R. v. Kaotalok, 2013 NWTSC 36

S-1-CR2011000134

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

BOBBY KAOTALOK

Transcript of the Reasons for Sentence by The Honourable Justice L. A. Charbonneau, at Yellowknife in the Northwest Territories, on April 22nd A.D., 2013.

APPEARANCES:

Mr. K. Onsykevitch: Counsel for the Crown

Mr. T. Boyd: Counsel for the Accused

An order has been made banning publication of the identity of the Complainant/Witness pursuant to Section 486.4 of the Criminal Code of Canada or disclosing any information which could reveal the identity of the Complainant/Witness identified in the charge under Section 271 of the Criminal Code

Official Court Reporters

1 THE COURT: Before I give my reasons for
2 sentence on this matter, I just want to remind
3 everyone that there is in place an order that
4 is prohibiting the publication or broadcast of
5 any information that could identify either of
6 the complainants in this case.
7 Today it is my responsibility to impose a
8 sentence on Bobby Kaotalok for two charges of
9 aggravated sexual assault. Mr. Kaotalok
10 entered guilty pleas to those charges back on
11 February 4th, 2013, the date on which his
12 trial was scheduled to commence. Sentencing
13 was adjourned to allow time for the
14 preparation of a pre-sentence report. The
15 sentencing hearing proceeded a few weeks ago,
16 on March 27th. That day I heard about the
17 facts underlying the offences, and submissions
18 from Crown and defence as to what sentence
19 should be imposed for these crimes. I decided
20 to adjourn my decision to today's date in
21 order to have sufficient time to review the
22 exhibits and the case law that was filed at
23 the hearing and also to consider the very
24 thorough submissions that were presented by
25 both counsel, as well as the comments that
26 Mr. Kaotalok himself made to the Court when he
27 was given the chance to speak. I have now had

1 an opportunity to review all of the that, and
2 have come to a decision.
3 As is often said, sentencing is a
4 difficult task, one of the most difficult
5 tasks for Judges, because it requires
6 balancing a number of factors, often competing
7 ones.
8 Sentences are supposed to express
9 society's disapproval of criminal conduct and
10 reflect the harm that that conduct causes to
11 victims and to the community. They are
12 supposed to discourage the offenders and other
13 people from committing crimes. They are also
14 supposed to attempt to foster the
15 rehabilitation of the offender because if that
16 can be achieved, it is probably the best way
17 to protect the public. Not surprisingly, all
18 of these objectives often do not point in the
19 same direction as far as what the sentence
20 should be and that is what makes sentencing
21 such a difficult task.
22 Every time that the Court imposes a
23 sentence, it has to take into account the
24 circumstances of the person who is being
25 sentenced, the circumstances of the offence
26 that this person committed, and the principles
27 of sentencing that are set out in the Criminal

1 Code. Sentencing involves the exercise of
2 considerable discretion but in exercising that
3 discretion, courts have to follow the legal
4 framework that is provided for in the Criminal
5 Code and how that framework has been
6 interpreted by the higher courts.
7 I will start by summarizing the
8 circumstances of these offences. They are set
9 out in detail in an agreed statement of facts
10 that was filed as an exhibit at the sentencing
11 hearing, and they were read into the record at
12 that time. I am not going to read that
13 document again today in its entirety but I
14 will simply summarize its main points.
15 Mr. Kaotalok is believed to have been
16 infected by the Human Immunodeficency Virus
17 (HIV) when he was born. He was diagnosed when
18 he was seven years old and he has been under
19 medical treatment for this medical condition
20 essentially his whole life.
21 The agreed statement of facts explains in
22 some detail what HIV is, how it is treated,
23 and what factors affect the risk of its
24 transmission to another person. For the
25 purposes of my decision today, I will not go
26 over all of that technical medical information
27 in detail. It is part of the record and it is

1 available to anyone who may want to refer to
2 it. The things that I want to underscore for
3 my purposes today are the following:
4 The HIV virus is able to establish a
5 lifelong infection in immunologic cells. Once
6 infection is established, these cells are
7 slowly destroyed ultimately making the
8 infected person's immune system weaker and
9 weaker which leaves the person more
10 susceptible to infection. In an advanced
11 stage it is called Acquired Immune Deficiency
12 Syndrome, commonly referred to as AIDS.
13 Mr. Kaotalok's medical condition with
14 respect to his HIV infection varied over the
15 years. There were periods of time where he
16 adhered to his medical treatment and others
17 where he did would not. When he did not
18 adhere to it, his medical condition (the state
19 of advancement of his infection) got worse.
20 This in turn has an impact on the risk of
21 transmission of the disease to others.
22 During the period of time where these
23 offences were committed, Mr. Kaotalok's
24 condition was such that he presented a higher
25 risk for transmission of HIV.
26 The first complainant L.F. was born in May
27 1992. She was 17 when the offence occurred.

1 She had met Mr. Kaotalok in Yellowknife in
2 2009 and they had become friends. They
3 periodically spent time together, sometimes
4 alone and sometimes with other friends. On
5 one of those occasions, in the fall of 2009 or
6 early winter 2010, they were walking around
7 together in Yellowknife. They were both
8 sober. They decided to go to Mr. Kaotalok's
9 place of residence, which at the time was a
10 room at Bailey House. Bailey House is a
11 transition home for men. There, they had
12 sexual intercourse. Mr. Kaotalok used a
13 condom. L.F. did not know that he was HIV
14 positive and he did not tell her. Had she
15 known that, she would not have consented to
16 the sexual activity.
17 It is admitted that at the time that this
18 happened, there was a realistic possibility of
19 transmission of the HIV virus from him to her.
20 To date, however, she has not been diagnosed
21 with HIV.
22 The second complainant J.E. was born in
23 May 1991. She was 19 at the time she had
24 sexual contact with Mr. Kaotalok. She too had
25 met him in Yellowknife and had become friends
26 with him. They periodically spent time
27 together as part of a larger group of friends

1 and acquaintances.
2 One night she, Mr. Kaotalok, and other
3 friends, spent an evening drinking at a local
4 bar. J.E. and Mr. Kaotalok both were
5 intoxicated by the time they left the bar at
6 closing time. J.E. went to a friend's
7 apartment and continued drinking there. She
8 then went to a neighbouring apartment to see
9 Mr. Kaotalok. There, they continued drinking
10 together. The agreed facts say that she was
11 significantly intoxicated and experienced
12 blackouts that night. It is admitted that she
13 and Mr. Kaotalok had sexual intercourse at
14 some point that night. Neither of them
15 remembers if a condom was used.
16 I pause here to note that in law, a person
17 who is highly intoxicated may, in some
18 instances, not have the capacity to consent to
19 sexual activity. In those circumstances any
20 so-called consent that is given is not valid.
21 We see a fair number of cases like that in our
22 courts. Given the alleged facts here, at the
23 sentencing hearing, I sought clarification on
24 this point from the Crown and the Crown
25 confirmed that the basis for this prosecution
26 is not that the complainant was too
27 intoxicated to be capable in law to give

1 consent to sexual activity. The basis for the
2 prosecution is the same as it is on the charge
3 involving the other complainant; that is, J.E.
4 did not know that Mr. Kaotalok was HIV
5 positive, that he did not tell her, and that
6 she would not have consented to sexual
7 activity with him had he disclosed his medical
8 condition to her.
9 Mr. Kaotalok also acknowledges with
10 respect to this count that at the time that he
11 had intercourse with J.E. there was a
12 realistic possibility of transmission of HIV
13 from him to her. To date, she has not been
14 diagnosed with HIV.
15 The Crown confirmed that both complainants
16 were advised of their right to prepare a
17 victim impact statement. No such statement
18 has been filed by either of them.
19 I have to pause here again to note
20 something about the pre-sentence report. It
21 is a very thorough report in most respects but
22 I am concerned about one aspect of it.
23 For many years it has been a standard
24 practice in the preparation of these types of
25 reports in this jurisdiction for the person
26 preparing the report to contact the victims of
27 the crime and see whether they want to make

1 any contributions to the report. There is
2 even a special heading in the pre-sentence
3 reports we see that is called "interview with
4 victims". It is an important aspect of the
5 pre-sentence report because it is one of the
6 ways whereby the victims' views about the
7 offence and the impact it had on them can be
8 conveyed to the Court. It is not the only
9 way, but it is one of the ways.
10 In this report, under that heading on page
11 9, the author states that because of the
12 publication ban that prevents the publication
13 and broadcast of the identity of the victims
14 in this case, they were not contacted.
15 This shows a lack of understanding of the
16 scope and effect of a publication ban. There
17 are almost always things in court records that
18 identify victims. More often than not the
19 Indictment does. Usually the agreed statement
20 of facts does. If photographs were filed they
21 also do. If medical records are filed they
22 also do. And often the pre-sentence reports
23 do. Preparing and filing documents to be used
24 as part of a sentencing hearing does not
25 offend a publication ban. What is prohibited
26 is for anyone to publish or broadcast
27 information that could identify the victims.

1 So the existence of a publication ban is not a
2 bar to contacting victims as part of the
3 preparation of the pre-sentence report to see
4 if they want to contribute anything to it. It
5 is not a bar to reporting the victim's views
6 of the offence in the report itself. The
7 victims have no obligation to participate and
8 should never be pressured to do so, but they
9 should always be given an opportunity to do
10 so. Some victims choose not to prepare a
11 victim impact statement but may be prepared to
12 speak with the person preparing a pre-sentence
13 report who takes the step of contacting them.
14 Everyone is different. Sitting down and
15 writing a victim impact statement is different
16 from having a conversation with someone. So I
17 strongly suggest that the Crown raise this
18 issue with responsible officials to clarify if
19 there is a misunderstanding about this. If
20 there is any concern on the part of the
21 government officials on this point, then it
22 should be brought to the attention of the
23 Court when these reports are ordered because
24 it would be easy enough for the Court to make
25 it clear when it orders the preparation of a
26 pre-sentence report to state that it will not
27 be a breach of the publication ban for the

1 victims to be contacted and for their views to
2 be reflected in the report.
3 That issue aside, the pre-sentence report
4 that was prepared in this case is very helpful
5 in providing information about Mr. Kaotalok's
6 personal circumstances to which I now turn.
7 I also have had the benefit of the
8 submissions of his counsel and of the comments
9 that Mr. Kaotalok himself made at the
10 conclusion of the sentencing hearing. As I
11 have said, when he was given an opportunity to
12 speak he spoke at length about his
13 circumstances, the struggles that he has
14 faced, and how he contemplates the future.
15 I have given careful consideration to
16 everything that I have heard about
17 Mr. Kaotalok's personal circumstances. I will
18 refer to and emphasize some aspects here, but
19 I want to make it clear that I have considered
20 all of the information that was presented
21 whether I refer to a specific detail or not.
22 Mr. Kaotalok is of Inuit descent. He was
23 born in 1985 and is now 27 years old. His
24 family resided at an outpost camp that was
25 located in Nunavut between Bathurst Inlet and
26 Bay Chimo. The family had a house in Bay
27 Chimo but led a traditional lifestyle,

1 spending a lot of time at the outpost camp,
2 sometimes years at a time.
3 Aspects of his childhood years at the
4 outpost camp were happy but unfortunately also
5 involved a number of sad and tragic things.
6 The first of course is the fact that he was
7 infected with the HIV virus at birth. When he
8 was six, his mother passed away. He explained
9 to the author of the pre-sentence report that
10 he believes that his mother and himself both
11 were infected with the virus when his mother
12 had to have a transfusion when Mr. Kaotalok
13 was born and ultimately, that is what she died
14 from.
15 For the next few years after his mother
16 died, Mr. Kaotalok was raised by his father,
17 still at the outpost camp. But when he was
18 eight, his father drowned following an
19 accident that happened when several family
20 members, including Mr. Kaotalok, had been
21 traveling in a canoe. Mr. Kaotalok almost
22 drowned himself that day but he was saved by
23 his brother. From that point on, Mr. Kaotalok
24 was raised by his grandmother. He was fond of
25 her and she taught him a lot. But she too
26 passed away a few years later. Mr. Kaotalok
27 and his brother were then placed in the care

1 of an aunt and that did not end up being a
2 good situation for them. The aunt began
3 abusing alcohol and was physically and
4 mentally abusive to both of them, both when
5 she was intoxicated and when she was not.
6 Mr. Kaotalok stayed at the outpost camp
7 until he moved to Cambridge Bay to go to
8 school. After a few years he moved to Hay
9 River to live with an aunt and uncle. At that
10 point he had nowhere to go and the alternative
11 would have been placement in foster care so
12 his aunt and uncle took him in. The move to
13 Hay River meant being reunited with his
14 siblings because his sister had been adopted
15 by the same aunt and uncle and from time to
16 time his brother traveled to Hay River to
17 spend time there as well.
18 Mr. Kaotalok lived in Hay River from 1997
19 to 2005. After moving there, he was required
20 to attend school and there was structure in
21 the home. He was able to secure various jobs
22 in the community but he had behavioural issues
23 and ultimately this led to his aunt and uncle
24 asking him to leave.
25 After that, he stayed with friends and
26 relocated to various communities. By then he
27 had started consuming alcohol and drugs and

1 his use of alcohol and drugs increased
2 particularly after he moved to Behchokò.
3 In 2005, Mr. Kaotalok had a serious car
4 accident after falling asleep while driving
5 and in that accident he lost an arm.
6 While he was in Behchokò, he developed a
7 romantic relationship with a woman and that
8 relationship appears to have continued over
9 the years despite the fact that Mr. Kaotalok,
10 especially in recent years, has spent a
11 considerable amount of time in jail. This
12 woman is still supportive of him and he spoke
13 about her and this relationship when he spoke
14 to the Court. This seems to have remained a
15 significant relationship for him.
16 Mr. Kaotalok relocated to Yellowknife in
17 2006 on the advice of his doctor who was
18 concerned about the fact that he was not
19 taking his medication. Since his move to
20 Yellowknife, unfortunately he seems to have
21 frequented people who, like him, abuse drugs
22 and alcohol, have no employment, and lead a
23 fairly destructive lifestyle. His consumption
24 of alcohol escalated and he was convicted of
25 numerous property crimes committed to acquire
26 money to sustain his drug and alcohol habits.
27 The author of the report, who has been

1 Mr. Kaotalok's probation officer since 2006,
2 writes that Mr. Kaotalok "has become embedded
3 in this negative lifestyle and has been since
4 his teenage years".
5 This unfortunate fact is reflected in
6 Mr. Kaotalok's criminal record. As his own
7 counsel put it, his life has been in a
8 downward spiral since 2006. Since that time
9 he has been in and out of jail, and more often
10 in than out. He has accumulated a steady
11 pattern of convictions for various offences
12 and has received jail term after jail term.
13 Since April 2006, the longest period of time
14 that he has spent out of custody was just over
15 four months. That, on its own, says a lot
16 about the pattern that he has been stuck in.
17 According to the pre-sentence report,
18 Mr. Kaotalok has not consistently sought help
19 to deal with his addiction and other issues
20 when he has been out of custody. Anything
21 that he has done in this regard has been
22 sporadic and inconsistent. It seems that
23 while in custody, particularly during this
24 last period of two years he has spent on
25 remand, Mr. Kaotalok has engaged more actively
26 in support services available to him - he has
27 met with the jail psychologist at various

1 points in time, he has attended AA meetings,
2 he has completed the Healing Drum program
3 "Embracing our Human Nest", he has completed
4 two life skills modules that are done by
5 completing workbooks.
6 Mr. Kaotalok has told the author of the
7 pre-sentence report that for a period of about
8 a year he used crack cocaine and was addicted
9 to it. He also said he stopped using crack on
10 his own because he recognized how destructive
11 it was. The Court often hears about how
12 difficult it is to beat that addiction; if
13 Mr. Kaotalok was addicted to crack cocaine,
14 and if he beat that addiction on his own, it
15 certainly says something about his ability
16 when he sets his mind to doing something. It
17 means that he can show inner strength and
18 personal power.
19 He has expressed to the author of the
20 report that he also recognizes that alcohol
21 and other drugs are destructive for him and he
22 wants to stop using them as well. It is
23 obvious to the Court, and would be to anyone
24 reviewing the materials filed on this case,
25 that unless and until Mr. Kaotalok gets
26 alcohol and other intoxicating substances out
27 of his life, his chances for rehabilitation

1 are slim to none. And irrespective of the
2 sentence that I impose today, that step will
3 be up to him because one way or another he
4 will eventually be released and he will once
5 again be free to make choices in this regard,
6 as well as many others.
7 As I have already said, when Mr. Kaotalok
8 addressed the Court at the conclusion of his
9 sentencing hearing on March 27th he spoke at
10 length. He was quite articulate. He comes
11 across as a bright person capable of insight.
12 He has at times gone to school and been able
13 to work so it is obvious that he has
14 capabilities and skill. He has shown
15 resilience at some points in his life. It
16 seems to me that there are reasons to think
17 that Mr. Kaotalok does have the capacity and
18 the skills to make the changes that he needs
19 to make but there is no question he is the
20 only one who can do this. This Court cannot
21 make him do it; doctors cannot make him do it;
22 no one else can make him do it.
23 I did note that Mr. Kaotalok told the
24 author of the pre-sentence report that he
25 expects to die from the HIV virus within the
26 next few years and that he is more or less
27 resigned to that fact. Maybe a part of

1 Mr. Kaotalok's failure to take real steps to
2 make real changes in his life until now has
3 been in part based on that belief and that
4 feeling of being doomed no matter what. The
5 Court obviously has no medical expertise but I
6 will just say this:
7 From what is set out in the agreed
8 statement of facts, it appears that when he
9 strictly followed his medical regimen, his
10 viral load became very low, which is another
11 way to say that the medication did help to
12 control the progression of this disease. It
13 is also clear from the agreed statement of
14 facts, that compliance, strict compliance with
15 the medical treatment that he is under, is
16 crucial to stabilizing his condition and
17 improving his prognosis. So in many ways, and
18 to that extent, his treatment is in his hands.
19 To the extent that the life and
20 circumstances of a person can be summarized in
21 a few minutes, that is my understanding of
22 Mr. Kaotalok's personal circumstances as they
23 were presented at the sentencing hearing and
24 must all be taken into account in deciding
25 what sentence should be imposed today.
26 I now turn to the principles of
27 sentencing. I will deal with the principles

1 of sentencing in two parts - first, sentencing
2 principles generally; and second, sentencing
3 principles that apply to this particular of
4 offence.
5 The general principles of sentencing are
6 all set out in the Criminal Code. I am not
7 going to read them all, I have considered them
8 all, but I will simply refer to the
9 fundamental purpose of sentencing because it
10 is always a good place to start when examining
11 the question of what is a fit sentence for any
12 given crime.
13 That is set out in Section 718 of the
14 Criminal Code which says,
15 The fundamental purpose of
16 sentencing is to contribute, along
17 with crime prevention initiatives,
18 to respect for the law and a
19 maintenance of a just, peaceful
20 and safe society by imposing just
21 sanctions that have one or more of
22 the following objectives:
23 (a) to denounce unlawful conduct;
24 (b) to deter the offender and
25 other persons from committing
26 offences;
27 (c) to separate offenders from

1 society, where necessary;
2 (d) to assist in rehabilitating
3 offenders;
4 (e) to provide reparations for
5 harm done to victims or to the
6 community, and
7 (f) to promote a sense of
8 responsibility in offenders, and
9 acknowledgment of the harm done to
10 victims and to the community.
11 So to achieve these objectives, the Code
12 sets out several sentencing principles.
13 The fundamental sentencing principle is
14 proportionality. A sentence should be
15 proportionate to the seriousness of the
16 offence and to the level of responsibility or
17 blameworthiness of the offender.
18 The Criminal Code lists a number of other
19 principles, the most significant ones to this
20 case, the most relevant ones, are, first of
21 all, parity, which means that similar offences
22 committed by similar offenders should result
23 in similar sentences being imposed. That is a
24 matter of simple fairness.
25 Another important principle that is
26 engaged here is totality. Where the Court
27 sentences a person for more than one offence

1 and imposes consecutive sentences, the Court
2 has to make sure that the global effect of all
3 of the sentences is not unduly harsh. And
4 that is important.
5 Restraint is a very important sentencing
6 principle. It means that when jail can be
7 avoided, it should be. And when jail has to
8 be imposed, it should never be a longer jail
9 term than is necessary to achieve the goals of
10 sentencing. Sentencing is not and should
11 never be about exacting a price for conduct or
12 effecting revenge.
13 The principle of restraint takes on
14 particular significance when dealing with
15 aboriginal offenders because paragraph
16 718.2(e) of the Criminal Code says
17 All available sanctions other than
18 imprisonment that are reasonable
19 in the circumstances should be
20 considered for all offenders, with
21 particular attention to the
22 circumstances of aboriginal
23 offenders.
24 There has been much debate about what this
25 provision meant when it first came into force,
26 and I must now take a moment to explain what
27 the Supreme Court of Canada has said it means,

1 which is, of course, binding on me as a
2 sentencing Judge.
3 Two decisions from the Supreme Court,
4 R. v. Gladue, [1999] 1 S.C.R. 688 and
5 R. v. Ipeelee, 2012 SCC 13, have explained the
6 special considerations that are engaged when a
7 sentencing Court is determining the sentence
8 to be imposed on an aboriginal offender. I am
9 not going to quote from those cases but I will
10 refer to the main points that emerge from
11 those decisions.
12 First, this provision is a remedial
13 provision that was designed to address the
14 overrepresentation of aboriginal people in
15 Canadian jails. That means that when
16 sentencing an aboriginal offender, Courts are
17 required to take into account the unique
18 systemic and background factors that may have
19 played a part in bringing the offender before
20 the Court; and also, to consider what
21 sentencing procedures and sanctions may be
22 appropriate to the offender in light of his or
23 her aboriginal heritage. Sentencing Courts
24 are directed to take judicial notice of broad
25 systemic factors, background factors, that
26 affect aboriginal people generally.
27 For example, Courts are required to take

1 judicial notice of the history of colonialism,
2 displacement, residential schools, and how
3 these have often translated in lower
4 educational attainment, lower income, higher
5 unemployment rates, high rates of substance
6 abuse and suicide, and high levels of
7 incarceration for aboriginal people. I have
8 taken judicial notice of these factors which
9 are also things that we commonly hear about in
10 this jurisdiction in the day-to-day work of
11 the Courts.
12 I am also required to take into account,
13 and I have, case-specific information about
14 Mr. Kaotalok as it has been conveyed in the
15 pre-sentence report, the submissions of his
16 counsel, and the comments that he made to the
17 Court himself.
18 It is clear that he was raised initially
19 in a very traditional lifestyle. He lost his
20 parents at a young age. Because he lived for
21 many years at the outpost camp, it is not
22 difficult to imagine it would have been quite
23 a change to relocate to Cambridge Bay to
24 attend school, particularly without family
25 supports in place. He was fortunate to be
26 taken in by his aunt and uncle in Hay River
27 but there is little doubt that the behavioral

1 issues that he displayed there and the
2 unhealthy relationships that he developed with
3 alcohol and drugs was partly related to the
4 numerous losses that he experienced early in
5 life, the abuse that he suffered when he was
6 under of the care of his other aunt, having to
7 relocate to go to school and live in a place
8 where he had no connections, not to mention
9 having to live basically from the start of his
10 life with the knowledge that he had this very
11 serious disease. Not all of these things are
12 necessarily connected to the fact that he is
13 an aboriginal man but some of them certainly
14 are.
15 What the Supreme Court of Canada
16 jurisprudence says, among other things, is
17 that Courts have to consider to what extent
18 these types of factors have an impact or
19 should have an impact on the sentence to be
20 imposed. One way of understanding it is to
21 say that the question is whether those factors
22 have an impact on the offender's
23 blameworthiness which, in turn, has an impact
24 on the application of the proportionality
25 principle.
26 I have gone to some lengths here to make
27 it clear, I hope, that in considering my

1 decision in this case I have been mindful of
2 the duty that rests on me to take
3 Mr. Kaotalok's aboriginal heritage into
4 account, both the matters that I am required
5 to take judicial notice of and the
6 case-specific information that has been
7 presented at the sentencing hearing. The
8 question in this case is not whether jail is
9 required, (Mr. Kaotalok's counsel acknowledges
10 that it is), the issue really is how long that
11 jail term should be. In arriving at that
12 decision, I have considered the impact that
13 Mr. Kaotalok's unique circumstances and the
14 circumstances have had on his level of
15 blameworthiness.
16 I turn now to the sentencing principles
17 that apply more specifically to this type of
18 case.
19 Aggravated sexual assault is an
20 objectively very serious criminal offence.
21 That is reflected in the fact that it is
22 punishable by life imprisonment. But it is
23 also an offence that covers a wide wide range
24 of possibilities as far as the behaviour that
25 qualifies under that section.
26 The particular type of aggravated sexual
27 assault charge that I am dealing with here

1 today, I think it is fair to say, is really in
2 a category of its own. It does not involve a
3 person forcing himself on his victims,
4 overpowering them, overtly causing physical
5 injuries during the commission of the act as a
6 result of violence used during the course of
7 the act. That is the type of scenario that we
8 more naturally think of when we hear about
9 aggravated sexual assaults. This, however, is
10 a very different type of aggravated sexual
11 assault. It involves deceitfully obtaining
12 the consent of another person in being
13 involved in a very personal and intimate
14 activity, one of the most personal and
15 intimate activities that a person can engage
16 in.
17 Mr. Kaotalok knowingly exposed L.F. and
18 J.E. to potentially lethal consequences and
19 took away their right to choose whether they
20 would engage in sexual contact with him,
21 despite that risk, and he did this for his own
22 sexual gratification. I agree with the
23 submission that was made by Crown counsel at
24 the sentencing hearing. He showed callous
25 indifference and ruthless disregard for their
26 well-being.
27 To my knowledge, this is the first time

1 that a Court in this jurisdiction has had to
2 deal with this type of offence. This does not
3 mean that the Court should make an example of
4 Mr. Kaotalok and impose a sentence on him that
5 would be unduly harsh. But it does mean that
6 the Court has to ensure that the decision that
7 it makes addresses the goals of sentencing and
8 makes it clear to everyone in this
9 jurisdiction what the consequences are for
10 this type of conduct.
11 Courts in other jurisdictions have dealt
12 with this kind of case before and I take much
13 guidance from the principles that have been
14 developed by those Courts. The cases from the
15 other jurisdictions are not binding on me of
16 course, but they are helpful for many reasons.
17 They assist in identifying which sentencing
18 principles have been found to be paramount in
19 these types of cases. They assist in
20 identifying the range of sentences that have
21 been found to be appropriate. And they assist
22 in fleshing out the factors that have been
23 considered to make a matter more serious or
24 less serious bearing in mind that to start
25 with it is serious conduct.
26 I am now going to spend a few minutes
27 talking about the broad principles that I

1 think emerge from the various cases that have
2 been filed with the Court. I have considered
3 R. v. Cuerrier, [1998] 2 S.C.R. 371;
4 R. v. Thomas, 2012 ONSC 1201; R. v. A.T.R.,
5 2011 BCPC 283; R. v. Tippeneskum, 2011 ONCJ
6 219; R. v. Felix, 2010 ONCJ 654;
7 R. v. Nduwayo, 2010 BCSC 1467;
8 R. v. McGregor, 2008 ONCA 831; R. v. J.M.L.,
9 2007 BCPC 341; R. v. Smith, [2007] S.J. No.
10 150; R. v. Walkem, [2007] O.J. No. 186;
11 R. v. Williams, 2006 ONCJ 484; R. v.
12 Lamirande, 2006 MCBCA 71; R. v. Smith, 2004
13 BCCA 657; and R. v. Miron, [2000] M.J. No. 500.
14 A useful starting point comes from
15 R. v. Cuerrier, a Supreme Court of Canada
16 decision dealing with this type of offence.
17 It is a reminder of the role the criminal
18 courts have in addressing this issue. I say
19 this because there is an obvious public health
20 dimension to issues surrounding HIV and AIDS
21 but that does not mean that the courts do not
22 have an important role when they are called
23 upon to impose sentences in the context that I
24 am facing today.
25 Cuerrier dates back 1998, but some of the
26 things that the Supreme Court said that in
27 case, I think remain very relevant:

1 The criminal law does have a role to play both in deterring those
2 infected with HIV from putting the lives of others at risk and in
3 protecting the public from irresponsible individuals who
4 refuse to comply with public health orders to abstain from
5 high-risk activities. Where public health endeavours fail to
6 provide adequate protection to individuals like the complainants,
7 the criminal law can be effective. It provides a needed measure of
8 protection in the form of deterrence and reflects society's
9 abhorrence of the self-centered recklessness and the callous
10 insensitivity of the actions of the respondent and those who have
11 acted in a similar manner. The risk of infection and death of
12 partners of HIV-positive individuals is a cruel and ever
13 present reality. Indeed the potentially fatal consequences are
14 far more invidious and graver than many other actions prohibited by
15 the Criminal Code. The risks of infection are so devastating that
16 there is a real and urgent need to provide a measure of protection
17 for those in the position of the complainants. If ever there was a
18 place for the deterrence provided by criminal sanctions it is
19 present in these circumstances. It may well have the desired
20 effect of ensuring that there is disclosure of the risk and
21 appropriate precautions are taken. R. v. Cuerrier, at paras 141 - 142
22

23 The dominant sentencing objectives in
24 cases like this, not just because of this
25 quote but as it emerges from the various cases
26 that I have reviewed, are the denunciation of
27 the conduct, and general and personal

1 deterrence. These cases have almost without
2 exception resulted in the imposition of jail
3 terms. The range is very broad. It basically
4 goes from one year to 18 years in just the
5 cases that I have reviewed. This is because
6 there is a wide range of potential factual
7 scenarios that can underlie a charge like this
8 one.
9 I want to refer to R. v. Williams, where
10 the Court talked about the potential for
11 far-reaching and widespread consequences of
12 actions like the actions of Mr. Kaotalok in
13 this case. The Court said:
14 There can be no doubt that the aggravated assault offences are
15 extremely serious. The potential individual consequences - both
16 medical and social - are monumental. They are multiplied
17 by two in the instant case. They are multiplied further by the
18 public health jeopardy arising from the risk of inadvertent
19 transmission by the complainants and any partners with whom they
20 might have sexual relations.
R. v. Williams, para 22
21
22 In a simple way, I think that underscores
23 why this is so serious. I agree with those
24 comments and I adopt them for the purposes of
25 this case.
26 As I have said, the range of sentences
27 imposed for aggravated sexual assault charges,

1 involving offenders who do not disclose their
2 HIV status to a sexual partner, goes from jail
3 terms in the range of one year, 18 months, all
4 the way up to close to 20 years imprisonment.
5 In R. v. Smith, a Saskatchewan provincial
6 court Judge, after having reviewed many cases,
7 stated that he felt that the appropriate range
8 for a single incident involving sexual
9 activity in these kinds of circumstances is
10 between three and four years. I tend to agree
11 with that conclusion. This is a range that
12 addresses, to me, the fundamental principle of
13 proportionality because it addresses the
14 seriousness of the offence and the
15 blameworthiness of the person who acts in this
16 way. I am not saying that is a minimum
17 sentence because, always, the Courts have to
18 take into account aggravating and mitigating
19 factors. But I agree with the conclusion in
20 Smith that that is a useful yardstick.
21 The factors that have been considered to
22 make matters more serious and have led to the
23 imposition of longer sentences include things
24 like high risk behaviour; for example, not
25 using any protection during sexual activity:
26 that factor is not present here. The
27 repetition of conduct with several different

1 victims: that factor is present here. Another
2 factor is the fact that a victim was actually
3 infected with the HIV virus: that fact is not
4 present here.
5 In Williams, the Court noted this and
6 said:
7 I cannot ignore the fact that neither woman was infected through
8 her sexual involvement with Mr. Williams. This may be a product
9 of good fortune alone, but it materially distinguishes this case
10 from a number of those in which near-draconian sentences have been
11 pronounced.
R. v. Williams, at para 22
12
13 So obviously, and this runs through the
14 cases in general, when the complainants are
15 infected that is considered a very significant
16 aggravating factor.
17 Another factor that is aggravating is
18 where the offender is in a position of trust
19 vis-à-vis the victim. And finally, as is
20 always the case, the offender's criminal
21 record can be an aggravating factor.
22 So what does all of this mean for this
23 case? The question, really the ultimate
24 question, is where Mr. Kaotalok's case fits in
25 all of this.
26 He has a substantial criminal record and,
27 as the Crown pointed out, that record includes

1 many convictions for crimes of dishonesty and
2 deceit. These are property crimes that would
3 normally be considered marginally relevant on
4 a sexual assault sentencing. But, as Crown
5 counsel noted during the submissions, it is
6 not completely irrelevant because there is a
7 deceitful aspect to his conduct in this case,
8 albeit in a much more serious context, and
9 with much more serious potential consequences.
10 There are two victims in this case, one
11 who was still a minor at the time that the
12 offence was committed. I find there is an
13 element of breach of trust in this case
14 although not as significant as it would be
15 with a spouse. But these young women had
16 befriended Mr. Kaotalok. Presumably they
17 trusted him more than they would have trusted
18 a complete stranger and he violated that trust
19 by not disclosing his medical status to them.
20 The assault on the victim J.E., as defence
21 counsel acknowledged, is more of a high risk
22 situation given the level of intoxication of
23 both parties.
24 As I have already said, on the other hand
25 some factors that have been found to be
26 aggravating in other cases are not present
27 here.

1 Thankfully neither victim, as of today,
2 have been diagnosed as having been infected
3 with HIV. However, as some of the excerpts I
4 have quoted from the case law suggest, they
5 still have to live with the possibility, the
6 anguish, the medical tests, and those
7 consequences are not to be dismissed as
8 insignificant. If a person is actually
9 infected that makes the matter even more
10 serious. But I think it must be remembered
11 and acknowledged that even if they did not
12 actually get sick, there are and will continue
13 to be repercussions for these victims.
14 Mr. Kaotalok has pleaded guilty which is
15 very mitigating. It was not a guilty plea at
16 the first opportunity; in fact, it occurred
17 long after the charges were laid but this too
18 must be placed in context. As defence counsel
19 pointed out, there was an important case
20 pending before the Supreme Court of Canada for
21 some time and that case was expected to, and
22 did, clarify what defences are and are not
23 available in a case like this.
24 R. v. Morbior, 2012 S.C.C. 47 was released
25 on October 5th, 2012. It clarified this area
26 of the law and the issues that were before the
27 Supreme Court of Canada had a direct bearing

1 on whether Mr. Kaotalok could or could not
2 advance certain defences in this case. It was
3 not unreasonable at all for him to want to
4 know the outcome of that case before giving
5 his final instructions to his counsel. He had
6 the right to choose his course of action and
7 get advice from his counsel in light of what
8 that decision was going to be as far as the
9 law.
10 The other thing about the guilty plea, and
11 I say this in every case where there is one,
12 is that it has spared both complainants from
13 having to come to the Court and testify about
14 very personal intimate things. The Court
15 knows from seeing witnesses testify in court
16 proceedings that it is a process that is often
17 difficult and sometimes very painful for them.
18 Sparing someone from that is always very
19 significant. Mr. Kaotalok is entitled to
20 considerable credit for having pleaded guilty.
21 In addition to what it spared the
22 complainants, it is obvious from the agreed
23 statement of facts that it also saved
24 considerable resources considering the type of
25 medical evidence that would have to have been
26 called by the prosecution had this matter
27 proceeded to trial.

1 The other aspect of guilty pleas is they
2 are usually considered to be an indication of
3 remorse. There are comments in the
4 pre-sentence report that call into question
5 whether Mr. Kaotalok is truly remorseful. He
6 appears to have expressed conflicting things
7 to the author of the pre-sentence report with
8 respect to his views of the victim and taking
9 responsibility for this. But he has pleaded
10 guilty. He has expressed his remorse to the
11 Court when he was given an opportunity to
12 speak. And while it is clear that his
13 expressions of remorse may not have been the
14 most unequivocal during the process leading up
15 to the sentencing, I am satisfied, based on
16 what he said to the Court, that he does take
17 responsibility for his actions at this point.
18 Whether he is truly fully deeply remorseful
19 and sorry in an absolute sense is something
20 that only he knows and only he will ever know
21 in his heart. I can only hope that he is and
22 that he realizes the ramifications of what he
23 has done.
24 Crown counsel made submissions about
25 Mr. Kaotalok's recklessness, tying it in with
26 the inconsistent attitude in complying with
27 his medical regimen. I do not disagree: It

1 is obvious that Mr. Kaotalok has not been
2 diligent in complying with his medical
3 regimen, but I also take the point that
4 defence counsel made. The reality is
5 Mr. Kaotalok, for large periods of time while
6 he was in Yellowknife, has been residing at
7 the Salvation Army without a fixed address or
8 any place to really call home. That lack of
9 stability can only have an impact on a
10 person's overall stability, including
11 compliance with medical treatment. It is not
12 an excuse, and obviously it is crucial that
13 Mr. Kaotalok take his medical treatment
14 seriously, but I accept that the lack of
15 stability in his life was an impediment to him
16 adhering strictly with his treatment plan.
17 And this seems to be confirmed that his
18 compliance was better when his living
19 situation was more stable.
20 Another matter that has an important
21 bearing on the sentence to be imposed today is
22 how much credit Mr. Kaotalok is going to
23 receive for the time that he has spent on
24 remand which, in this case, is a substantial
25 period of time. He has been on remand since
26 March 1st, 2011, which is two years and three
27 weeks. The first question is whether I have

1 discretion to give credit on anything more
2 than a one for one ratio. Or, in other words,
3 whether I have discretion to grant him
4 enhanced credit for his remand time.
5 The Crown argued that I do have discretion
6 for the portion of his remand time up until
7 April 2012 when he had a bail review. But
8 that after that, my discretion is limited
9 because he was detained at that bail review
10 primarily because of his record. The defence
11 says that I have discretion to grant him
12 enhanced credit for the full period of his
13 remand.
14 Whether I have discretion or not depends
15 on the reason why bail was denied.
16 Paragraph 515(9.1) of the Criminal Code
17 imposes a requirement for the Justice who
18 detains an accused primarily because of his
19 record to indicate so clearly on the record.
20 The provision says "the Justice shall state
21 that reason in writing on the record", that
22 reason being that it was primarily because of
23 the criminal record.
24 Mr. Kaotalok had a show cause hearing on
25 March 1st, 2011 and was ordered detained. The
26 warrant of committal issued on that date does
27 not include any note that he was detained

1 primarily because of his record. Then he had
2 his preliminary hearing and he was committed
3 to stand trial in August 2011. He did not
4 apply for release at the conclusion of the
5 preliminary hearing. He had a number of bail
6 reviews scheduled in this court by operation
7 of the law, which requires there to be a
8 review of detention every 90 days. He waived
9 those reviews in November 2011 and February
10 2012. He did seek release at a bail review on
11 April 30th, 2012 and on September 24th, 2012,
12 and was ordered detained both times.
13 The Crown argues that the transcript of
14 the reasons given by the Judge who ordered his
15 continued detention on April 30th makes it
16 clear that the primary reason for that
17 decision was his criminal record. The Crown
18 says that the transcript can serve as the
19 written entry into the record referred to in
20 paragraph 9.1 of Section 515. I disagree with
21 that submission.
22 The requirement for a written entry into
23 the record as to the primary ground for
24 detention is designed to ensure there is no
25 ambiguity in this area. A transcript of
26 reasons given orally does not constitute a
27 written statement as to the primary reasons

1 for detention. In my view, Parliament's
2 requirement to have the reasons for detention
3 entered in writing is precisely to ensure that
4 there is not going to be a debate based on a
5 transcript or on clerk's notes about what the
6 reason for detention was. Clarity in this
7 area is very important given the potential
8 implications. In this case the difference is
9 a full year of credit that is either possible
10 to give or not possible to give depending on
11 the answer.
12 So I am not satisfied that the transcript
13 of the April 30th decision is something that
14 can be used or meets the requirements of the
15 Criminal Code. The net result is that I have
16 discretion to give Mr. Kaotalok enhanced
17 credit for the full period of time that he has
18 spent on remand.
19 The fact that I have that discretion does
20 not mean that I should ever use it. Granting
21 enhanced credit for remand time is not
22 automatic - far from it.
23 The relevant portions of Section 719
24 provide that the starting point is that the
25 credit for the remand time is to be given on a
26 ratio of one for one but that if the
27 circumstances justify it, enhanced credit can

1 be granted up to a ratio of one to one and a
2 half.
3 In a relatively recent case, R. v. Green,
4 2013 NWTSC 20, I discussed some of the issues
5 that have arisen about the interpretation to
6 be given to the words in the provision and the
7 case law that has interpreted it. The
8 principles that emerge from the case law,
9 including appellate jurisprudence, is that
10 while the circumstances that may justify
11 enhanced credit need not be rare or
12 exceptional, they do have to be
13 individualised; that is, they have to relate
14 to the person being sentenced. This
15 case-specific information can be provided
16 through evidence from case managers or, as has
17 been frequently accepted in this jurisdiction,
18 from information provided by counsel as
19 officers of the Court as long as counsel is
20 able to indicate that he or she has obtained
21 that information from a reliable source such
22 as the offender's case manager. This
23 approach has been adopted fairly consistently
24 in various cases such as R. v. Stonefish, 2012
25 MBCA 116; R. v. Carvery (L.A.) 2012 NSCA 107;
26 R. v. Summers, 2013 ONCA 147; R. v. Mannilaq,
27 2012 NWTSC 48; R. v. Desjarlais, 2012 NWTSC 2;

1 and R. v. Vittrewkwa, 2011 YKTC 64.
2 In this case the information before me is
3 that Mr. Kaotalok's behaviour while on remand
4 was, for the most part, without problems. He
5 had a few incidents with other inmates,
6 apparently arising from him getting taunted by
7 them, but the information that was conveyed to
8 this Court by his counsel is that his case
9 manager advised that if he had been a serving
10 prisoner during this period of time, he would
11 have earned most of his remission for the time
12 that he spent on remand.
13 I also have information that Mr. Kaotalok
14 benefitted from some programs while he was on
15 remand. The lack of availability of programs
16 for remand prisoners and harsh detention
17 conditions are among the factors that
18 historically have been taken into account in
19 the decision to give enhanced credit for
20 remand time. Those factors do not apply here.
21 All in all, I am satisfied that
22 Mr. Kaotalok should be granted credit for his
23 remand time on an enhanced basis but not quite
24 to the maximum ratio of one to one and a half.
25 I do not think that the maximum ratio is
26 appropriate given the overall circumstances of
27 his pre-trial detention, including the fact

1 that he has had access to some programs.
2 Although it is said that he would have earned
3 most of his remission, this is not a case
4 where his behaviour was without problems.
5 The Crown's position is that I should
6 impose a global sentence of four years in jail
7 for these two charges broken down to two years
8 on each count consecutive. The Crown says
9 that this position takes into account
10 concerns about totality. The Crown says that
11 from this sentence of four years, Mr. Kaotalok
12 should be given credit for the time that he
13 spent on remand.
14 Defence counsel has argued that the
15 sentence could be of a shorter duration, given
16 the guilty plea and the absence of some of the
17 aggravating features found in cases from other
18 jurisdictions.
19 Considering the range is between one year
20 and 18 years in the cases that I have
21 reviewed, I think it is fairly clear that
22 Mr. Kaotalok's case does not belong at the
23 higher end of that spectrum. But I also do
24 not consider that his case falls at the very
25 low end of the spectrum.
26 It is tragic that Mr. Kaotalok was
27 infected with the HIV virus at birth. He was

1 an innocent victim of very unfortunate
2 circumstances in this regard. But what he has
3 done as an adult through his behaviour is he
4 has passed on that victimization to two other
5 people by exposing them to the risk of
6 infection. He has created a risk for these
7 people to suffer the same fate that he did in
8 a way - to be infected with this virus without
9 having any control or any ability to protect
10 themselves from that risk.
11 I have said it many times already, and I
12 will say it again, it is very fortunate that
13 to date these victims have not been diagnosed
14 with being infected with HIV but they will
15 live with the spectre of that possibility for
16 a long time and with that sense, I am sure,
17 that their trust has been abused by their
18 friend in a terrible way.
19 I certainly agree with the submissions of
20 defence counsel that some of the cases filed
21 involve situations where the offenders showed
22 much more recklessness and even more callous
23 behaviour than what is in question here, but
24 the fact that there are worst cases out there
25 does not make this one any less serious. But
26 for his guilty plea, Mr. Kaotalok would be
27 facing a much more significant sentence today.

1 Having taken his circumstances into
2 account and the principles of the law that are
3 binding on me, I do conclude that a jail term
4 of some significance is required in this case
5 to address the goals of sentencing, to
6 denounce his conduct, to hopefully deter other
7 people from behaving in this selfish reckless
8 way. There is no doubt in my mind that the
9 global sentence sought by the Crown is within
10 the range of what would be fit for these
11 sentences. I do not even think that it is at
12 the higher end of what could be imposed.
13 Even so, having given this matter a lot of
14 anxious thought, I have decided to exercise as
15 much restraint as I can, taking into account
16 Mr. Kaotalok's overall circumstances,
17 including his circumstances as an aboriginal
18 offender. And so although I think that the
19 position of the Crown was quite reasonable, I
20 will impose a sentence that is slightly shorter
21 than what the Crown has sought, but only
22 slightly. It is not because there is any joy
23 in imposing a jail term to someone, especially
24 knowing some of their difficult circumstances,
25 but it is because in my view I would be
26 shirking from my responsibility if I did not
27 impose a sentence of some significance here.

1 The Crown has applied for certain
2 ancillary orders and I will deal with those
3 first. The defence is not opposed to any of
4 these requests.
5 There will be a firearms prohibition order
6 that will commence today and expire ten years
7 from Mr. Kaotalok's release.
8 There will be an order that he comply with
9 the requirement of the Sexual Offender
10 Information Registration Act. By operation of
11 the Criminal Code, that order is for life
12 under Section 490.03(ii)(c). It is a lifelong
13 order because of the maximum sentence
14 available for aggravated sexual assault.
15 There will be no victim of crime
16 surcharge. There would be an obvious hardship
17 in imposing one considering the time that
18 Mr. Kaotalok has spent on remand, his lack of
19 means, and the fact that he will spend more
20 time in custody.
21 Mr. Kaotalok, please stand.
22 For these two counts of aggravated sexual
23 assault, Mr. Kaotalok, I have reduced the
24 sentence as much as I feel that I can. I have
25 taken into consideration the global effect of
26 the sentences. I have concluded that a fit
27 sentence for each of these counts is 21 months

1 in jail, so that means a total of 42 months.
2 For the two years and three weeks that you
3 have spent on remand, I give you credit for 30
4 months, which is more than one for one but not
5 quite one and a half.
6 What that means is on Count 1, there will
7 be a further jail term of six months. And on
8 Count 3, there will be a further jail term of
9 six months consecutive.
10 You can sit down.
11 Mr. Clerk, I can assist you with the
12 warrant of committal if you need me to but it
13 should show 21 months on Count 1, 15 months
14 credit for remand time. And 21 months on
15 Count 2, 15 months credit for remand time on
16 that one as well.
17 I will not make any order with respect to
18 exhibits because there remains the matter of
19 Count 2 which is going to be going to trial.
20 I would ask that counsel ensure that when that
21 matter is concluded, the Court's attention's
22 is drawn to the issue of the exhibits.
23 On the matter, Counts 1 and 3 which were
24 set for sentencing today, I extend again my
25 thanks to the counsel for their submissions.
26 Mr. Kaotalok, I hope that you are able to
27 do some of the things that you talked about

1 when you spoke to me a few weeks ago and that
2 you will be able to get your life in the
3 direction that you want it to be. It sounds
4 like you have the ability to do that if you
5 choose to. It will really be up to you.
6 THE ACCUSED: Thank you.
7 THE COURT: As far as Count number 2,
8 Mr. Boyd, first of all, have I omitted or
9 forgotten anything on the sentencing matter?
10 MR. ONYSKEVITCH: Your Honour, I apologize as
11 I was not here for the submissions that were
12 made but as I understood it, the Crown also
13 sought an order for the DNA of Mr. Kaotalok
14 pursuant to Section 487.
15 THE COURT: You're correct, and I'm
16 sorry, I meant to say that. Thank you for
17 reminding me of this.
18 This is a primary designated offence and
19 being the order is mandatory, so there will
20 will be one of those as well. Thank you.
21 Anything else that I may have missed?
22 MR. ONYSKEVITCH: Nothing further from the
23 Crown with respect to Counts 1 and 3, Your
24 Honour.
25 MR. BOYD: Nothing from defence, Your
26 Honour.
27 [DISCUSSION WITH COUNSEL REGARDING COUNT 2]

1 THE COURT: Thank you, counsel. Close

2 court.

3 ---

4

5 Certified correct to the
best of my skill and
6 ability,

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10 ____________________________

11 Lois Hewitt,
Court Reporter
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