R. v Avadluk 2009 NWTSC 28

S-1-CR2007000107

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

NOEL JUNIOR AVADLUK

Transcript of the Reasons for Sentence by The Honourable Justice L. A. Charbonneau, at Hay River in the Northwest Territories, on May 5th A.D., 2009.

APPEARANCES:

Mr. M. Himmelman: Counsel for the Crown

Mr. T. Boyd: Counsel for the Accused

Charge under s. 271 Criminal Code of Canada

An Order has been made banning publication of the Complainant/Witness Pursuant to Section 486.4 of the Criminal Code of Canada

1 THE COURT: Good afternoon, everyone.
2 Before I begin, I just want to remind
3 everyone that yesterday I confirmed that there
4 was a publication ban in this matter which means
5 that any information that could disclose the
6 identity of the complainant is not to be
7 published or broadcast in any way.
8 Noel Junior Avadluk has pleaded guilty to a
9 charge of sexual assault, and today it is my task
10 to impose a fit sentence for that crime. There
11 are many things that must be taken into
12 consideration when sentencing a person. I must
13 say that I found the submissions that I heard
14 yesterday from both counsel very thorough and
15 very well presented. It was clear to me that
16 both of them have put a great deal of thought and
17 effort into this case and I did find their
18 submissions very helpful in arriving at what is
19 not an easy decision.
20 Mr. Avadluk also spoke yesterday morning and
21 he spoke for quite some time about some of the
22 struggles that he has faced in his life, some of
23 the things that he has come to realize and
24 understand about himself over the past months,
25 and how he wants to move forward from here. I
26 listened to him carefully and I have also given a
27 lot of thought to the things that he has told the

1 Court.

2 The circumstances of the offence committed
3 by Mr. Avadluk are set out in an agreed statement
4 of facts that was made an exhibit. It was marked
5 as Exhibit 1. Those facts were read into the
6 record when Mr. Avadluk entered his guilty plea
7 in Yellowknife on May 1st, and they were read
8 again into the record yesterday. I am not going
9 to read the whole document in its entirety but to
10 put my sentencing decision in context, I must
11 refer, to some extent, to what happened that day
12 because it is why we are all here.

13 In June of 2007 when this offence was
14 committed, the victim of this crime was 63 years
15 old. She came upon Mr. Avadluk when she was on
16 her way to a radio studio situated on the third
17 floor of the highrise building here in Hay River.
18 She went up the stairs, and Mr. Avadluk followed
19 her. She let him go by. He asked her what floor
20 she was going to and she told him. He said that
21 he was going to another floor. Before this day,
22 she did not know who he was.

23 When she arrived at the door of the unit
24 where she was going and unlocked the door, she
25 realized that Mr. Avadluk was right beside her.
26 She went into the unit and tried to close the
27 door but he prevented her from doing so. She did

1 everything that she could to try to keep him out.
2 But it did not work and he was eventually able to
3 force his way in. She screamed for help but he
4 put his hand over her mouth and pushed her to the
5 floor. She tried to struggle but eventually she
6 stopped because she was having difficulty
7 breathing. They then got up off the floor. He
8 asked her for some money and she gave him what
9 she had which was just small change. She asked
10 him what he wanted. He pushed her back to the
11 floor and then started sexually assaulting her by
12 putting his hands down her pants. He put his
13 fingers in her vagina and she thinks he stayed
14 that way for half an hour. He then got her to go
15 to the main area of the unit and held her with
16 her back over a chair. She said that hurt her
17 back so he put her back onto the floor. Her
18 estimate is that she was kept on the floor for
19 over two hours, and that he was touching her for
20 most of this time. At times she was able to get
21 his finger out of her but then he put it back in.
22 She was afraid he would have forced intercourse
23 with her. She was afraid that he would kill her.
24 At times he pulled her pants down and she pulled
25 them back up. At times he would lift her blouse
26 and touch her breasts and she would pull it back
27 down. She tried to resist at one point but he

1 pulled her hair so she stopped fighting.

2 Mr. Avadluk eventually told her that he was
3 going to leave. He sat down and she sat with
4 him. They talked. They later walked down the
5 hallway and he got on his knees and asked her to
6 forgive him. After he left, she returned to the
7 studio and called her husband who immediately
8 called the police.

9 It was about 1 o'clock in the afternoon when
10 she first arrived at the highrise that day. It
11 was about a quarter to four when she returned to
12 the studio and called her husband. So this
13 ordeal lasted well over two hours, almost three
14 hours.

15 The victim was treated at the outpatient
16 services at the local hospital. She had bruising
17 to various parts of her body. And I have no
18 doubt that those two to three hours of her life
19 left an impact less visible than bruises but far
20 more significant because this had to have been a
21 very very traumatic event for her.

22 Mr. Avadluk was on process when this
23 happened. On April 11th, he had been released on
24 an undertaking for various charges and he has
25 been in custody since his arrest the day
26 following this event. I was told that a few
27 months later he was sentenced on unrelated

1 matters and that the time that he spent on remand
2 from the point of arrest to the point of that
3 sentencing was taken into account at that
4 sentencing. So for this charge he has been in
5 pre-trial custody for 18 months.
6 Sentencing is not an exact science. Quite
7 the opposite. It requires weighing a lot of
8 different factors and it requires the exercise of
9 a considerable amount of discretion. It is a
10 complicated exercise, one that is often said to
11 be among the most difficult things that a Judge
12 has to do. And this case is no exception.
13 In any sentencing, the Court has to take
14 into account sentencing principles that are set
15 out in the Criminal Code. Those principles
16 provide the framework for every sentencing
17 decision that is ever made. I am not going to
18 read all of the sections in the Criminal Code but
19 I will read some excerpts because I think it is
20 important, again to put my decision in context.
21 One of the very important sections in the
22 Criminal Code on sentencing is Section 718 and it
23 reads,
24 The fundamental purpose of
25 sentencing is to contribute, along
26 with crime prevention initiatives,
27 to respect for the law and the

1 maintenance of a just, peaceful and
2 safe society by imposing just
3 sanctions that have one or more of
4 the following objectives:
5 (a) to denounce unlawful conduct;
6 (b) to deter the offender and other persons
7 from committing offences;
8 (c) to separate offenders from society where
9 necessary;
10 (d) to assist in rehabilitating offenders;
11 (e) to provide reparations for harm done to
12 victims or to the community; and
13 (f) to promote a sense of responsibility in
14 offenders, and acknowledgment of the
15 harm done to victims and to the community.
16 Another fundamental principle referred to in
17 Section 718.1 is that a sentence must be
18 proportionate to the gravity of the offence and
19 the degree of responsibility of the offender.
20 There are other sentencing principles and
21 some of the most relevant ones in this case, I
22 find, and those are principles that are listed in
23 Section 718.2, and I will not read them all, but
24 the most relevant ones, in my view, in this case
25 are that a sentence should be similar to
26 sentences imposed on similar offenders for
27 similar offences committed in similar

1 circumstances, and that all available sanctions
2 other than imprisonment that are reasonable in
3 the circumstances should be considered for all
4 offenders with particular attention to the
5 circumstances of aboriginal offenders.
6 I have heard a lot yesterday about
7 Mr. Avadluk's personal circumstances.
8 He is 36 years old, and his lawyer explained
9 the circumstances of his upbringing. I have no
10 doubt that those circumstances played an
11 important part in the many difficulties that he
12 has had with the law and those circumstances,
13 sadly, are similar to those that many aboriginal
14 people from the north have faced.
15 I was told that Mr. Avadluk's father was
16 largely absent from the home because he was a
17 heavy equipment operator and worked at various
18 job sites. The family was primarily in the care
19 of Mr. Avadluk's mother who, unfortunately,
20 abused alcohol significantly, which made life in
21 the household very chaotic.
22 Mr. Avadluk first came into contact with the
23 law when he was 12 years old for a relatively
24 minor offence for which he received a relatively
25 minor sentence. But he was then apprehended by
26 Social Services and, as a result of that
27 incident, placed in foster care far from his home

1 community of Kugluktuk. He was placed in the
2 care of a man and that man sexually abused him.
3 When Mr. Avadluk's lawyer talked about this
4 event during his submissions, I was able to
5 observe, and this is very understandable, that
6 this is a subject that brings out a lot of
7 emotion for Mr. Avadluk. Those emotions were
8 also apparent when he himself talked about that
9 aspect of his life.
10 Mr. Avadluk disclosed this abuse and was
11 placed in the care of other people who,
12 fortunately, appeared to have taken good care of
13 him.
14 When he was 15 years old, he returned to
15 Kugluktuk. By then he had lost some of his
16 Inuinnaqtun language and that made his
17 reintegration into that community more difficult.
18 A short time after, his mother decided to move to
19 Cambridge Bay and Mr. Avadluk moved there with
20 her. He was not treated well by his mother's
21 then spouse. The year that he spent in Cambridge
22 Bay was chaotic and described as "a year of
23 hell".
24 He eventually called his father so that
25 arrangements could be made for him to return to
26 Kugluktuk. At that point he was 16 years old. I
27 was told that an older sister was then more or

1 less in charge of the family at that point but
2 she abused alcohol too and things remained
3 chaotic.
4 So life continued to be difficult for
5 Mr. Avadluk and by then he himself, based on what
6 I heard, had started consuming and abusing
7 alcohol.
8 When Mr. Avadluk turned 18, he moved to
9 Edmonton. One of his sisters was living there,
10 having moved there many years before because she
11 needed special care because of a serious hearing
12 impairment that she had. By all accounts she has
13 done very well and now lives in Yellowknife.
14 Counsel described her as Mr. Avadluk's "anchor".
15 He hopes to be able to live with her after his
16 release, at least for a short time until he can
17 find a place of his own and get his life going
18 again.
19 Mr. Avadluk ran into some trouble when he
20 was in Edmonton and that is apparent from his
21 criminal record which includes a number of
22 convictions from that community. And again, this
23 appears to have occurred in circumstances where
24 he was abusing alcohol and other substances.
25 Mr. Avadluk eventually returned to the NWT
26 and lived in Yellowknife. He was able to secure
27 employment. He has worked at various jobs and I

1 am told that he is a skilled carver. But, as had
2 been the case in his years in Edmonton and before
3 that in Kugluktuk, his abuse of alcohol and, as
4 his counsel put it, his lack of certain basic
5 life skills, continued to lead him into all kinds
6 of trouble with the law.
7 Indeed, since he was first before the Court
8 in 1985, Mr. Avadluk has accumulated a
9 significant criminal record which includes over
10 40 convictions. Many are for property crimes,
11 many others are for breaches of court orders, and
12 some are for crimes of violence.
13 In 1995 there are convictions for assault
14 with weapon and assault causing bodily harm, each
15 brought about jail terms of five months. In 1996
16 there is a conviction for assault that led to a
17 jail term of four months, and another that led to
18 a jail term of six months. In 1999 there is
19 another conviction for assault, which appears to
20 have been of a spousal nature, for which he
21 received a sentence of eight months in jail. In
22 the year 2000, there is a conviction for assault
23 causing bodily harm and for that offence he
24 received a jail term of one year. And in 2007,
25 in his last series of convictions, one of the
26 charges was a charge for uttering death threats.
27 And as I have already said, for those series of

1 offences, the time that Mr. Avadluk has spent on
2 remand was taken into account on sentencing. He
3 essentially got time served.
4 While in custody Mr. Avadluk has been able
5 to access certain programs that are offered at
6 the North Slave Correctional Centre including AA
7 and a program called the Healing Drum which is
8 available both to inmates in the facility and to
9 people who are at large in the community.
10 Having talked about the circumstances of
11 this offence and the sentencing principles that
12 apply and Mr. Avadluk's circumstances, I now turn
13 to the analysis of what is a fit sentence for
14 this crime.
15 The Crown argues that a fit sentence is
16 three years and that from this I should deduct
17 whatever credit I find should be given to
18 Mr. Avadluk for the time that he has spent on
19 remand. Defence counsel argues that in all the
20 circumstances, including the time spent on
21 remand, the time that Mr. Avadluk has already
22 spent in custody should be sufficient and that my
23 sentence today should simply be one of time
24 served.
25 I spoke at length earlier about the personal
26 circumstances of Mr. Avadluk as they have been
27 explained to me yesterday. Because one of the

1 sentencing principles that I have to apply,
2 because Mr. Avadluk is an aboriginal man, is the
3 principle referred to at Section 718.2(e) of the
4 Criminal Code and I have read it before, I will
5 simply refer to it again.
6 All available sanctions other than
7 imprisonment that are reasonable in
8 the circumstances should be
9 considered for all offenders, with
10 particular attention to the
11 circumstances of aboriginal
12 offenders.
13 That last segment, the "particular attention
14 that must be paid to the circumstances of
15 aboriginal offenders", has been interpreted by
16 many courts, including the Supreme Court of
17 Canada, on a number of occasions. It has been
18 interpreted to mean that when sentencing an
19 aboriginal person, Courts must approach the case
20 differently than how they might approach it if
21 they were sentencing a non-aboriginal offender
22 and; specifically, the Court should take into
23 account the systemic and background factors that
24 have played a part in bringing the person before
25 the Courts as well as the type of sentencing
26 processes or sanctions that might be most
27 appropriate to an aboriginal offender because of

1 his or her particular heritage.

2 In this case the first aspect is the most

3 relevant.

4 The circumstances that Mr. Avadluk faced as

5 he was growing up no doubt contributed to his

6 coming into conflict with the law starting from a

7 very young age and, tragically, that first time

8 that he came into conflict with the law, to the

9 extent that it may have contributed to his

10 apprehension by Social Services and placement in

11 foster care, triggered other events that were

12 devastating to him. The abuse that he suffered

13 at the hands of his first foster parent obviously

14 had very negative impacts on him and we know that

15 that is often the case. Those who are abused

16 unfortunately sometimes repeat that pattern and

17 become abusers. It is also very common to see

18 that children who grow up in households where

19 alcohol is abused end up abusing alcohol

20 themselves. Dysfunction leads to dysfunction,

21 and the cycle continues. Mr. Avadluk's example

22 is an all too familiar example.

23 I recognize that Mr. Avadluk grew up in an

24 environment as a young aboriginal man where he

25 faced systemic difficulties, difficulties and

26 circumstances that are unfortunately shared by

27 many aboriginal people. I also recognize that

1 these things contributed to his difficulties
2 later in life including his steady pattern of
3 conflict with the law. The question is what
4 impact can this have on the sentence that I
5 impose today.
6 There is no suggestion that any specific
7 type of sanction other than imprisonment would be
8 better suited for Mr. Avadluk because of his
9 aboriginal heritage. But even if there were, the
10 crime that he has committed is so serious that I
11 don't think there is a reasonable alternative to
12 imprisonment in a case like this one.
13 As for whether his circumstances should
14 cause the Court to reduce the jail term that
15 would otherwise be imposed, the Supreme Court of
16 Canada has said, and Mr. Avadluk's lawyer
17 acknowledged this, that the more serious the
18 offence the less likely it is that the sentence
19 imposed on an aboriginal offender will be
20 different than the sentence imposed for the same
21 crime for a non-aboriginal offender.
22 So Mr. Avadluk's circumstances and personal
23 history are important to note, they must be taken
24 into account and I have taken them into account.
25 They go some distance in explaining some of the
26 difficulties that he has in his life. At the
27 same time, those circumstances do not eliminate

1 the need for other sentencing principles to also
2 be taken into account in the face of such a
3 serious crime.
4 Sexual assault is always a serious crime but
5 it can include a wide range of behaviours. This
6 sexual assault that Mr. Avadluk committed in June
7 of 2007 was a very serious one. It did not
8 involve sexual intercourse but that does not mean
9 that it was not serious. There was prolonged
10 digital penetration which is extremely intrusive.
11 It occurred in circumstances that could only be
12 completely terrifying for the victim. She was
13 afraid this would progress to an even more
14 intrusive assault. She was afraid she might get
15 killed. Mr. Avadluk said things to her during
16 the assault suggesting that she was letting it
17 happen, letting him do it, implying even that she
18 might be finding it enjoyable. This was
19 degrading behaviour and behaviour that showed
20 complete and contemptuous disregard for this
21 woman's personal and sexual integrity and
22 dignity.
23 Apart from the apparent seriousness of the
24 assault, there are significant aggravating
25 factors stemming from the facts of this offence.
26 The first is that Mr. Avadluk's actions
27 appear to have been somewhat planned. This may

1 have been a crime of opportunity in the sense
2 that he ran into her at the building and may not
3 have known in advance that she would be there,
4 but I can only conclude on the facts before me
5 that there was an element of short-term planning.
6 He asked her which floor she was going to. He
7 appears to have lied about where he was going.
8 And even if he was originally going to the fourth
9 floor, at some point he obviously made the
10 decision to follow her to the third floor, and I
11 infer that this was with the intention of taking
12 advantage of the situation.
13 It has been said on his behalf that he was
14 under the influence of drugs and alcohol when
15 this happened. And that may well be. But the
16 facts suggest that whatever he may have been
17 under the influence of, once he decided what he
18 was doing, he carried out those intentions with
19 some deliberateness and some persistence. The
20 fact that he made the comment that the victim
21 would probably call the police and the fact that
22 he later asked for her forgiveness also suggests
23 to me that whatever state he was in, he was aware
24 that he was doing something that was a serious
25 crime and something that was very wrong.
26 The second aggravating factor is the element
27 of confinement in this. As I have already

1 referred to, this incident lasted several hours
2 and during those hours the victim was prevented
3 from leaving the unit and her movements were
4 restrained. Mr. Avadluk asserted total control
5 over her, getting her to the floor, then against
6 a chair, then back to the floor. He used force
7 to control her and confine her. She was at his
8 mercy for those few hours and I am sure that she
9 knew it.
10 The third aggravating factor is that the
11 force used was not simply incidental to the
12 sexual act. She tried screaming, she tried
13 struggling, she tried fighting back. He put his
14 hand over her mouth, he forced her to the floor,
15 she had to stop struggling at points because she
16 was having trouble breathing and at one point her
17 hair was pulled. She was bruised in various
18 parts of her body and in her struggle, she
19 scratched him to the point of drawing blood. So
20 I find from all of this that she struggled hard
21 so there was definitely more force used here than
22 what was inherent in an unwanted sexual touching.
23 There are also other aggravating factors
24 stemming from the circumstances of this case.
25 The fact that Mr. Avadluk was already facing
26 other charges when this occurred and that he was
27 bound by an undertaking to keep the peace and be

1 of good behaviour. And finally, of course,
2 Mr. Avadluk's criminal record is an aggravating
3 factor. There are no prior convictions for
4 sexual offences, and I take it that into account,
5 but a fair number of offences on the record are
6 for crimes of violence, as I have referred to
7 earlier, and some brought on jail terms of some
8 significance. I remind myself it is very
9 important not to overemphasize the criminal
10 record because Mr. Avadluk should not be punished
11 over and over again for the crimes that he has
12 already been sentenced for. But from the
13 perspective of determining what is required for
14 the protection of the public, the record cannot
15 be disregarded.
16 There are also mitigating factors in this
17 case. The most significant one from the point of
18 view of things Mr. Avadluk had control over is
19 that he pleaded guilty. That plea is anything
20 but an early guilty plea. It came at the 11th
21 hour on Friday, May 1st, the last working day
22 before the trial was scheduled to commence on
23 Monday, May 4th. The victim did have to testify
24 at a preliminary hearing and the matter was set
25 for trial once before in late October/early
26 November of 2008 and was adjourned at the last
27 minute because there was a change of defence

1 counsel.

2 Despite the fact that the guilty plea came

3 so late in the proceedings, Crown counsel takes

4 the position that it should still, nonetheless,

5 have a significant mitigating effect. He said

6 that the Crown's case was strong in that there

7 was forensic evidence (DNA) that would have

8 assisted the Crown in proving its case, more

9 specifically, identity. But he also said that

10 there were frailties with some aspects of the

11 case and recognized that there is always

12 uncertainty in a trial and that reliance on

13 highly technical evidence comes with its

14 challenges and potential problems. Crown counsel

15 said that in the circumstances of this case,

16 there was great value in the certainty of outcome

17 that was brought about by his guilty plea.

18 Counsel are aware of all sorts of things

19 that the Court may not know. They obviously know

20 their case. So I accept what the prosecutor, who

21 is an experienced counsel, has said about the

22 significant value of the guilty plea in this case

23 and the significant mitigating impact it should

24 have even though it came late in the proceedings.

25 Apart from all of that, I have taken into

26 account something that is always true

27 irrespective of the strengths or frailties of the

1 Crown's case.

2 A guilty plea spares the victim from having
3 to testify and relive the events in question. I
4 do not doubt for a second, having seen many
5 witnesses testify in these types of cases, that
6 it was a great relief and much better for this
7 particular person not to have to testify about
8 the minute details of what happened to her during
9 those terrifying hours.

10 In addition, the guilty plea has saved
11 significant costs. This trial would have taken
12 at least a week, possibly more. I am told
13 witnesses would have had to have been brought
14 here from all corners of Canada - from Nova
15 Scotia, from British Columbia, from Manitoba,
16 some from elsewhere in to this jurisdiction, like
17 Inuvik, which is in the Northwest Territories but
18 is far away and a very costly place to travel to
19 and from. So there would have been significant
20 costs associated with this trial and all of this
21 was avoided.

22 Finally, and this is very important in my
23 view, a guilty plea, even one at the 11th hour,
24 represents an acknowledgment of responsibility on
25 the part of the offender.

26 Mr. Avadluk, when he spoke, alluded to this
27 a little bit. He talked about the importance of

1 not hiding anymore, and of the truth, and of not
2 lying to himself anymore. Sometimes it takes
3 people a long time to be able to admit their
4 wrongdoings, even to themselves. So I think this
5 guilty plea is important for that reason because
6 of what it says about where Mr. Avadluk is at.
7 The next factor that mitigates the sentence
8 is the time that Mr. Avadluk has already spent in
9 pre-trial custody - a period of some 18 months.
10 How much credit he should receive for that is the
11 matter for the Court's discretion. There is no
12 fixed or rigid formula and that is what the
13 Supreme Court of Canada said in the case of
14 R. v. Wust which was referred to by defence
15 counsel.
16 A number of factors have an impact on how
17 this discretion should be exercised. The
18 rationale for giving credit for remand time on a
19 ratio higher than one-for-one is that remand time
20 is sometimes considered "harder time" because of
21 the detention conditions.
22 In some jurisdictions prisoners, who are in
23 pre-trial custody, are held in separate centres
24 where little or no programs are offered. Some of
25 those centres are overcrowded and the detention
26 conditions are much harsher than the detention
27 conditions of those who are serving prisoners.

1 And sometimes even when remand prisoners are
2 housed in the same facilities as serving
3 prisoners, they are held in a separate part of
4 the facility where access to certain things
5 available to serving prisoners is limited.
6 There was no evidence called about the
7 conditions at the North Slave Correctional Centre
8 where Mr. Avadluk was held on remand but both
9 counsel provided the Court with information
10 during their submissions, and neither counsel
11 contested what the other one has said. There is
12 general agreement that remand prisoners at this
13 particular facility are able to apply for
14 programs available to regular inmates except
15 those that involve leaving the facility.
16 I accept that serving prisoners may have
17 priority of access to some of the programs but
18 there definitely are some programs available to
19 prisoners on remand. The best evidence of that
20 is that Mr. Avadluk himself (this is to his
21 credit) has availed himself of some of the
22 programs that were available, including AA and
23 the Healing Drum program that I have already
24 talked about.
25 There is no evidence or suggestion of
26 overcrowding of that particular facility either.
27 Mr. Avadluk had to share a room with various

1 people while on remand, one person at a time,
2 that is, but different people throughout the time
3 that he spent on remand, but that cannot be
4 characterized as "overcrowding" or harsh
5 detention conditions.
6 I also take into account the circumstances
7 that led to Mr. Avadluk being in remand. He has
8 a significant criminal record which includes a
9 large number of convictions for failure to abide
10 by Court orders. He was at large on process when
11 this offence was committed. Although he was
12 never released on this particular charge, he had
13 been released on other charges and had failed to
14 comply with his promises to the Court. That is
15 part of the reason why he remained detained all
16 of this time awaiting trial.
17 The last factor to consider is the fact that
18 remand time corresponds to a longer period of
19 time imposed as part of a sentence because people
20 do not earn remission for the time they spend on
21 remand. The reasoning, basically, is that if a
22 person were to be sentenced to 18 months in jail,
23 they could be expected to earn remission and not
24 serve the full 18 months. So if a person spends
25 18 months on remand, that amounts to the time
26 they would probably spend in jail if they
27 received a two year sentence taking into account

1 the remission that they would earn.
2 It is important to know that Judges are not
3 permitted to take remission into account when
4 they impose a sentence in the sense that it is
5 not permitted to make a sentence longer knowing
6 that part of it will not be served. So I am sure
7 at times it may be difficult for some members of
8 the public to understand why Courts are not
9 allowed to take remission into account when they
10 impose a sentence but are expected to take it
11 into account when they decide how much credit to
12 give to time spent on remand. But that is what
13 Courts have done everywhere in the country on a
14 regular basis and the Supreme Court of Canada has
15 confirmed in clear terms it is an appropriate
16 factor to consider, and so I have considered it.
17 Based on all of this, I am not satisfied
18 that Mr. Avadluk should receive credit for the
19 time he has spent on remand on a ratio as high as
20 two-for-one. Many of the factors that are
21 ordinarily present to justify this, or an even
22 higher ratio, are simply not present here. But
23 recognizing that remission is not earned on
24 remand time, I do accept that he should be given
25 credit on something more than a one-for-one
26 ratio.
27 I want to address the question of delay

1 briefly since both counsel have referred to it.
2 In my view it is simply a neutral factor in this
3 case.
4 The preliminary hearing was adjourned at the
5 request of the Crown because of an unrelated
6 tragic event that took place in this community
7 and impacted on the police's resources and
8 impacted personally several officers involved in
9 this case. The delay that came from this was two
10 months because the preliminary hearing had been
11 scheduled for October 12th and was rescheduled to
12 proceed, and did proceed, on December 13th.
13 Another part of the delay arose as a result
14 of the breakdown that occurred in the
15 relationship between Mr. Avadluk and his former
16 counsel. This breakdown occurred very shortly
17 before the date that had been originally set for
18 this trial in late October 2008. After
19 Mr. Avadluk got new counsel, the trial was
20 rescheduled for this week so the delay arising
21 from a change in counsel was about five months.
22 But again, just like with the adjournment of the
23 preliminary hearing, these things do happen from
24 time to time, and I do not think that the delay,
25 any of the delay that arose in this case, is a
26 significant factor except of course from the
27 point of view that Mr. Avadluk has spent this

1 time on remand and that will be taken into
2 account as I have already explained.
3 The Crown has brought a number of cases to
4 my attention, and I have reviewed them. When it
5 comes to sentencing, case law is of assistance in
6 setting out principles and sometimes ranges of
7 sentences, but there is always distinctions on
8 the facts and no two cases are ever the same, and
9 this is true for the cases that were filed in
10 this case.
11 All five were convictions that took place
12 after trial. There are distinctions on the facts
13 of each of these cases. Some involve full
14 intercourse, others not. But generally these
15 cases do support the proposition that a jail term
16 of some significance is required to address the
17 principles and purposes of sentencing in cases
18 like this one where there is serious interference
19 with the victim's sexual integrity, some force
20 used, and an element of confinement.
21 Sexual assault is a crime that is
22 unfortunately very prevalent in our jurisdiction.
23 It is a serious problem in our communities and
24 for that reason our Courts have stressed over and
25 over again the importance of denunciation and
26 deterrence as the paramount sentencing principles
27 in cases like this. Many of the cases that come

1 before the Courts involve offenders who know
2 their victims. Cases like this one, where the
3 offender preys on someone unknown to them, are
4 more rare but either way there is a strong need
5 to denounce and deter this type of conduct.
6 While rehabilitation is also a factor, in
7 this case it cannot take precedence over other
8 factors nor can the fact that Mr. Avadluk is an
9 aboriginal offender reduce the sentence that
10 should be imposed for this serious crime.
11 Even giving Mr. Avadluk the maximum credit
12 possible for his guilty plea, a sentence in the
13 range of three years is, in my view, at the low
14 end of what can be imposed in the circumstances.
15 This is because of the persistence and prolonged
16 nature of the sexual assault, its level of
17 intrusiveness, the element of confinement, and
18 also taking into account that Mr. Avadluk has
19 been before the Courts consistently over the last
20 last two decades and on a number of times for
21 crimes of violence. But because I will give Mr.
22 Avadluk credit for the time that he has spent in
23 custody, the sentence that I impose today will be
24 of less than two years, and this raises a
25 question of whether I should also place him on
26 probation when he is released.
27 I had given this issue a lot of thought. At

1 first blush, I would have been reluctant to do so
2 because of the many many breaches of convictions
3 on his criminal record. But I listened carefully
4 when Mr. Avadluk spoke yesterday. He said that
5 he has started to change his attitude and his
6 outlook on things, that he has taken some steps
7 to get help and deal with his issues, and he
8 wants to continue in that process. He wants his
9 life to change. He says that he does not want to
10 clash with people anymore, he is willing to
11 listen, and he wants to do the work he needs to
12 do to live a productive life.
13 I also consider that because of his
14 background, the struggles and some of the
15 systemic problems that he has faced, it is
16 appropriate to include a rehabilitative component
17 to his sentence despite his past record and
18 despite the fact that in the past these types of
19 court orders have not necessarily been complied
20 with very well.
21 So I am prepared to take a calculated risk
22 that this time will be the right one and that
23 Mr. Avadluk will take advantage of the
24 supervision and support he can get from a
25 probation officer once he is released from
26 custody. Because by then he will have been in
27 jail for longer than he had ever been before and

1 it would not be surprising if he needed some help
2 and some guidance to continue on the path that he
3 says he now wants to follow. So I am trusting
4 what Mr. Avadluk said yesterday to me, and he
5 said it directly to me, that his lawyer did not
6 need to be worried about him clashing with people
7 because he is tired of that, he is tired of the
8 negative attitude, he is tired of repeating the
9 same mistakes over and over again and he wants to
10 help himself.
11 Ultimately if Mr. Avadluk is successful in
12 rehabilitating himself, that will be the best way
13 to protect the public for good. He seems to have
14 realized that he needs to come to terms with what
15 has happened to him as a youth, and he can have
16 more positive outcomes in the rest of his life.
17 He seems to recognize that some of those issues
18 about his past are at the root of his being in
19 and out of court and in and out of jail over the
20 last 20 years, and he wants to change that.
21 It seems that some of the people that he has
22 been talking to about these things have helped
23 him to get some insight into his behaviour.
24 Hopefully he will persevere and hopefully he will
25 continue to have the support of some of those who
26 have tried to help him already.
27 He has a son, a daughter, and a grandchild

1 now. He is able to work at many jobs. He has
2 talents and he has skills. Substance abuse seems
3 to have been a major obstacle in his life and he
4 is the only one that can change that. No matter
5 what the Court does today, he is the one who
6 holds the keys to his future and who can decide
7 whether this will be one more conviction on his
8 record to be followed by more, or whether this is
9 going to truly be a turning point for him. And
10 it is this Court's sincere wish that he will
11 persevere and that in fact this will have been a
12 turning point.
13 Stand up please, Mr. Avadluk.
14 Mr. Avadluk, I have given you as much credit
15 as I can for your guilty plea. I listened
16 carefully to everything that was said but I feel
17 strongly that I must impose a further jail term
18 because of the seriousness of this particular
19 offence. So for the charge of sexual assault
20 there be a further term of imprisonment of 12
21 months. That term will be followed by a period
22 of probation for two years. I am not making this
23 probation order to punish you. I am making this
24 probation order because I hope that it will help
25 you do the things that you want to do when you
26 get out of jail.
27 The conditions of the probation order will

1 be very simple. You will have to keep the peace
2 and be of good behaviour, you know what that
3 means. You will have to appear before the Court
4 when you are required to do so. And you may
5 never be required to do so but if you are, you
6 have to appear. You will have to notify the
7 Court or the probation officer in advance of any
8 change of name or address, and promptly advise
9 your probation officer if you change employment
10 or occupation. You will take counselling as
11 directed by your probation officer. I am sure
12 that if you keep an open mind and if your
13 probation officer keeps an open mind, you will
14 not be directed to take counselling to harm you
15 or to cause you problems. You will be directed
16 to take counselling that is meant to assist you,
17 and I trust that you will be able to work with
18 someone who is trained to try to help people get
19 back on their feet after they have had lots of
20 problems. That's why that condition is there -
21 it is not to punish you, it is to help you. And
22 finally you will have absolutely no contact,
23 direct or indirect, with Jerrilyn Forsythe. I
24 don't need to explain that further to you, I am
25 sure that you understand why I am making that
26 condition as well as part of your order.
27 You can sit down.

1 There will also be ancillary orders as
2 requested by the Crown.
3 First, pursuant to Section 109 of the
4 Criminal Code, Mr. Avadluk will be prohibited
5 from possessing firearms or any of the other
6 items that are listed in Section 109 for a period
7 commencing today and expiring ten years from when
8 he is released from custody, and any such items
9 shall be surrendered forthwith.
10 There will also be a DNA order pursuant to
11 Section 487.051 of the Criminal Code.
12 And finally there will be an order pursuant
13 to Section 490.013 and that is an order that
14 Mr. Avadluk comply with the Sex Offender
15 Information Registration Act for a period of 20
16 years.
17 The written orders will be prepared setting
18 out all of this and they will be explained to
19 you, Mr. Avadluk.
20 Under the circumstances, I will not make an
21 order for a victim of crime surcharge. Given the
22 time that Mr. Avadluk has already spent in
23 custody and the fact that there will be further
24 custody, I am satisfied that there would be
25 hardship if such an order was made.
26 Do you require an order with respect to
27 exhibits, counsel?

1 MR. HIMMELMAN: That they be released, Your
2 Honour, into the custody of the RCMP pending the
3 appeal period.
4 THE COURT: And destroyed after the appeal
5 period?
6 MR. HIMMELMAN: Yes, with the exception of a
7 personal item belonging to the complainant, a
8 pair of shoes.
9 THE COURT: There will be an order for the
10 RCMP to retain the exhibits until the expiration
11 of the appeal period. After the expiration of
12 the appeal period, the exhibits are either to be
13 destroyed or returned to their lawful owners if
14 it is appropriate to do so. And I will leave
15 that with the authorities, Mr. Himmelman.
16 MR. HIMMELMAN: Thank you.
17 THE COURT: Anything further required by
18 the Crown?
19 MR. HIMMELMAN: Not from the Crown, Your
20 Honour, thank you.
21 THE COURT: Anything further from the
22 defence?
23 MR. BOYD: No, Your Honour, thank you.
24 THE COURT: I want to extend again my
25 thanks to both of you for your work and conduct
26 of this difficult case. Your submissions were
27 very helpful. Mr. Avadluk, good luck to you for

1 the future.
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3 Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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9 Lois Hewitt, CSR(A), RPR, CRR
Court Reporter

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