

ONTARIO COURT OF JUSTICE

COURT FILE No.: Toronto
CITATION: *R. v. Pelletier*, 2016 ONCJ 628
DATE: October 12, 2016

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JOSEPHINE PELLETIER

Before Justice Nakatsuru
Heard on October 6, 2016
Reasons for Judgment released on October 12, 2016

M. Cole..... counsel for Her Majesty
D. O’Connor, C. O’Connor..... counsel for the Accused

NAKATSURU J.:

[1] Josephine Shelly Lynn Pelletier is a 31 year old First Nations woman from Regina, Saskatchewan. Over five years ago, she was sentenced to jail by a judge of the Queen’s Bench for Saskatchewan for three years and three months for two robberies, arson, and an assault. This was in addition to substantial pretrial custody. A seven year long-term offender supervision order was also imposed. On March 8, 2016, Ms. Pelletier was released to a Women’s Supervision Unit in Toronto. In May, Ms. Pelletier tested positive for cocaine metabolites in two urinalysis tests. She has pled guilty to a breach of the condition in her order that she abstains from illegal drugs.

[2] Let me explain the best I can to you Ms. Pelletier why I have come to my decision about the sentence I am going to give you. Since your arrest, you have done 161 days in pretrial custody. By law, I am limited to giving you one-to-one credit for that.

[3] Mr. Cole for the Crown wants me to give you a total sentence of 18 months. He has given me materials including prison records to review. Also the lengthy decision that brought you into the system. Ms. Ginny Hughes, your Parole Officer for the short two months you were out, came and testified. Mr. Cole went through the case law I must consider. He pointed out that despite your tragic personal history, you are a high risk for violence, your addictions add to that risk, and you have never had any successful treatment. He has made his arguments skillfully but fairly. Your lawyer, Mr. O’Connor, in perhaps an old school way, has argued passionately that

you have done enough time. He has challenged the value of these long-term offender designations. He says that as an addict, this breach is understandable. Indeed, inevitable.

[4] My sentence Ms. Pelletier must be proportional. In other words, it must be fair. It must be balanced. I must consider many principles. I know you are already familiar with them. You have, for a relatively young woman, a long criminal record. My sentence must denounce your crime. It must deter you and others. It must also rehabilitate you.

[5] Some things make this offence more serious. You have convictions for violence on your record. You have convictions for not obeying court orders. This crime is also about not obeying a legal order. This offence was committed soon after you were released from custody. You tested twice for cocaine use. There was an earlier test that was positive for methamphetamine. I know and appreciate you say this was part of the medication you were prescribed. What concerns me more is that even though you tested once for cocaine, you did it again. I appreciate the first time you quickly confessed your breach before the test came back positive. But you were given another chance. You failed. Cocaine is a serious drug. Also, it is important that all the material I have before me have made a link between your consumption of illegal drugs and some of the violent acts you have done in the past. In other words, when you are sober, your risk is more manageable. At the same time, I am aware that no one is suggesting that you misbehaved or became violent when you were at the center run by the Elizabeth Fry Society. This was only a urine test. Finally, you have had a difficult time when you were in jail. You were also a difficult inmate. You were in the hole a number of times. You were not always good when faced with authority. According to the authorities, you did not succeed with the programs offered to help you. With your addiction. With your traumatic past. You did not behave when you got into the community.

[6] Some things weigh in your favour. You have pled guilty. You are sorry for what you did. I know there is a part of you that wants to become well. I accept you truly want to do that. Sometimes it is not easy. We do not live in a world of unlimited resources to help you. Some program rules may be frustrating. Even though good meaning people may want to help, nothing is perfect. For instance, I agree with you that as a Cree woman, being given an Ojibway Elder was not a good fit. Even though you respected his teachings and spirituality. It did not work for you. I know that some in-patient programs would not accept you because of your violent background. It has not always been easy. But I do accept that you have tried in your own way. You have tried even though the history that has shaped who you are may mean things do not come as easy for you as it does for others. Who you are is shaped by the trauma you have suffered. It is now a part of your personality. The certificates you presented to me shows me that you did not simply sit in your cell and feel sorry for yourself. Having heard you at this sentencing, I know that you are not just doing this to make yourself look good. I appreciate some have felt you were manipulative. I do not feel that way. You are doing this for yourself. For your future.

[7] You are an indigenous person. You spent some of your time on the Muskowekwan First Nation. It is near the town of Melville, Saskatchewan. A First Nation of maybe a couple of thousand. Not too large. The Muskowekwan First Nation signed Treaty 4 with Canada. You also spent much of your time in Regina. What is left of your family lives on the prairies. As you know, I myself was raised on the prairies. I know firsthand the discrimination suffered by

indigenous peoples in that part of our country. It is something all right thinking people are ashamed of.

[8] When you pled in front of me, we all agreed that a *Gladue* Report should be prepared for you. But it was not to be. You could not bring yourself to open up those parts of your past that cast such a shadow on your present. It was too difficult for you. I understand. I believe I have enough information about your indigenous background to do justice in your case.

[9] I will not detail in my decision the trauma you have suffered. Physical, sexual, and emotional trauma. Even when you were so young. A child. To do so in such a public way as in a judicial decision will not help you heal. I will say this though. Ms. Hughes testified that in the years she has worked as a Parole Officer she has never met anyone who has faced so much death in her personal life as you. The suicides. The loss. That really struck me. I will also say that you are a Residential School survivor. You are not ready to reveal all that went on. You have just this spring received almost two hundred thousand dollars in compensation. That can only hint at the experience you had to endure. Let me say this about this compensation. You have shown much wisdom and insight about it. When you were offered an inpatient program in Vancouver, you said no. You were concerned that this would not be a good place to be for a serious addict such as yourself. Especially with this money. You have kept the funds safe. You understand that it can help you forge a new life for yourself. And your son. Let me also say this about the compensation. It can never be enough. It cannot fully restore what was lost. But it is recognition of the injustice done to you and other indigenous people in Canada. It recognizes the truth of what was done. It can be part of the reconciliation needed.

[10] My sentence must denounce your act and deter you and others. It must recognize the fact you are a long-term offender. It must recognize the risk you still pose to the safety of the community. It is a risk of violence. At the same time, I cannot forget your needs. Your need to be rehabilitated. The addictions you have are at the root of some of your problems. But deeper than those addictions, are things from your past you are not yet able to deal with. I believe we all understand that. But left untreated, it does mean that you continue to pose that risk.

[11] To do my job right, I must apply what I know about your indigenous identity and background in coming to the right sentence. It is what we lawyers and judges mean when we talk about how *Gladue* factors apply in a case. I am not the only person who must do this. Indeed, the Correctional Services of Canada has that duty. This is what Ms. Hughes has said about how that history has affected you:

[A] Community Assessment identified Ms. Pelletier's childhood trauma, victimization, violence, loss of culture, family and community history of substance abuse and suicide, and the generational impacts of the Indian Residential Schools as significant factors in her pattern of criminal activity. As supported by her Aboriginal Social History, Ms. Pelletier has learned unhealthy ways to cope with her trauma and negative emotions. She developed an early substance issue which has significantly impacted her life and heavily contributed to her offending. She has also engaged in a high risk lifestyle, living on the streets and committing crime to support her addiction. Ms. Pelletier has a history of assaultive and violent behaviour and she has continued to act out aggressively and violently throughout her sentence.

[12] I agree with Ms. Hughes. The trauma you suffered may not be unique to indigenous offenders. But it is unique how these traumas have been created or contributed to by the colonial legacy of our country. By some deliberate policies and laws of our nation. By overt and systemic discrimination against indigenous peoples. I am required to consider that in my sentence.

[13] The line between your identity and history as an indigenous person as well as the effects of the injustices done to indigenous peoples and your breach is direct and obvious. It has had a big hand in your addiction. Your crime is using cocaine. This addiction of yours has been with you for most of your life. It has a firm grip on you at times. You have not been able to shake its grasp. The beginnings of that addiction started with your lived experience as an indigenous person. The chaos in your upbringing. The lack of opportunity caused by little education and poverty. The life you lead as a young woman. With its dangers. Its lack of meaning. These problems are ones that many in the indigenous communities face. They are problems that have their origins in the way indigenous people have been treated.

[14] You have also explained that since you were not believed about why you tested for methamphetamine, you gave up. You just used coke. This anger and distrust is everywhere in the records. Your feelings of abandonment and distrust have played a major role in your life. I see it there when you act out violently. When you shift to so fast to anger when you cannot get what you feel is right. When you disregard the rules because you feel unfairly treated. This does not excuse your actions. But it does explain them. It explains why you breached. It also explains the difficulties you have had in getting and staying in treatment. This too had its start in your lived experience as an indigenous woman. As an indigenous child. The beginnings no doubt started when you were abused at the hands of those who should have protected you. And I have no doubt that your experience at Residential School made it worse.

[15] The current of how indigenous men and women have suffered in our society runs deep in you. I find *Gladue* considerations are most important in your case. Indeed, more so than in the many cases I have had. You are as much a victim as an offender when I look at the whole picture.

[16] Let me talk about some points raised by Mr. Cole. I know in the very important case of the Supreme Court of Canada, both Mr. Ipeelee and Mr. Ladue received a 12 month sentence for their breaches. They too are indigenous offenders. That fact was taken into account in the sentence. But each case is different. Each case is distinct. There is a range of right sentences. I note that in the decision by Justice Molloy that Mr. O'Conner gave me, Mr. Kenneth McDonald received a suspended sentence for the first breach of his long-term offender supervision order by failing his urinalysis. He later received a conditional sentence for his fourth breach.

[17] In the end, I cannot agree with Mr. Cole that 18 months is the right sentence. Let me be quick to add Ms. Pelletier that my sentence must find you accountable. You made a choice. It was a bad choice. It would be disrespectful of me to say that you are blameless. You are a moral human being. You have free will. Do you know how awful it would be if someone took that away from you? Far worse than taking away your liberty. So I must punish you for that choice you made.

[18] I must deter you and others. I must denounce what you did. Despite the factors in your favour, this crime is one that calls for jail. The key question I must answer is how much jail.

[19] This is your first breach. No one has punished you for a breach before. You have not yet had the chance to learn how serious judges treat such breaches. You are sorry. You pled guilty. Also, while I do not minimize the seriousness of the crimes you have committed in the past, the facts of your past offences have been less violent than done by some of the offenders in the cases the Crown has relied on. For example, Mr. Ipeelee and Mr. Ladue committed violent crimes that lead to serious bodily harm. They also did crimes of serious sexual violence. The risk of harm you pose to the community based upon breaches such as this is not as great as other offenders like Mr. Ipeelee and Mr. Ladue. Some of your convictions are youth convictions. While you had a knife in the index offences, no one was harmed. You were also only 26 years old when found to be a long-term offender. You were about 23 when first brought in on remand. I find you have matured. Sadly, that maturation had to happen in jail. Jail has not been very useful in your rehabilitation. Some of it may not be your fault. A large part is. But sending you back to jail for a significant time will not help your rehabilitation or reintegration into the community. There is no need to separate you from the community for such a period of time for the community's safety. Finally, while your criminal history is connected with drug use, it is not the only connection. I agree with the words of Justice Watt in the case named *R. v. Matte* that this kind of breach is not trivial. That is because of the connection between addiction and risk. The sentence Mr. Matte received was much longer than even what Mr. Cole asks for. But Mr. Matte was not an indigenous offender. It was also Mr. Matte's third breach.

[20] In addition, the risk of re-offending in your case is not just connected to an untreated addiction. It is connected to the historical injustice done to indigenous people. It is connected to your own personal indigenous history. Connected to the abuse you suffered. The breakdown in your family and social environment. The chaos of your life. The lack of chances to succeed. Given all this, it is not surprising that your first brush with the law came at the age of 13.

[21] I must have regard to your special circumstances as an indigenous offender. How it is connected to you and this offence. When I do, while I must hold you responsible for your actions, the moral blameworthiness of it is lessened. Quite frankly, in a way, we all share blame for what you have become and what you have done.

[22] I must also craft a sentence that recognizes the over-incarceration of indigenous people in our jails. Bluntly, we are jailing too many. For too long. This is not to say that jail, even lengthy periods of jail, can never be right. It just means I must think hard about alternatives in each case. I must make sure that if jail is needed, that it is carefully tailored to the offence and offender. It must be imposed with restraint.

[23] Now Ms. Pelletier, I do not want to only talk about the negatives here. There are positives. I saw glimpses of it when you testified. I see the success you can have when you want it. You have a good shot of being someone that others can look to for guidance. That lies within your power.

[24] I have heard from you about the wisdom told to you by an Elder who you trusted. The wisdom told to you was about the roots of a tree. True strength. Lasting strength. It comes from within Ms. Pelletier. It does not come from others. It does not come from programs. Yes, those things can help. And I strongly encourage you to benefit from them. But in the real world, nothing is perfect. The real world can be unfair. Those programs and those who offer help may anger you sometimes. May let you down. People like Ms. Hughes, the Elder, myself, we all have our own lives. As much as we may want to help you, we all have other worries. Other people to care about. Remember Ms. Pelletier true strength comes from within. To be strong, you must have strong roots. It is easy to stand tall when the day is calm. The sky sunny. But it takes strong roots to hold you fast when the storm comes. When the wind blows hard. And threatens to uproot you. And those days will always come. To have strong roots you may have to uncover them. You may have to dig deep to examine them. To check that they are strong. To shore them up where needed. I am talking about your roots Ms. Pelletier. Your past that has rooted your life now. It takes courage to dig deep into that past. To examine it. Honestly. Without fear. But I believe you have that courage. There is much positive about you that you can offer to your son, your mother, and your people. You can be that person the Elder spoke of. If you take the path you need to take.

[25] I find that rehabilitation is an important principle in my sentence. I find that restraint in imposing jail is important. Obviously it is important for you Ms. Pelletier. But is also important to deal with the problem we have in this country of sending too many indigenous offenders to jail. The courts recognize that problem. I have to address it in my sentencing of you.

[26] I asked you Ms. Pelletier to tell me something about your hopes. Something good. There is so much negative in the materials. I have heard your answer Ms. Pelletier. I have heard of your connection to your son. He too is struggling to find his way. He is in a youth facility for lashing out at a police officer. But I can tell he is what brings you back when you feel the blackness of despair. His connection to you is so understandable to each one of us who is a parent. Our relationships with our children can be complicated. It can cause us pain. But also bring great joy. I do believe that this relationship can help you. It is a very valuable one. So too your connection to your mother. You are still struggling. No doubt. But these are ties that can further your rehabilitation.

[27] You want to go back to Saskatchewan. You have a plan to continue your rehabilitation there. You are no longer welcome at the center run by Elizabeth Fry Society here in Toronto. I do not know much about the plan that awaits you in Saskatchewan. Ms. Hughes did not know. But I am sure there will be supports for you there. There will be programs. Services you can access. Correctional Services of Canada supports you in your plan to move back to your home province.

[28] Mr. Cole argued that the plan to send you back to Regina is a problem. That was where many of your crimes took place. Where you initially joined a gang. Where your cravings for drugs deepened. Where your triggers are.

[29] I said to Mr. Cole that it is the most natural of human instincts to want to go home. Even when memories of home are at times tinged with sadness, fear, or regret. Because I am not

talking about someone's actual home. Or a home from one's childhood. We all nurture in our heart the idea of "Home". The idea of home is about a place of safety. A refuge. A sanctuary. Where love resides. Home is a place of hope. A place of potential. A place where every one of us can feel like we can become better. Every one of us has such a home, Ms. Pelletier. Even if you live in a small room dimly lit by a bare light bulb hanging from the ceiling. Even if that home can only be conjured up in your imagination if you have the misfortune of having to sleep in a dormitory of a shelter. Or on a steel cot in a prison cell.

[30] After careful reflection, Ms. Pelletier, I am sending you home. I wish you all the best in your life.

[31] After taking into account time served, the sentence will be 1 day.

Released: October 12, 2016

Signed: "Justice S. Nakatsuru"