

In the Court of Appeal for the Northwest Territories

Citation: *R v Avadluk*, 2024 NWTCA 2

Date: 2024 01 24

Docket: A1-AP-2014-000011

Registry: Yellowknife, N.W.T.

Between:

His Majesty the King

Respondent

- and -

Noel Avadluk

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

**The Honourable Chief Justice Ritu Khullar
The Honourable Justice Neil Sharkey
The Honourable Justice Kevin Feehan**

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Justice K.M. Shaner
Dated the 4th day of August, 2017
(2017 NWTSC 51, Docket: S-1-CR-2012 000093)

Memorandum of Judgment

The Court:

[1] Mr Avadluk was found to be a dangerous offender and was sentenced to an indeterminate sentence: *R v Avadluk*, 2017 NWTSC 51 (*Sentencing Decision*). He appeals only the indeterminate sentence, not the dangerous offender designation. The appeal is granted for the reasons below.

I. Background Facts

[2] Mr Avadluk committed the predicate offence of sexual assault in 2012, and a jury convicted him in 2014. He and a friend had been visiting the 56-year-old female complainant. When the friend left, he propositioned the complainant for sex, which she refused. When that happened, he dragged her into the bathroom, threw her on the floor and forced intercourse on her. He dragged her to the bed, sexually assaulted her a second time, and she passed out. The sentencing judge described the assault as “sudden, brutal and sustained”.

[3] Mr Avadluk came to the court with 43 convictions from 1985 through 2012, which included a range of property offences, offences against the administration of justice, resisting arrest and assaulting a police officer. Most significantly, his record included eight violent crimes, punctuated by significant acts of physical and sexual violence against women often, but not exclusively, against women he knew or his intimate partners. Many of these assaults were described as prolonged and terrifying. The appellant frequently sought to minimize his actions, discredit his victims as jealous addicts and paint himself as the true victim.

[4] There were two expert witnesses at the sentencing hearing, Dr Woodside for the Crown and Dr Nesca for the appellant. They provided extensive evidence about the appellant’s past offending and his future prognosis. They both agreed that the appellant was at high risk to reoffend violently and a high to medium risk to reoffend sexually. The defence expert was more optimistic about the appellant’s prospects for rehabilitation. Specifically, he was more optimistic about the success of various intensive treatments that would be available in the penitentiary system and, after treatment, that the appellant could be managed in the community with appropriate supervision.

[5] The appellant is Inuit and at the time of sentencing was 44 years old. He grew up in a large family in a very small community in what is now Nunavut. His childhood was marked by poverty, neglect, physical and sexual abuse. His father taught him to hunt, trap, and carve. He described his mother as a violent alcoholic who left the family when he was five years old. He spent time with each parent and ended up in a group home where he was sexually assaulted by a caregiver. His involvement in the justice system started from a young age, and he has struggled with alcohol addiction throughout his life. He may have Fetal Alcohol Spectrum Disorder, though it has not been diagnosed. While he did not complete high school, he has his journeyman certification in small engine repair. As an adult, he has supported himself in this line of work as well as

construction, commercial fishing and carving. He had a positive relationship with his father who died in 2005 and has two adult children in Nunavut with whom he reportedly has a positive relationship.

[6] The appellant's background was summarized at para 110 of the *Sentencing Decision*:

Residential school devastated his parents, particularly his mother. That filtered down and devastated Mr. Avadluk, wreaking havoc and chaos in his home, the place where he should have been safe and felt loved. When there was finally intervention, it did nothing to address his needs. Instead, it resulted in further trauma for him, in the form of sexual assault. He turned to substances for comfort and he started to engage in criminal conduct at a young age. He was in and out of prisons, his underlying needs, his addiction, his mental health problems, his anger issues, his own trauma, remaining unresolved. It is little wonder Mr Avadluk turned to solvent and alcohol abuse at a young age. It is little wonder he has spent much of his life incarcerated. And it is little wonder that he has now been designated a dangerous offender. The system has failed Noel Avadluk and in doing so, it has failed its victims. He now needs significant treatment and the public needs protection.

[7] As noted, the appellant had been in and out of jail for much of his life. While he had taken a few courses on anger management, life skills and received some treatment for his addiction issues, he had not had the opportunity for any extensive treatment.

II. Sentencing Decision

[8] Most of the *Sentencing Decision* addresses the appellant's designation as a dangerous offender, which is not under appeal. In the sentencing part of the reasons, the sentencing judge held herself bound to impose an indeterminate sentence unless there was a reasonable expectation that the public could be adequately protected by the combination of a determinate custodial sentence and a long-term supervision order.

[9] Mr Avadluk's counsel submitted there was a reasonable expectation that a custodial sentence sufficiently long to enable Mr Avadluk to receive high intensity sex offender treatment in prison, combined with a 10-year long term supervision order would adequately protect the public. That sentence combination would have Mr Avadluk released into the community at age 50 when, according to Dr Nesca, his risk of sexual recidivism would be significantly lower.

[10] The Crown argued that only an indeterminate sentence would adequately protect the public. It also argued that the determinate sentence proposed by Mr Avadluk's counsel was not legally available. A fit sentence for the predicate sexual assault in ordinary sentencing proceedings would be six to seven years' imprisonment, but the determinate sentence proposed by Mr Avadluk's counsel would come close to the 10-year maximum¹. The Crown relied on the Alberta Court of Appeal decision in *R v Severight*, 2014 ABCA 25 for the proposition that a sentencing judge cannot

¹ Appeal Book, Vol 2, p 586.

impose a determinate sentence on a dangerous offender that exceeds what would be fit in regular sentencing proceedings under the *Criminal Code*.

[11] The sentencing judge imposed an indeterminate sentence. She accepted that treatment in custody might eventually reduce Mr Avadluk's risk of reoffending to an acceptable level although she did not know how long it would take. The sentencing judge briefly addressed the determinate sentence proposed by Mr Avadluk's counsel but rejected it as a legally unavailable sentence. While she also expressed doubt about whether the appellant's risk of sexual recidivism would reduce by the age of 50 and whether a long-term supervision order would adequately manage his residual risk of reoffending when released, fundamentally, she rejected this option because she did not consider it to be legally available.

III. The Issue

[12] The appellant argues that the sentencing judge made several errors in imposing an indeterminate sentence including (1) failure to apply *Gladue* factors, (2) relying on rejected and unproven aggravating circumstances from the index offence, (3) misapplication of legal standards, and (4) misapprehension of the evidence.

[13] We find it necessary to address only issue (3) and, specifically, whether the sentencing judge erred in law in her approach to imposing a determinate sentence in dangerous offender proceedings. Such errors are reviewed on a standard of correctness.

[14] Section 753(4) of the *Criminal Code* sets out the types of sentence that a sentencing judge may impose on a dangerous offender.

(4) If the court finds an offender to be a dangerous offender, it shall

(a) impose a sentence of detention in a penitentiary for an indeterminate period;

(b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

(c) impose a sentence for the offence for which the offender has been convicted.

[15] Section 753(4.1) goes on to state that a sentencing judge must impose an indeterminate sentence unless there is a reasonable expectation that a lesser measure (such as a determinate sentence for the predicate offence, with or without a long term supervision order) will adequately protect the public.

[16] In this case, the sentencing judge declined to impose the composite sentence under s 753(4)(b) suggested by Mr Avadluk because she thought it was not an available option in light of *Severight*. The appellant argues that was an error. We agree.

IV. Error in Approach to Imposing Determinate Sentence

[17] The sentencing judge's discussion of *Severight* is brief:

Increasing the length of the sentence to accommodate the contingencies [of possible treatment] is not an option. If the court imposes a determinate sentence, whether or not it is followed by a supervision order, it must fall within the range the predicate offence would attract *in an ordinary sentencing*. *R v Severight*, 2014 ABCA 25. (emphasis added)

Sentencing Decision at para 103.

[18] In other words, a determinate custodial sentence to enable the appellant to get extended treatment in prison and have him released at age 50 was unavailable. It would require sentencing the appellant to a further six years in custody (in addition to several years' pre-sentence custody), which would exceed a fit sentence for the sexual assault under ordinary sentencing principles. The sentencing judge held that a determinate sentence for a predicate offence under ss 753(4)(b) or (c) cannot be longer than would be justified in a "normal" sentencing proceeding.

[19] The sentencing judge did not have the benefit of the Supreme Court of Canada decision in *R v Boutilier*, 2017 SCC 64, which interpreted the dangerous offender provisions of the *Criminal Code*. The following principles from *Boutilier* (at paras 53-65, 69, 76) are relevant in this appeal.

1. The dangerous offender provisions in Part 24 of the *Criminal Code* are sentencing provisions.
2. The general sentencing principles set out in Part 23 of the *Criminal Code* also apply to the sentencing of dangerous offenders.
3. The sentencing judge in a dangerous offender application must still consider moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders in deciding whether a sentence less than an indeterminate sentence would sufficiently protect the public.
4. The general purpose of the dangerous offender provisions in Part 24 is the prevention of future harm to the public. This objective has "enhanced status" in dangerous offender proceedings compared with other sentencing objectives.
5. There is no presumption that a dangerous offender will receive an indeterminate sentence.
6. The sentencing judge must impose the least restrictive sentence that will adequately protect the public from the threat of violent reoffending. An indeterminate sentence is justified only if it is the least restrictive means to protect the public.

[20] In light of these principles, the sentencing judge erred in finding that she could not impose the determinate sentence proposed by Mr Avadluk.

[21] The sentencing judge was not restricted to imposing a sentence for the predicate offence that would be justified by the application of ordinary sentencing principles. While ordinary sentencing principles (under Part 23) apply in dangerous offender proceedings, so do the distinctive principles of the dangerous offender regime (under Part 24). The overall objective of that regime is the protection of the public, which has “enhanced status”: *Boutilier* at para 56. If a longer than normal determinate sentence (with or without a long-term supervision order) can adequately protect the public, such as by facilitating rehabilitative treatment, the sentencing judge may impose it. *Boutilier* has overtaken *Severight* on this point.

[22] The Ontario Court of Appeal reached the same conclusion in *R v Spilman*, 2018 ONCA 551. Apart from the point just mentioned about the “enhanced status” of public protection, the Court gave various reasons why the range of determinate sentences under ss 753(4)(b) or (c) is not limited to what would be fit under ordinary sentencing principles.

1. In appropriate circumstances, a sentencing judge may impose an indeterminate sentence in dangerous offender proceedings, even though it is not an available option under ordinary sentencing principles. If the application of sentencing principles in dangerous offender proceedings can justify an indeterminate sentence, it can also justify a less onerous, determinate sentence that is longer than would be fit in ordinary sentencing proceedings.
2. The language of ss 753(4)(b) and (c) does not require determinate sentences for predicate offences to match the sentences that would be justified by ordinary sentencing principles.
3. The requirement under s 753(4)(b) that the custodial component of a composite sentence (which also has a long-term supervision order component) must be at least two years long is itself a departure from ordinary sentencing principles.
4. In dangerous offender proceedings, the offender is being sentenced not just for the predicate offence but also because he is a dangerous offender, so the “focal point” of those proceedings is different from ordinary sentencing proceedings.

Spilman at paras 33-37.

[23] An approach that restricts determinate sentences under s 753(4)(b) or (c) to what would be fit in ordinary sentencing proceedings also conflicts with the duty to impose the least intrusive sentence necessary to protect the public: *Boutilier* at paras 57, 60. If a determinate sentence for the predicate offence (with or without a long-term supervision order) *would* reduce the risk of reoffending to an adequate level (for example, by providing access to treatment for a certain period), but it exceeds what would be justified by ordinary sentencing principles, that option must be chosen. The only other option would be an indeterminate sentence *even though the*

indeterminate sentence is not necessary to protect the public. That is inconsistent with the requirement of restraint in *Boutilier*; see also *Spilman* at para 38.

[24] In conclusion, *Boutilier* establishes that a sentencing judge may impose a determinate sentence for the predicate offence (under ss 753(4)(b) or (c)) that is longer than would be justified by the application of ordinary sentencing principles if it is necessary to protect the public from future violent reoffending. Indeed, if there is a determinate sentence that would adequately protect the public, the sentencing judge *must* impose it rather than an indeterminate sentence. This approach was expressly endorsed in *Spilman* and implicitly endorsed in *R v Cosman*, 2018 ABCA 388. However, there is an important limit on the length of a determinate sentence under ss 753(4)(b) or (c) – it cannot exceed any maximum sentence for the predicate offence set out in the *Criminal Code*: *R v Durocher*, 2023 NWTCA 4 at para 59; *Spilman* at para 52.

[25] A determinate sentence up to the maximum for sexual assault (plus a long-term supervision order) was legally available in this case. Whether that was an appropriate sentence turned on whether, as required by s 753(4.1), there was a reasonable expectation that it would adequately protect the public from the risk of future violent reoffending by the appellant. The Crown concedes that the sentencing judge's approach was in error but argues that, given the sentencing judge's evaluation of the expert evidence, the error had no material impact. It says that the sentencing judge would have come to the same conclusion - that only an indeterminate sentence could adequately protect the public.

[26] We disagree. The sentencing judge believed the sentencing options were limited by law and evaluated the evidence in light of what she thought were the available options. The error had a material impact on her assessment of whether there was a reasonable expectation that a sentence less than an indeterminate sentence would adequately protect the public from future violent reoffending.

V. Remedy

[27] At the appeal hearing, the panel asked the parties about the appropriate remedy if it found that the sentencing judge erred when she held she could not impose the determinate custodial sentence proposed by Mr Avadluk.

[28] Mr Avadluk has now applied to adduce new evidence about his progress since he was sentenced in August 2017. The parties agree that the evidence is admissible under s 687 of the *Criminal Code* for the purpose of determining the appropriate remedy.

[29] Based on the supplemented record, Mr Avadluk asks this Court to substitute a 10-year custodial sentence for the predicate sexual assault with no credit for pre-sentence custody, followed by a 10-year long-term supervision order. Under that sentence, he would be released from prison in August 2027 at the age of 54 and would be subject to long-term supervision until the age of 64.

[30] Mr Avadluk argues that there is a reasonable expectation that the 10-year custody/10-year supervision order combination will adequately protect the public against the violent offending by Mr Avadluk in the future as required by s 753(4.1) of the *Criminal Code*. While the Crown agrees with this position, it also points out some deficiencies in the new evidence. We agree with the Crown that there are deficiencies with the new evidence and notwithstanding the Crown's consent, we decline to set a sentence on appeal, and instead remit the matter for a new sentencing hearing for the reasons explained below.

VI. The New Evidence

[31] The new evidence comprises the following documents:

- A report on Mr Avadluk's participation in the Inuit Integrated Correctional Program Primer in 2019.
- A report on his participation in the Inuit Integrated Moderate Intensity Sex Offender Program between 2020 and 2023.
- A Correctional Services of Canada report dated February 2022 approving Mr Avadluk's transfer from Beaver Creek Institution to Bowden Institution.
- Records of his attendance at Alcoholics Anonymous meetings between 2019 and 2023.
- A report on Mr Avadluk's participation in a wood carving group at Bowden Institution.

[32] Mr Avadluk completed the Inuit Integrated Correctional Program Primer in September 2019. The program is not specifically for sex offenders and is an entry level program for those required to take moderate or high intensity programming. It is designed to reintroduce offenders with Inuit backgrounds to their culture and motivate them to want to change. Participants are required to commit to their own healing journey and to formulate a self-management plan (a Healing Journey document) which includes goals and self-care strategies. It is a group program consisting of 11 sessions over a few weeks including ceremonial sessions. It is led by a trained Indigenous correctional program officer or a culturally competent corrections program officer. An Inuit Elder is assigned to lead Inuit cultural ceremonies and provide Inuit teachings.

[33] Mr Avadluk attended all required sessions on time, contributed to group discussions, reflected in one-on-one sessions about why he came to be incarcerated and completed his homework assignments thoughtfully. The report describes his interactions with group members, the facilitator and the Elder as "positive".

[34] Mr Avadluk participated in the Inuit Integrated Moderate Intensity Sex Offender Program between November 2020 and January 2023. That is a program aimed at Inuit male sex offenders whose risks and needs place them at a moderate or high risk to re-offend sexually. When he

participated in the program, he was assessed as an offender presenting a high risk to reoffend who would also need to take high intensity sex offender programming.

[35] In the moderate intensity program, participants identify the risk factors linked to their sexual offending, thinking that supports sexual offending and reflect on how to build appropriate intimate relationships. As with the Primer Program, there is a focus on Inuit values and social history. Again, it is a group program consisting of 62 sessions in which an Inuit Elder is involved.

[36] Mr Avadluk attended the sessions on time, engaged in all Inuit cultural activities, completed his written assignments, treated others respectfully and demonstrated a positive attitude towards change. The report indicates that Mr Avadluk developed some insight into the factors that led to his previous offending. However, the report is critical of Mr Avadluk's understanding of the harm caused to his victims:

Throughout the course of this program, Mr Avadluk's understanding of the impact his criminal behaviour has had on himself or others did not improve ... This is due to Mr Avadluk's tendency to blame others for his violent actions.

...

Mr Avadluk seemed to recognize some of the harm that he caused to himself; he indicated that he was filled with shame. He did not share very much in terms of his views on the harm he caused to his victim, he was not able to or may have not chosen to describe or detail how his victim may have been impacted except to state that the victim of his index offence may have developed trust issues with men (p 17).

[37] During the program, Mr Avadluk was required to identify personal targets to manage the risk factors associated with his past offending. Those risk factors were (1) harmful and/or ineffective relationships with intimate partners, (2) harmful or ineffective relationships with associates, friends, family and others, (3) unstructured leisure time and engaging in harmful activities, (4) thoughts, attitudes and belief that justify and support substance abuse, (5) inability to recognize and/or address problems, and (6) sexual preoccupations/sex drive, particularly engaging in multiple casual sexual relationships with women.

[38] The report indicates that, over the course of the program, Mr Avadluk's commitment to personal targets to address risk factors 2 to 6 improved slightly from "needs a lot of improvement" to "needs some improvement". With respect to the personal targets to address harmful relationships with intimate partners, the report states that Mr Avadluk made no progress and needs "lots of improvement" (p. 18).

[39] The report contains the following overall summary of Mr Avadluk's ability to manage risk factors associated with his offending:

Based on the analysis of each of Mr Avadluk's Personal Targets, it is determined that his current overall ability and commitment to use the skills required to achieve

his Personal Targets and thereby manage his risk factors improved slightly and is currently rated as ‘needs some improvement’ (p 24).

[40] Despite Mr Avadluk’s slight progress during the program, the facilitator who authored the report was willing to recommend an “override” of the requirement for Mr Avadluk to attend the high intensity sex offender programming. However, that issue never arose because Mr Avadluk was transferred from Beaver Creek Institution to Bowden Institution.

[41] The new evidence also contains a report dated February 2022 approving Mr Avadluk’s request to be transferred from Beaver Creek Institution to medium security at Bowden Institution. The point of the transfer was to enable him to be closer to his family in Edmonton and Inuit cultural activities. For the purpose of the transfer request, Mr Avadluk was assessed as follows.

A HIGH needs offender; his Static and Dynamic Factor ratings are HIGH with three identified contributing factors, Substance Abuse, Personal/Emotional, and Attitude having ratings of HIGH need. Associates, Education/Employment, Marital/Family, and Community Functioning require a MODERATE need for improvement. He is assessed with a LOW level of accountability, MEDIUM level of motivation, and LOW Reintegration Potential

(p 213)

[42] The report states that Mr Avadluk has *some insight* into the risk factors associated with his offending but that, at the time of writing, he had only “verbalized” his willingness to address them and had not demonstrated any actual progress. However, this assessment did not consider Mr Avadluk’s completion of the Integrated Moderate Intensity Sex Offender Program.

[43] The lukewarm assessment of Mr Avadluk’s progress was primarily relevant to his “public safety rating” and did not prevent the transfer being approved. The report states that Mr Avadluk has met the expectations of his case management team, has “demonstrated positive gains towards participation in his Correctional Plan” and that he received no disciplinary charges while he was in Beaver Creek Institution.

[44] The new evidence also shows that Mr Avadluk regularly attended Alcoholics Anonymous meetings at Beaver Creer Institution for nearly four years between June 2019 and March 2023. He was appointed chairman of the group for much of that time, which made him responsible for setting up a classroom for sessions, collecting group dues and leading meetings.

[45] Finally, there is a report about Mr Avadluk’s participation in a wood carving group since his transfer to Bowden Institution. The author observes that wood carving has particular cultural significance for Inuit men and that Mr Avadluk has progressed “quite well,” relearning carving skills, producing several carvings and interacting well with other carving group members. It also indicates that Mr Avadluk received counselling services from an Inuit Elder and was involved in some way in Inuit cultural activities.

A. Analysis

[46] While the new evidence indicates some progress, it does not address Mr Avadluk's risk of reoffending. It does not help this Court to answer the required question under s 753(4.1) of the *Criminal Code*: is there a reasonable expectation that the sentence combination proposed by Mr Avadluk will adequately protect the public?

[47] Mr Avadluk's memorandum of argument implicitly concedes that the new evidence is insufficient for this Court to substitute the proposed sentence. At paragraph 2 of the memorandum, he says that if the Court remits the sentencing to the trial court, "additional evidence, including up-to-date assessments, would likely be required". Logically, if "up-to-date assessments" are needed for the trial court to impose a fresh sentence, this Court also needs them to impose a fresh sentence. The up-to-date assessments would address, among other things, whether the programming Mr Avadluk has undertaken or will undertake before his proposed release in August 2027 reduces his risk of reoffending to a level that can be adequately managed in the community with appropriate conditions.

[48] The new evidence does not address this topic and contains other significant gaps. Crucially, there is no updated expert evidence about Mr Avadluk's current mental health diagnoses, personality issues or sexual propensities. There is no updated assessment, based on actuarial tools, of Mr Avadluk's current risk of reoffending and his future risk at the proposed release date in August 2027.

B. Disposition

[49] To substitute a 10-year custodial sentence followed by a 10 year long-term supervision order, the Court must be satisfied that there is a reasonable expectation that the sentence would adequately protect the public from future violent offending.

[50] The record, supplemented by the new evidence, does not enable the Court to make that determination. A fuller record, including up-to-date expert psychological evidence and risk assessments, is required. The appropriate remedy is to return the sentencing portion of the dangerous offender proceeding to the trial court for a fresh decision.

[51] Mr Avadluk raises some doubts about whether an appeal court has jurisdiction to remit only the sentence to the trial court and not the dangerous offender designation. He relies on some *obiter* remarks in *R v Ross*, 2022 SKCA 149 at para 138 and *R v Skookum*, 2018 YKCA 2 at para 66 about the language in s 759(3)(a)(ii) of the *Criminal Code*. He suggests, tentatively, that if this Court remits the sentence to the trial court, it should remit the dangerous offender designation too. This is a rather remarkable request given that the dangerous offender designation was not appealed.

[52] There is no difficulty in remitting the sentence to the trial court, but not the dangerous offender designation. The language of s 759(3)(a)(ii) imposes no restrictions on the matters that can be remitted for rehearing. It says that the court of appeal "(a) may allow the appeal and ... (ii) order a new hearing, with any directions that the court considers appropriate". Recently, the Alberta Court of Appeal ordered a rehearing on sentence only in *R v Runions*, 2023 ABCA 29. We do the same here.

[53] The appeal is granted. The question of sentence is remitted to the trial court for a determination. For greater clarity, the original sentencing judge is not seized with this matter. Pending the new sentencing hearing, we direct that the appellant will remain in custody at Bowden Institution to facilitate his access to rehabilitative programming.

Appeal heard on June 13, 2023

Memorandum filed at Yellowknife, NWT
this 24th day of January, 2024

Khullar C.J.A.

Authorized to sign: Sharkey J.A.

Feehan J.A.

Appearances:

B. Green
for the Respondent

R. Clements
for the Appellant

IN THE COURT OF APPEAL
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MEMORANDUM OF JUDGMENT
