IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-and-

JOSHUA VERNON MOSES

REASONS FOR DECISION
of the
HONOURABLE JUDGE CHRISTINE GAGNON

Heard at:	Yellowknife, Northwest Territories May 12, 2009
Reasons:	May 14, 2009
Counsel for the Crown:	S. Bond
Counsel for the Defendant:	C. Wawzonek

[Publication Ban pursuant to section 486.4 of the *Criminal Code* ordered]

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INTRODUCTION

[1] Joshua Vernon Moses entered a guilty plea on March 31, 2009 to a charge of "On or about the 23rd day of August, A.D. 2008, did break and enter into a dwelling house, situated at 54, Main Street, in the community of Wrigley in the Northwest Territories, and did commit therein the indictable offence of mischief, contrary to section 348(1)(b) of the *Criminal Code of Canada*."

[2] The hearing on Facts and Sentence was adjourned to May 12, 2009, to allow for the preparation of a pre-sentence report.

THE FACTS

[3] The facts pertaining to this offence can be summarized as follows: during the night of August 23, 2008, the accused, who was very intoxicated, broke the bedroom window to the housing unit occupied by the complainant, G. H., and entered into the room where she was sleeping.

[4] He touched her leg, causing her to wake up, and he tried to pull her out of bed. She was able to free herself and to get him out of her house.

THE PERSONAL CIRCUMSTANCES OF THE ACCUSED, FROM THE PRE-SENTENCE REPORT

[5] The Accused was 18 years old at the time of the offence, and is a first-time offender.

[6] He is of aboriginal descent and has lived in Wrigley, a community of approximately 150 inhabitants, most of his life. He comes from a stable family and grew up in a structured, healthy, loving environment.

[7] He felt ashamed of this offence and did not tell his family about it until January 2009.

[8] In August 2008, (after this incident, but not as a result of it) Joshua went to live in Yellowknife for the purpose of attending the Sir John Franklin High School, although no information was specifically provided with respect to what grade he is actually enrolled in. His plans for the future include enrolling in the Buffalo Airway program for pilots.

[9] While in Yellowknife he lives with his cousins, Mr. Norwegian and Ms. Hardisty, in a stable home where strict rules are applied. They support Joshua's efforts at improving his education. They consider Joshua to be immature for his age and believe that he requires structure and guidance in order to be motivated.

[10] Joshua reportedly began consuming marijuana when he was approximately 14 years old and that he first consumed alcohol around the age of 16. He acknowledged that he was "really, really drunk" when he committed the offence of August 23, having consumed Vodka that night, and he does not really remember what happened.

[11] He told the Probation Officer that he has stopped consuming drugs and that he had cut down on his alcohol consumption. He said that he had not consumed any alcohol for two weeks as of the filing of the pre-sentence report.

THE IMPACT ON THE COMPLAINANT

[12] Although the Complainant did not wish to complete a Victim Impact Statement, she told the Probation Officer for the purpose of the pre-sentence report that she was affected emotionally as a result of the offence. She reported that she would not feel comfortable having Joshua being around her either when he is in a sober or intoxicated state. She also advised that she expected to have to absorb the cost of repairing the broken window, which she estimated at $800, although no actual work order or bill was produced in support of this allegation.

THE POSITION OF THE PARTIES AS TO SENTENCE

[13] The Crown is requesting a custodial sentence of 3 to 5 months, to be followed by a period of probation, including a specific condition to abstain from communicating with the Complainant G.H. The Crown further asks the Court to impose a DNA order in view of the seriousness of the offence.

[14] In support of this position, the Crown argues the breach of trust committed by the accused and characterizes the offence as a "grave invasion of privacy." The Prosecutor focuses on the nature of the offence, the need for general deterrence and asks that the sentence recognize the seriousness of the offence.

[15] She finally submits that the Court should give limited weight to the guilty plea, as it was not entered at the first opportunity, but rather at the time set for the preliminary inquiry.

[16] Counsel for the Defense takes the position that the Court should impose a non-custodial sentence and consider a 2-year period of probation, insisting on the fact that the accused is a first-time offender, his guilty plea, his expression of remorse, his insight into his behavior.

[17] The Defense further argues that the accused has not consumed alcohol for some time, that he changed his group of friends and that he has plans for the future.

[18] Alternatively, Counsel for the Defense asks that the Court consider an intermittent jail sentence.

[19] She argues that a DNA order is not necessary and that the Court should not impose a Victims of Crime Surcharge since the accused is currently unemployed.

APPLICABLE SENTENCING PRINCIPLES

[20] At the heart of this hearing is the issue of sentencing principles applicable to a youthful first offender.

[21] Clayton Ruby in his book on Sentencing[1], suggests that the "proper sentencing of first offenders requires that the sentencing judge exhaust all other possibilities before concluding that imprisonment is required" as this is consistent with the principles stated at section 718.2 (d) and (e) of the *Criminal Code*. He further adds that:

[1] Ruby, Clayton, Sentencing, 7th Edition, Lexis Nexis, 2008, at p. 358

> "(O)ur courts have shown a marked inclination to avoid or minimize, wherever possible, imprisonment for first offenders, relying on the lesson that experience has taught: imprisonment leads to more imprisonment. The absence of a criminal record is a mitigating factor on sentencing in that it reinforces the argument that the accused is of good character and reputation. Such a consideration is appropriate to an isolated criminal act or one that is committed on the spur of the moment in the context of an otherwise blameless record."

[22] The Ontario Court of Appeal in the matter of *Elliot* stated that "in the case of youthful offenders, deterrence must yield to the long-term benefit to, and protection of, society resulting in the real possibility of rehabilitation of the youthful offender."[2]

[23] As a fundamental principle, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (section 718.1 of the *Criminal Code*). A sentence that is perceived as too harsh will not achieve its purpose, in the same manner that a sentence that is too lenient will not attain its objective.

APPLICATION TO THE FACTS OF THIS CASE

[24] The accused was convicted of the offence of breaking and entering into a dwelling-house and therein committing a mischief, contrary to section 348 of the *Criminal Code*. This offence carries a maximum penalty of life imprisonment. "It is a crime which is seen to violate the sanctity of the home and to present danger to life through the potential for violent confrontation with occupants."[3]

[25] I quote again from Clayton Ruby's work: "Despite the basic seriousness with which housebreaking is regarded, lower sentences are imposed, ranging from a suspended or conditional sentence to a fine."[4]

[26] Section 348.1 was recently added to the *Criminal Code*, to make it an aggravating circumstance when "the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence, (a) knew that

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[2] Ibidem, at p. 253
[3] Ibidem, at p. 930

or was reckless as to whether the dwelling-house was occupied; and (b) used violence or threats of violence to a person or property".

[27] Neither counsel specifically referred to this section in their submissions. At this juncture, I can only infer that they did not consider it to apply, mostly in view of the fact that the count on the information was amended to read "mischief" rather than "sexual assault". In addition to this, I am of the view that the facts as they were narrated may reveal that a certain force was applied to the complainant, but that it would not come within the definition of "violence" contemplated by this section.

[28] More specifically, based on the case of *R. v. C.D.; R. v. C.D.K,* (2005) 3 S.C.R. 668, the term "violence" was defined as a circumstance of an offence whereby a (young) person causes, attempts to cause or threatens to cause bodily harm." In the case of *R. v. Picard*, (1976) 39 C.C.C. (2d) 57, the court stated that "violence (…) is the manifestation of an intense impetuous force; it is maltreatment, brutality against the person."

[29] Despite the objective gravity of the offence, I decided not to send this young man to jail for the time asked for by the Crown for the following reasons:

- He was 18 years old at the time of the offence and despite being an adult, he is still immature.
- He is a first offender.
- He entered a guilty plea. Even if it was entered only at the stage of the preliminary inquiry rather than at the first opportunity, the facts as they were exposed confirmed that whether touching the leg of the complainant was actually a sexual assault was a live issue that justified a preliminary inquiry. The complainant ultimately did not have to testify, so I give full weight to this guilty plea.
- He is remorseful.
- He has insight into his behavior, which reduces the need for deterrence and enhances the prospect for rehabilitation.
- He has a stable family environment, which again enhances the prospect for rehabilitation.

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[4] Idem

[30] As a matter of principle, I determine that a community-based disposition is appropriate under the circumstances.

[31] However, I acknowledge that the sentence should have a denunciatory aspect to it and therefore I will not suspend the passing of the sentence, but will rather impose a sentence of 1 day in jail, that is to be served by the attendance of Joshua in court this week, and this will be followed by a 2-year period of supervised probation including the following conditions:

1. Keep the peace and be of good behavior.
2. Appear in court when required to do so by the court.
3. Notify the court or the probation officer in advance of any change of employment or occupation.
4. Report to a probation officer today if possible, but no later than next (May 22), and thereafter as required.
5. Abstain from the consumption of alcohol or other intoxicating substances, or the consumption of drugs except in accordance with a medical prescription.
6. Perform 100 hours of community service work within the first 12 months of your probation.
7. Participate in any counseling as directed by your probation officer.
8. Continue to attend school or actively seek employment.
9. Abstain from contact with the Complainant G. H. unless you wish to present her an apology, which may be done through the probation officer.
10. Abstain from attending house 54, Main Street in Wrigley.
11. Pay to the complainant the amount of 250$ in compensation for the damages caused to her property (this may be done through the intermediary of the probation services).
12. Reside at a place approved by your probation officer.
13. Abide by a curfew of 9:00 pm to 7:00 am for the first 12 months of your period of probation, and you may only be outside of your home during those times if you have the prior written consent of your probation officer.

14. You must present yourself to the phone or at the door of your residence if you are requested to do so by a member of the probation services or a member of the RCMP.

[32] You will pay a Victims of Crime surcharge of $25 within 4 months from today.

[33] I have turned my mind to the issue of whether a DNA order should be made under section 487.051(2) of the *Criminal Code* and I am satisfied that under the circumstances of this case the making of the order would not have a disproportionate impact on the safety and security of the accused. I therefore order that a sample of a bodily substance be taken from the accused for the purpose of DNA analysis.

Christine Gagnon, J.T.C.

Dated at Yellowknife, Northwest Territories,
this 15th day of May, 2009

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2009NWTTC06
T-2-CR-2008-000671

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