

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and

NICOLAS RICHARDSON

---

REASONS FOR DECISION

OF THE

HONORABLE CHIEF JUDGE CHRISTINE GAGNON

---

This decision is subject to a ban on publication pursuant to s. 486.4 with respect to the name of the victim. Some details may have been edited to ensure that she may not be identified.

Heard At: Yellowknife, Northwest Territories

Date of Hearing: August 23, 24, 2017

Date of Decision: September 11, 2017

Counsel for the Crown: Ms Angie Paquin

Counsel for the Accused: Ms Nicola Langille

[Section 271 of the *Criminal Code*]

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and

NICOLAS RICHARDSON

---

REASONS FOR DECISION

OF THE

HONORABLE CHIEF JUDGE CHRISTINE GAGNON

---

This decision is subject to a ban on publication pursuant to s. 486.4 with respect to the name of the victim. Some details may have been edited to ensure that she may not be identified.

FACTUAL BACKGROUND

[1] Nicolas Richardson and the victim used to be friends. Something happened on June 26, 2016 that profoundly changed their relationship in the worst possible way. He touched her in a sexual manner without her consent.

[2] Nicolas Richardson pleaded guilty to the offence of sexual assault, he took responsibility for his action. But as much as he regrets this now, he broke something that is very precious, and very fragile. It's called trust.

[3] The facts were read into the record from an Agreed Statement of Facts. Rather laconically, it provides that the victim and the accused spent some time with a group of friends during the evening of June 25<sup>th</sup>, 2016. By two in the morning on the 26<sup>th</sup>, she had no place to go to and asked the accused if she could stay at his place overnight. He accepted. She went to sleep, fully clothed on his bed and he did the same. She woke up to him inserting his fingers into her vagina and kissing her. She pretended that she was still asleep and she rolled over to get away from him, and he stopped. She did not consent to him doing this, and he made no efforts to ascertain whether she consented or not.

[4] They were both 18 at the time. He is now 19, this is his first conviction as an adult.

[5] The accused has a youth record, containing one entry, for an assault with a weapon. His sentence was a term of probation for 12 months, beginning March 29<sup>th</sup>, 2016. At the material time, on June 26<sup>th</sup>, 2017, he was bound by this order.

[6] The court had the benefit of a Pre-Sentence Report (PSR), which was referred to extensively during the proceedings. A victim impact statement was tendered on behalf of the victim and the Crown prosecutor read it into the record. The victim wrote that she does not trust people as easy as she used to; she feels angry and violated. She now feels uncomfortable when she sees the accused.

[7] Counsel's positions on sentence are far apart, although the Defense suggests that they both agree that a custodial sentence is appropriate. The Crown says that a term of imprisonment for 9 to 12 months followed by 18-months' probation would be a fit sentence, while the Defense says that a three to six-months conditional sentence followed by 18-months' probation would be proportionate.

[8] The Crown says that the sexual assault was intrusive, that the accused's moral blameworthiness is high, that he was in a position of trust vis-à-vis the victim and that this form of sexual assault on a sleeping victim, who is totally vulnerable, is all too prevalent in our jurisdiction.

[9] The Crown pleads that emphasis must be placed on denunciation and deterrence first, and then on rehabilitation. The Crown points to the fact that the accused was on probation at the time of the offence, that his probation order contained a prohibition to possess or consume alcohol and that he has a prior conviction for a violent offence and they say that these are aggravating factors.

[10] The Crown opposes a conditional sentence, saying that although it is an available option, it would not achieve the objectives of denunciation and deterrence, and therefore, it would not be an appropriate sentence.

[11] Counsel for the Defense says that the position put forward by the Crown is disproportionate, and that it fails to take into account the fact that the accused is a youthful, aboriginal offender, whose actions should be considered as misguided sexual behavior due to lack of a significant adult male presence in his life.

[12] She warns against placing too much emphasis on the youth record, saying that acts committed as youths are not representative of a person's true character. She points to lenient sentences imposed in other jurisdictions for offences that were more egregious and says that it would not be fair to treat this young man more severely.

[13] Counsel insists that the accused's conduct should be characterized as a "drunken pass" at the victim, and that he recognizes now that he should have asked if she wanted this. His words to the author of the PSR were that he believed that "going further than (sic) kissing" was acceptable at that time.

[14] He did say for the purposes of the PSR that he had consumed alcohol that evening, but it is not alleged in the Agreed Statement of Facts that alcohol played a role in his actions. I therefore don't place too much weight on this fact.

[15] Counsel for the accused points to the comment by the author of the PSR that Nicolas would be a good candidate for a community-based sentence. Counsel says that a conditional sentence of imprisonment would allow him to serve his sentence in the community without endangering it, and that he would benefit from rehabilitative measures rather than from repression. She places great emphasis on his youthfulness, and on the possible negative impact that a jail sentence may have on the accused.

#### Characterization of the offence:

[16] Sexual assault is not defined in the *Criminal Code* except by reference to the offence of assault. The Supreme Court of Canada has defined it as "an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated".<sup>1</sup>

[17] Sexual assault includes a wide range of conducts. The Alberta Court of Appeal decided that:

"a sexual assault is a major sexual assault where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, *whether or not physical injury occurs.*"<sup>2</sup>

---

<sup>1</sup> *R. v. Chase*, [1987] 2 S.C.R. 293

<sup>2</sup> *R. v. Arcand*, 2010 ABCA 363

[18] The Alberta Court of Appeal in that decision determined that to properly express denunciation and achieve deterrence, a starting point of three year's imprisonment would be necessary for a major sexual assault. Decisions of the Alberta Court of Appeal are persuasive and carry significant weight in the Northwest Territories, since its judges compose our own Court of Appeal.

[19] Major sexual assaults are usually prosecuted by indictment. The Crown exercised its discretion and elected to proceed by summary conviction, eliminating the reliance on this guideline.

[20] The fact that this matter was prosecuted by summary conviction reduces the objective gravity of the offence, and the potential consequence for the accused, but it does not alter the impact of this offence on the victim.

[21] Victims of a sexual assault experience feelings of shame, loss of self-esteem, loss of confidence and lack of safety, regardless of whether a court calls the offence a major sexual assault or not.

[22] The Crown called the offence a *serious* sexual assault. The Defense reduced it to a drunken pass by a young misguided man who thought it would be ok to go further than kissing. Such a characterization by Defense counsel may reflect how the accused feels about his conduct, but for a victim, this can only add insult to injury.

[23] The difficulty with this statement by counsel for the accused is the lack of factual context for it. I have not been told why the accused thought that he could go further than kissing. The Agreed Statement of Facts does not provide context for the sexual assault other than the fact that the victim was woken from her sleep by the accused touching her.

[24] In the PSR, there is no exploration of the foundation for this belief beyond this statement made by the accused. In this state of things, it is hard to avoid a conclusion that this belief is based on stereotypes and myths about sexuality.

[25] If the same situation had occurred between the accused and a male friend, with respect to offering shelter for one night, I would not be surprised to hear that they would have both fallen asleep, woken up the next morning, shaken hands and parted ways, their friendship reinforced by the hospitality of the accused. Why is it different when a female friend is involved?

[26] It bears to be repeated that gender equality is a fundamental principle adopted by our society. A woman is entitled to expect from a man the same respect that he would show to another man. To quote from *R. v. Barton*, which considers this principle in regard to sexual relations,

(...) personal sexual autonomy is essential to human dignity. People are inviolate, and unless a person gives a genuine and informed consent to what actually happened to that person, the law recognizes an assault. Viewed in this light, the positive definition of consent contained in s. 273.1 of the Code, stressing as it does the equality of responsibility in sexual relations, is in keeping with women's equality rights under the Charter.<sup>3</sup>

[27] First, to make it perfectly clear to this accused, but also to the community in general, if a woman lies down on a bed late at night, the common assumption is that she wants to sleep, not that she intends or even expects to have sex. Second, even if she lies down on a bed alongside a man, the common assumption still is that she intends to sleep.

[28] Third, if a man offers overnight shelter to a woman, it is to keep her safe. All he should expect from her in return should be her gratitude. Gratitude is usually expressed with words of thank, maybe a handshake or a hug, but sex should not come to mind first as the mode of expression for gratitude.

[29] Fourth, unless a woman specifically and clearly expresses that she wants to have sex, then she is not interested in it. This is reflected in our legislation at sections 265, 273.1 and 273.2 of the *Criminal Code*. It is also founded in the basic rule that relates to agreements in general, which is that for an agreement to exist, it must be clearly expressed by both parties.<sup>4</sup>

[30] Although erroneous, the saying of "silence is consent" unfortunately continues to prevail in our society. By saying to the author of the PSR that he thought it was ok to go further than kissing, the accused perpetuates this false popular assumption.

[31] It bears to be repeated that it is not part of our criminal law. As a society, we need to repeat our denunciation of this belief. The fact that the accused entertained this belief as a result of the lack of an influential male figure in his life is not mitigating.

[32] In a recent decision, the Alberta Court of Appeal reminds us that:

By defining "consent" to mean the "voluntary agreement of the complainant to engage in the sexual activity in question", Parliament signaled that the focus should henceforth be on whether the complainant positively affirmed her willingness to participate in the subject sexual activity as opposed to where she expressly rejected it.<sup>5</sup>

---

<sup>3</sup> R. v. Barton, 2017 ABCA 216

<sup>4</sup> See : R. v. B. (D.K.) 2012 MBCA 114 (« Silence or failure to resist does not equal consent »)

<sup>5</sup> R. v. Barton, 2017 ABCA 216;

[33] The circumstances of this case are that the victim found herself in a situation where she had no place to go for the night. She was vulnerable, and totally dependent on the generosity of her friend.

[34] She undoubtedly was grateful for his offer, and she trusted that she would be safe in Mr. Richardson's home. This is why she fell asleep on a bed with the accused. Because she felt safe. The accused acted in a selfish need for gratification and breached that trust.

[35] The victim was sleeping. She was vulnerable. Her trust was violated that morning, as well as her sexual integrity. She ended up being victimized by the very person who was expected to keep her safe. The offence perpetrated on the victim is a serious sexual assault, and it is one of the most egregious forms of sexual assault being prosecuted on summary conviction.

#### Sexual assault in the Northwest Territories and the need for deterrence

[36] Sexual violence against women is prevalent in the North. Women of all ages are still subjected to unwanted sexual contact ranging from fondling to rape, sometimes more than once in their lifetime.

[37] The Crown read from *R. v. Michel*<sup>6</sup> the following quote: "the sad reality is that these types of facts, the sexual assault of a woman who is sleeping or passed out, is a common occurrence in this jurisdiction." , and the *Michel* case refers to more decisions of our courts which repeat this observation. It has been repeated so often that the meaning of the word prevalent is beginning to sound shallow. In order to avoid simply repeating words, I will try to place them in context.

[38] Based on statistics compiled by Statistics Canada,<sup>7</sup> there were 21 014 sexual assaults committed in 2016 across the country, of which 138 were committed in the Northwest Territories. In these statistics, the ratio of crimes per rate of population is expressed in terms of number of crimes for 100 000 people.

[39] Across the country, this rate is 57.91 sexual assaults for 100 000 people. In the Northwest Territories, this rate is 310.33 sexual assaults for 100 000 people. In real figures, 138 sexual assaults for about 44 000 people is 1 in 318, while 21 014 sexual assaults for 36 000 000 people is 1 in 1713 people. The value measured in the Northwest Territories is 5.3 times more than for the entire country. That's a factual illustration of what *prevalent* means.

---

<sup>6</sup> 2012 NWTSC 17

<sup>7</sup> Statistics Canada, Crimes by type of violation, and by province and territory; Summary table no 21, release date July 24, 2017

[40] This is why courts in our jurisdiction condemn sexual assaults by imposing sentences of imprisonment, and why precedents from other provinces are of limited weight.

### Imposing a fit sentence

[41] While I am convinced that this accused understands now that he committed a criminal offence and that his conduct was wrong, other people who may be tempted to act like Mr. Richardson must also be discouraged to do so. This is called general deterrence.

[42] But as the Crown says, this need for deterrence must be balanced with the other sentencing objectives and principles, as well as with the personal circumstances of the accused, including the fact that he is a person of aboriginal ancestry.

[43] The other sad statistic is that which establishes the over-incarceration of aboriginal offenders. While First Nations, Inuit, and Metis people make up for 3% of the population of Canada, in 1996 they made up 20% of the carceral population. This proportion has not decreased, notwithstanding the introduction of measures such as the conditional sentence of imprisonment, and notwithstanding the exhortations of the Supreme Court of Canada and Parliament to consider alternatives to imprisonment. Given this imbalance, the decision to impose a term of imprisonment on a person of aboriginal ancestry is never taken lightly.

[44] For the purposes of this decision, what needs to be balanced are the over-victimization of women in the North, against the over-incarceration of aboriginal offenders. As the Supreme Court of Canada repeated in *R. v. Ipeelee*,

Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality.<sup>8</sup>

[45] A fit sentence is one that is proportionate to the seriousness of the offence while not exceeding what is appropriate, given the moral blameworthiness of the accused. “A just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.”<sup>9</sup>

[46] A sentence is a punishment for a crime, not a vengeance; it must balance the need to hold an accused accountable for his actions and the harm done to the victim. A fit sentence should reflect the seriousness of the crime, while addressing the personal circumstances of an accused. A sentence must also be similar to other sentences imposed

---

<sup>8</sup> 2012 SCC 13, at par. 37

<sup>9</sup> *Idem*, at par. 37, *in fine*



on other offenders in similar circumstances. Judges in the Northwest Territories have been imposing terms of imprisonment to those convicted of sexual crimes, to clearly say that sexual violence against women is unacceptable.

[47] Counsel for the accused argued that a conditional sentence of imprisonment would be appropriate, in view of the personal circumstances of the accused, including the fact that he is of aboriginal ancestry. Counsel relies, among others, on the decision by a judge of this court in *R. v. F.R.*, in which he considered the fact that the accused was the primary caregiver to his mother who lost her eyesight, and that he was a first-time offender, to justify imposing a conditional sentence.

[48] In the matter of *R. v. Tatzia*, the Supreme Court of the Northwest Territories said:

This court has consistently stated that for the crime of sexual assault, in all but the most exceptional cases, the principles of sentencing to be primarily considered are deterrence and denunciation.<sup>10</sup>

[49] I have not found exceptional circumstances in Mr. Richardson's situation that would justify departing from this principle, such as those that were found to be present in the case of *R. v. F.R.*,<sup>11</sup> noting that this case was decided before *R. v. Lepine*, in the Northwest Territories. When it comes to sexual violence against women, I find that a sentence of imprisonment in one's home does not adequately reflect the principles of denunciation and deterrence.

[50] The Crown tendered the case of *R. v. Vernon Lepine*.<sup>12</sup> It is a decision of the Supreme Court of the Northwest Territories, and it is binding on this court. It involves digital penetration on a sleeping victim. Justice Shaner was of the view that digital penetration and penile penetration "are equally serious and (...) equally harmful violations of a victim's sexual integrity. The fact that there was no penile penetration does not remove this act from the category of a major sexual assault."

[51] I note that the Alberta Court of Appeal's classification of what constitutes a major sexual assault in *R. v. Arcand* included, *but was not limited to* non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.<sup>13</sup> Accordingly, I find that digital vaginal penetration of a sleeping victim is a major sexual assault.

[52] In the matter of *R. v. Lepine*, the Crown had proceeded by indictment and the Court imposed a sentence of 3 years' imprisonment, less time served in pre-trial custody. There are differences between this case and the matter before me. Mr. Lepine was an

---

<sup>10</sup> 2010 NWTSC 47

<sup>11</sup> 2012 NWTTC 05

<sup>12</sup> 2013 NWTSC 19, at tab 7 of the Authorities for the Crown

<sup>13</sup> *R. v. Arcand*, 2010 ABCA 363, cited in *R. v. Lepine*, op. cit.gf

older man, he had a significant criminal record including many for offences of violence against the person. He was found guilty after trial.

[53] Based on these precedents, I believe that there is no reasonable alternative to imprisonment that would properly achieve denunciation and deterrence. Having formed the opinion that the offence is a major sexual assault, I must ask whether the starting point of three-year's imprisonment established in *R. v. Arcand* means that I must impose the maximum sentence of 18 months in jail when the Crown proceeds by summary conviction.

[54] A starting point is not a minimum sentence, and applied to the facts of our case, it should not be considered as mandating the maximum sentence on summary conviction without balancing mitigating and aggravating factors. When assessing what sentence would be appropriate, I note that when a sexual assault is committed against a person under the age of 16, there is a mandatory minimum sentence of imprisonment for 6 months.

[55] The accused entered a guilty plea, and he is remorseful. He wrote a letter of apology to the victim, which was read out in court. I have no doubt that this apology was sincere. These are mitigating factors. Typically, this would reduce the sentence by one-third.

[56] He is a youthful offender and the prospect for rehabilitation is high. This would be his first sentence to be served as an adult, and there is no doubt in my mind that this would be a difficult experience for him. This consideration weighs heavily in my ultimate decision about the quantum of the jail sentence. I feel that this would further reduce the sentence.

[57] Mr. Richardson is of aboriginal ancestry, and a member of the Tli Cho First Nation. He spent his life between the community of Behchoko and the City of Yellowknife, and he was raised primarily by his mother and his grand-mother. His father was estranged early in his life, and it seems that the only time he's had contact with him was when his father was in jail.

[58] He currently lives in Behchoko with his grand-mother Francis Richardson, who reports that she is a residential school survivor and that her experience was traumatic. The PSR reveals that she

“disclosed her difficulty in sending her own children to school due to her fear that her children may suffer the same abuses. (Ms. Richardson) sought employment with the Behchoko School to ensure she was close to her children and retired in 1989. Francis commented that having a healthy home and adequate supervision is an ongoing problem for children in her community; therefore Francis was careful

to provide this for her children and grandchildren. Francis stated that Nicolas needs to focus on a life without alcohol to be healthy.”<sup>14</sup>

[59] Mr. Richardson was the victim of a knife assault in 2015, and he is reported to suffer from post-traumatic stress disorder. He took counselling while he was on probation, but since his order expired, he has not taken any further steps to access counselling on his own. This may explain his use of alcohol, but there is no indication that Post-Traumatic Stress Disorder played a role in the commission of the offence.

[60] The fact that he may have been drinking alcohol prior to committing the offence carries limited weight, given the lack of context for this information. Even if he had consumed alcohol that evening, it would not reduce his responsibility. I do not feel that these personal circumstances reduce his moral blameworthiness.

[61] The breach of trust is aggravating; the fact that he was on probation at the time is aggravating and the fact that he has a youth record is aggravating.

[62] The fact that the victim was sleeping is an aggravating factor. As Justice Shaner wrote in *R. v. Lepine*:

Since the offender knows full well that the person is not consenting, this reveals an enhanced degree of calculation and deliberateness by the offender. Further, at that point the person is at their most vulnerable, unable to defend themselves in any way and unable to call for help from others.<sup>15</sup>

[63] In *R. v. A.J.P.J.*, the NWT Court of Appeal was of the same view.<sup>16</sup> These aggravating factors increase the potential term of imprisonment.

[64] Mr. Richardson’s lack of experience and social awareness played a role in his conduct, but do not reduce significantly his degree of responsibility, because it is clear from the Agreed Statement of Facts that he deliberately put his fingers in the victim’s vagina knowing that she was sleeping. He desisted when she turned her body away from his reach.

[65] Counsel for the accused pleaded that had the offence been committed a few months earlier, this accused may have well been sentenced as a youth. I note that the offence was committed in June, and that the accused was born in December. I find that this argument, although sympathetic, is therefore not quite accurate.

---

<sup>14</sup> Pre-sentence report, at page 7

<sup>15</sup> 2013 NWTSC 19, at tab 7 of the Authorities for the Crown, at p. 16

<sup>16</sup> 2011 NWTCA 2, at par.12; tab 6 of the book of authorities for the Crown

[66] Furthermore, the sentencing objectives of the *Youth Criminal Justice Act* and the *Criminal Code* are fundamentally different and attaining the age of eighteen carries many responsibilities, whether or not a person is ready to endorse them.

[67] I find therefore that a fit sentence would be one that recognizes the prevalence of sexual assaults on sleeping victims in our jurisdiction and the seriously intrusive nature of the assault, while acknowledging the guilty plea, the remorse, the young age of the accused, who is also of aboriginal ancestry, in addition to the fact that this is a first adult sentence, to emphasize the need for restraint.

[68] I also take into consideration similar sentences imposed since 2010 on offenders in similar circumstances in the Northwest Territories.<sup>17</sup> Finally I take into consideration the particular circumstances of the offence, as well as the aggravating circumstances, which are the breach of trust, the youth record, and the fact that the accused was on probation at the time of the offence.

## CONCLUSION

[69] Accordingly, I order that Mr. Richardson serve a continuous term of imprisonment for 9 months, which is long enough to emphasize the seriousness of the offence, while recognizing the impact that this kind of sentence will have on this youthful accused.

[70] This will be followed by a period of probation for 18 months. There will be a Victim of Crime surcharge of 100\$, payable 60 days from the end of the sentence. There will be a DNA order, and a SOIRA order for 10 years.

DATED AT YELLOWKNIFE, NORTHWEST TERRITORIES THIS 11<sup>TH</sup> DAY OF  
SEPTEMBER, 2017

---

Christine Gagnon, Chief Judge

## ADDENDUM

---

<sup>17</sup> R. v. E.A., 2016 NWTSC 50 (13 months' imprisonment); R. v. *Lepine*, op. cit; R. v. *Tatzia* [2010] NWTSC 47; R. v. A.J.P.J. op ci

The conditions of the probation order are:

- Have no contact or communication with the victim
- Report to a probation officer within two days of your release, and thereafter as directed
- Participate as directed in counselling, programming (for example, with respect to healthy relationships), educational or vocational programs.

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES  
BETWEEN:

HER MAJESTY THE QUEEN

and

NICOLAS RICHARDSON

---

REASONS FOR DECISION  
OF THE  
HONORABLE CHIEF JUDGE CHRISTINE GAGNON

---

This decision is subject to a ban on publication pursuant to s. 486.4 with respect to the name of the victim. Some details may have been edited to ensure that she may not be identified