

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

K.K.

**REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT D. GORIN**

Held at: Yellowknife, Northwest Territories

Date of Written Decision: July 31, 2015

Date Application Heard: July 13, 2015

Counsel for the Crown: Jacqueline Porter

Counsel for the Accused: Peter Harte

[Sections 271, 155, and 279(2) of the *Criminal Code*]

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I) INTRODUCTION

[1] On July 13th of this year, the accused applied for a sentencing circle. The Crown opposed the application. After hearing from counsel, I adjourned the matter to today's date to consider their submissions.

II) ANALYSIS

[2] The accused is charged with having committed a sexual assault contrary to s. 271 of the *Criminal Code* along with other related charges. The Crown has elected to proceed by way of indictment. The accused has elected to be tried in the Territorial Court and has entered a guilty plea to the count contrary to s. 271 early on in these proceedings. The remaining counts, I understand, are to be dispensed with by the Crown following the ultimate acceptance of the guilty plea.

[3] Counsel appropriately filed an agreed statement of facts at the hearing of the within application. With the exception of initials being substituted for names, it states:

The accused, Mr. "K.K.", for the purposes of this application only, admits the following facts for the purpose of dispensing with proof thereof:

i) *The accused is the complainant's brother.*

- ii) *He was born to the same parents as the complainant; the two siblings are less than two years apart in age.*
- iii) *He was custom-adopted by an aunt and raised in her household, but he was aware that he and the complainant were blood siblings.*
- iv) *On January 3rd to 4th, 2015, the complainant spent the evening at her cousin's house, playing cards with three girlfriends: her sister "C.", her cousin "S." (who is the accused's adopted sister), and another friend.*
- v) *After the friend left, "S." asked "C." and the complainant to call their brother, the accused.*
- vi) *After the accused arrived, "S." went upstairs to sleep.*
- vii) *"C." wanted the accused to look after the complainant so that she could leave; the complainant had consumed alcohol and marijuana and was very intoxicated.*
- viii) *However, the accused poured himself a drink of hard liquor, so "C." left the residence to get money from her house; her plan was to call a cab to take the three of them to the accused's house so that the complainant could sleep.*
- ix) *"C." was gone for a very short time, but when she returned the door was locked.*
- x) *She began to bang on it.*
- xi) *At approximately 4:59 a.m., the Inuvik RCMP received a call from "R.W." reporting a loud banging on her neighbor's door.*
- xii) *It had been going on for 10 to 15 minutes.*
- xiii) *Constable "F." and Constable "R." made a patrol to this residence and found "C." there, banging on the door.*
- xiv) *"C." told the officers that she was concerned about the complainant.*

- xv) *She said she had left her at the residence highly intoxicated, and when she returned, the door was locked.*
- xvi) *The officers allowed her to bang on the door once more but there was no response.*
- xvii) *At approximately 5:15 a.m. and again at 5:17 a.m., "R.W." called the RCMP to report that she could hear what sounded like a child crying from inside her neighbor's residence and a young female voice screaming, "I don't want you here, please out, I don't want you here".*
- xviii) *"R.W." also heard the voice say, "No, no, no, don't, leave me alone".*
- xix) *Constable "F." and Constable "R." made another patrol to the residence.*
- xx) *After the RCMP officers had arrived, "R.W." could hear the young female voice say, "Please, please, just answer the door" and another voice saying something to the effect of, "Be quiet".*
- xxi) *At this point, "R.W." became upset.*
- xxii) *She put on her coat and marched out the door and spoke to the officers, asking them to look in the window.*
- xxiii) *The officers decided to forcibly enter the residence to ensure the safety of the occupants.*
- xxiv) *They kicked in the front door and entered a room, where they saw the accused laying on a mattress on his left side, completely naked, pressed up against the complainant in a spooning position, his arm around her.*
- xxv) *The complainant was naked from the waist down.*
- xxvi) *The minute the officers entered the residence, the complainant screamed, "Help me, help me" and said that her brother was raping her.*

- xxvii) *Constable "F." observed the accused move back slightly, withdrawing his penis from the complainant's genital area.*
- xxviii) *Constable "R." observed blood on the mattress between the accused and the complainant and noted that there was blood on the accused's penis as well.*
- xxix) *The officers noted that there were clothes scattered around the mattress, including a pair of female jeans, inside out, the legs of which were threaded through a pair of underwear containing a feminine hygiene pad stained with blood.*
- xxx) *Constable "F." noted blood on the accused's hands.*
- xxxi) *The officers pulled the accused off of the complainant and placed him on his front on the floor, arresting him.*
- xxxii) *The accused told them that he "didn't do anything".*
- xxxiii) *Constable "R." covered the complainant with a blanket and placed her on the love seat.*
- xxxiv) *The officers then took the accused to the RCMP vehicle where they left him while they returned to the residence to speak to the complainant.*
- xxxv) *When they returned, the complainant was sitting where Constable "R." had left her, partially covered with the blanket.*
- xxxvi) *She was hyperventilating, alternating between bursts of hysterics and repetition of phrases such as "He is my brother, my fucking brother" and "He raped me".*
- xxxvii) *She tried to grasp the officers' hands, apparently seeking comfort.*
- xxxviii) *She told the officers that she remembered her sister "C." leaving the residence but did not remember anything else until she was trying to push the accused off of her while they were on the bed.*

- xxxix) *She said she fought hard to keep her clothes on but the accused took them off and raped her, penetrating her vagina with his penis as she tried to push him off of her.*
- xl) *During the assault she was calling for help from her sister, from her boyfriend (even though he did not live in town), and from her father.*
- xli) *On the evening of the same day, the accused gave a statement in which he said that he got a telephone call at approximately 2 a.m. from his biological sisters and his adopted sister asking if he wanted to drink with them.*
- xlii) *He went over to the residence and drank with them.*
- xliii) *He estimated he drank approximately half of a 26-ounce bottle of vodka and a quarter of a bottle of rum.*
- xliv) *The last thing he remembers is cleaning up vomit.*
- xlvi) *On the date of the alleged offence, the complainant was three days shy of her 20th birthday; the accused was 21 years old.*
- xlvii) *The accused has no prior criminal convictions.*

[4] In *R. v. Morin* (1995), 134 Sask. R. 120, the Saskatchewan Court of Appeal dealt with the propriety of a sentence that was imposed following a sentencing circle. The main ground of appeal argued by the Crown was that the sentence imposed, imprisonment combined with a probation order, was unfit, given the seriousness of the offence and the previous criminal record of the accused. The secondary ground of appeal argued was that the sentencing judge had erred in holding a sentencing circle.

[5] The majority in *Morin* allowed the appeal holding that the original sentence was unfit. At paragraph 16 the court expressly declined to lay down guidelines for determining whether or not a sentencing circle should be used in a given case. However, it went on to state:

18 As a matter of principle, however, we should say that it would be futile, for the reasons given in both *Joseyounen* and *Cheekinew*, to use a sentencing circle in those cases where it is clear that the circumstances require, at a minimum, a penitentiary term. If a sentence exceeds two years imprisonment, the court is without

power to impose any conditions on the accused after he has served his term. There is, accordingly, no means of enforcing any obligations undertaken by an accused as a result of the recommendations of the community through a sentencing circle. That does not preclude voluntary action on the part of the community and the accused such as that contemplated by Fafard P.C.J. in *Joseyounen* when he indicated that he was prepared to use what he termed a "healing circle" which might make suggestions for parole conditions to the Parole Board if and when the accused made application for parole.

[6] In order to avoid confusion, I note that technically speaking, a "penitentiary term" of imprisonment can in fact be joined with a probation order. A term of imprisonment of two years or more must be served in a penitentiary; see s. 743.1(1)(c) *Criminal Code*. A term of imprisonment of more than two years cannot be coupled with a probation order; see s. 731(1)(b) *Criminal Code*. Therefore, a penitentiary term of precisely two years imprisonment can be accompanied by a probation order. However, subject to that minor and perhaps pedantic clarification, I substantially agree with the analysis of the majority of the Saskatchewan Court of Appeal in *Morin*.

[7] Not only does a sentence exceeding two year's imprisonment not only eliminate the possibility of a probation order, it also eliminates in all cases the possibility of a conditional sentence of imprisonment since such an order cannot be for two years or more; see s. 742.1 *Criminal Code*. In the absence of a conditional sentence or probation order, a community based sentence is not feasible. As noted by the majority in *Morin*, without such orders there would be no means of enforcing the accused's obligations recommended by the community's representatives.

[8] I appreciate that this application is not a sentencing hearing. Certainly, I am not in a position to state with great precision what my ultimate sentence will be. However, based on the agreed facts I have referred to, and having heard the submissions of counsel, I am unable to see how a prison term exceeding 2 years would not be necessary. I find that a sentencing circle would therefore be inappropriate.

[9] This was a case of forced intercourse. The sexual assault appears to have been protracted over a significant period of time. The complainant, who was 19 years old at the time, was the biological sister of the accused. This factor combined with the sexual assault itself understandably caused the complainant intense emotional anguish at the time of the incident.

[10] The early guilty plea is an important factor and will almost certainly warrant a very substantial reduction in the prison term. The accused's age and previous

good behavior are also important as are the *Gladue* factors noted in his presentence report. His rehabilitation is also a major concern given the absence of a criminal record. However, notwithstanding the foregoing considerations, the aggravating factors present are such that I am unable to see how any sentence other than a jail term of more than two years could not be unfit, given the need for denunciation and deterrence coupled with the overarching principle of proportionality.

III CONCLUSION

[11] For the foregoing reasons, I find that the within matter is not an appropriate case for a sentencing circle and decline the accused's application.

[12] I thank both counsel for the benefit of their able assistance in this matter.

Robert David Gorin
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 31st day of July,
2015.

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