accused is an aboriginal Canadian. While that is a factor to consider, as I am directed to do so by the Criminal Code, there were no particular systemic or background factors brought to my attention which may justify some different type of sentencing approach. There were certainly no particular cultural factors in this case.

This was a judgment of Justice Vertes, and

another Supreme Court judge since then has remarked to the same effect.

The judges of our Supreme Court are also judges of our Court of Appeal; their judgments, even when they are not sitting in an appellate capacity, are significant for this reason.

The Crown filed a book of sentencing authorities to assist the Court. I thank Crown counsel for doing so. By filing a booklet of this sort, it assists the Court in following the similar sentence approach which I have referred to.

I now have some remarks to make about the cases. I do not intend to go into them in much detail. I have reviewed the material. It is with the court file. If the matter goes to the Court of Appeal, it will be there for its review.

I begin with tab 2. This is the case of V.J.O. from 2006 in our court, the Territorial Court. In that case Judge Schmaltz had some pointed comments to make about the abuse of children. At paragraph 10, she stated:

> We all have a duty to care for and protect children. A child's safety is the responsibility of every adult in the community. I find the intentional hurting or abuse of a

child a particularly disturbing crime. Besides the abuse of trust involved when the child is related or known to an offender, there is also a breach of the duty we all have to children, there is a breach of the authority that all adults inherently have over small children. A child is a particularly vulnerable victim.

At paragraph 11:

A young child will usually blindly trust an adult, though this may be changing. Sadly, we can't as a society, as a community, trust as much as perhaps we used to. Nowadays, we have to teach our children to be wary of strangers. Crimes where children are the victims harm us all. These crimes make us all trust each other less. And this is especially so when they are committed by someone who we should have been able to entrust the care of a child to - such as a grandfather.

I add "such as a trusted family friend".

At tab 3, there is a 2004 judgment of Kemper. Members of the Alberta Court of Appeal make up much of the Court of Appeal of this jurisdiction, hence their judgments are given considerable attention. The Court of Appeal said in Kemper at paragraph 7:

> The commission of a serious sexual assault on a child by a person who is in a position of trust typically attracts a starting point sentence of four years incarceration.

I have already found as a fact, Mr. Epelon, that what you did amounts to a serious sexual assault. Typically, the starting-point is four years. This does not mean there must be a sentence of four years. It does not mean there must be a sentence of more than four years. This is a guideline to assist the court. They are not saying in every case there must be a starting-point of four years. It is a guideline to help sentencing judges.

Crown counsel, in my view, has been very fair in taking the position of a range of 24 to 30 months, but I am not bound by that range.

I am also not dealing with a joint submission. Were I dealing with a joint submission, I would have to, if I were

considering departing from it, conduct an inquiry to determine the basis upon which the joint submission was arrived at. But, I do not have to conduct such as inquiry in this case because the position taken by both counsel is not one that was jointly arrived at through the plea bargaining process. It may have been arrived at through plea bargaining, but it is not a jointly arrived at position.

What you have done in prison speaks a great deal in your favour.

I have already spoken of the significant credit for pleading guilty. I need not comment upon it further.

I agree with the factual observation submitted by Mr. Cashman that this was "a single incident". But, you know, pulling the trigger on a rifle, pointing it at somebody's head and discharging it is also a single incident.

There is the issue of remand credit. The defence has properly addressed, and correctly so, the appropriate law. There generally is enhanced credit of some sort over and above one-for-one credit because of a number of factors. One of these is that a person in remand, as you have been since early August, is not eligible for any form of early release.

Another factor is that remand credit, depending on where the institution is and the circumstances, can be harsher than the time served by a sentencing prisoner. But, that cannot be argued in this case. Indeed, the facility at the North Slave Correctional Centre, which I have toured, is a rather generous facility for everyone, including remand prisoners.

The third factor is whether there is evidence of a denial of programs. There is a suggestion that there might be an alcohol issue in this case but that is about it. You have been very busy within the institution improving your education and taking occupational training. I cannot find that there is evidence before me of a denial of programs. There might be other programs outside the institution which you could benefit from, but you have been very busy within the institution taking care of your needs.

I also am obligated to consider how it is that you ended up in remand. It was not because of the sexual assault; it was because you did not show up in court on the sexual assault and the accompanying breach of probation. You put yourself into that position by not coming to court.

Offenders should not be entitled to determine a component of the sentencing process by absenting themselves from court, ending up in remand and then doing what used to be called "hard time" so that they can argue for more than one-for-one credit by reason of their unlawful act of failing to appear in court. That would be illogical. Think of how those accused of offences could begin to think: "I better not show up for my court date because if I don't show up I'll get a two-for-one credit, so I'll miss court once or twice and see what happens." That sort of thought process has to be nipped in the bud.

I have difficulty appreciating why there should in the circumstances of this case be more than a one-for-one credit. But, the very first factor, the denial of any early release, is present. It is a constant for everybody in this jurisdiction in remand. I am going to afford you 1.5:1 credit approximately. This is not a precise mathematical calculation to the exact minute, but I am giving you six months' credit.

I am of the view that a fit and proper sentence for this offender for having committed these offences, in particular the sexual assault on this victim, taking into account all the other

analyses that I have done and allowing the significant credit for the guilty plea to the sexual assault, is 36 months' imprisonment. This is higher than what the Crown had recommended. But, as I told you, I am not bound by what the Crown or by what the defence have recommended.

From the 36 months - and this will be reflected on the warrant of committal, Madam Clerk - will be deducted six months remand credit. This leaves remaining 30 months or two-and-a-half years. This is for the sexual assault.

For the failure to obey the probation order, there will be four months' imprisonment. It will be concurrent. I am not adding it on.

For the failure to appear, there will be two months' imprisonment and I am going to make it concurrent because of the totality principle. I see no need to add it to the 30 months in all the circumstances. This latter observation incorporates a measure of restraint which I spoke of earlier.

There will be a DNA order to be worded according to law for the sexual assault. It may be that there already is in the DNA national databank a sample of the accused's DNA. There should be by reason of his record, but that does

not affect the obligation that I have to make the order. I make the order. Whether they collect a sample is for somebody else to determine.

There will for the sexual assault be the mandatory firearm prohibition order, because sexual assault is a crime of violence. In this case the Crown has gone by indictment. It fits section 109. It will begin today and it will end ten years after the release from imprisonment. There will, because of the traditional lifestyle argument which the Crown did not take issue with, be a section 113 exemption for sustenance purposes.

Hardship obviously applies to any victim of crime surcharge, unless the Crown is arguing to the contrary in which case I will hear from counsel.

MS. VAILLENCOURT: No, Your Honour.

THE COURT: Does the defence make that application?

MR. CASHMAN: Yes, we do, sir.

THE COURT: Hardship will apply.

There cannot be a probation order because of the combined length of the sentences.

Does the Crown have anything further?

MS. VAILLENCOURT: No, Your Honour. I think you've already mentioned the SOIRA registration

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THE COURT: Yes, I mentioned that at least twice, yes.

Does the defence have anything further?

MR. CASHMAN: No, sir.

THE COURT: You can go with the officer now, Mr. Epelon.

If you take anything away from this, if there is only one thing you take away from it, if you forget the rest, remember, the Crown prosecutor is probably getting very close to applying to having you declared to be a long term offender or dangerous offender. Clean up your behaviour, clean up your attitudes. If you need help, get it. Good luck.

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Certified to be a true and accurate transcript pursuant to Rule 723 and 724 of the Supreme Court Rules of Court.

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Annette Wright, RPR, CSR(A)
Court Reporter