

1 THE COURT:

This matter was set over for sentencing:

2 The accused is charged with the offence of sexual assault,
3 contrary to Section 271 of the Criminal Code. The agreed
4 statement of facts indicates that, after consuming a
5 significant amount of alcohol, and going to bed, the
6 accused got up, left his room during the night and went
7 downstairs and sexually assaulted a six-year old child,
8 whom he believed to be sleeping on the floor. The
9 accused was a guest in the residence, drinking with the
10 child's parents and residing there.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 end of gravity of offence.

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

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

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

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

1 sexual assault. The accused received two months.

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

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

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

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

1 is a marginal sexual assault.

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

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

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

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

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

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

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

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

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

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

13 THE ACCUSED: Yes.

14 THE COURT: How long do you need?

15 MS. MACPHERSON: Four months, Your Honour.

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

18 MS. MACPHERSON: Yes, sir.

19 THE COURT: Thank you.

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Certified a correct transcript,

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Loretta Mott, Court Reporter

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