

1 THE COURT: The accused was convicted of
2 sexual assault after a trial by jury on
3 December the 13th, 2012.

4 The evidence led by the Crown, and
5 accepted by the jury, was that on August 6th,
6 2011, after a nightlong drinking party, the
7 victim and a number of others were sleeping at
8 the house where the party had occurred. She
9 and a boyfriend were sleeping, fully clothed,
10 on a bed in the spare bedroom. When she awoke
11 very early that morning, she found that her
12 pants and underwear had been lowered to her
13 ankles and the accused was engaged in sexual
14 intercourse with her. She struggled and
15 pushed him off and he left the room.

16 The accused had been at the party the
17 evening before, had gone to a bar and returned
18 to the house later, early the next day,
19 shortly before he committed the offence.

20 Both the victim and the accused are young
21 adults. The accused was 20 years of age at
22 the time. The accused was intoxicated at the
23 time of the offence.

24 With respect to the offender's background,
25 Donovan Blake resides with his mother in
26 Whitehorse. He grew up in various places in
27 the north but for the last six or seven years

1 has lived in Whitehorse. He was in Inuvik on
2 the day of the offence attending a family
3 wedding. Mr. Blake did not complete school in
4 a conventional setting however he has attained
5 Grade 12 equivalency through a work-life
6 experience life skills program at a Whitehorse
7 secondary school. Notwithstanding this
8 achievement he has difficulties with reading,
9 writing and communication.

10 A pre-sentence report was prepared in this
11 matter. It is dated February 26th, 2013. The
12 report appends a previous pre-sentence report
13 from May 5th, 2009. This in turn references a
14 psychologist's report and the material
15 includes two progress reports from 2010 and
16 2011. These earlier reports relate to an
17 offence committed by Mr. Blake in 2009 when he
18 was 17 and dealt with as a youth offender.

19 The circumstances of the 2009 offence are
20 markedly similar to what occurred in this
21 case. Mr. Blake, while intoxicated, engaged
22 in sexual intercourse with the victim who was
23 also intoxicated and vulnerable to his
24 actions. The youth sentence imposed was six
25 months deferred custody which, from the
26 description in the report, involved community
27 supervision, participation in the work-life

1 experience life skills program and a
2 subsequent adult offender's program.

3 Mr. Blake performed reasonably well during
4 the two years or so he was under the
5 management of court and probation officers.
6 He completed the education program and with
7 the exception of one incident of alcohol
8 abuse, he complied with the regulatory terms
9 of the sentence. Unfortunately, only a number
10 of weeks after he completed his term of
11 probation he committed the offence now before
12 the Court.

13 The psychological assessment, although
14 somewhat dated, provides some insights.

15 Mr. Blake is identified as a fairly
16 amiable individual but of low intelligence.
17 He has a history of substance abuse and
18 although there was no evidence of sexual
19 deviance or predation, to quote from the
20 report, "it is probable that he does not
21 always consider the consequences of his
22 actions prior to embarking on them". After
23 the event he genuinely appears remorseful but
24 nonetheless, now on two occasions, has
25 violated a defenceless victim in a very
26 similar manner.

27 Mr. Blake retains family support. His

1 family background has, at times, been
2 difficult, with alcohol abuse and violence
3 being a past feature of his family life. He
4 now has two children, one of whom has often
5 been resident with him at his mother's
6 residence and to whom he has been a caregiver.

7 Mr. Blake is a Tetlit Gwichin First Nation
8 person. He himself has not been directly
9 subject to systematic treatment that might
10 have influenced his behaviour. But it is
11 clear from the letters provided by his mother
12 and aunt, the family has a history of children
13 of previous generations being taken from their
14 homes to be confined in residential schools.
15 The legacy of this treatment, the often
16 evident decline into substance abuse and
17 victimization of other family members, often
18 persists into subsequent generations.

19 However, it is also notable that the
20 victim is of First Nations heritage. And, as
21 has been commented on in a number of
22 authorities, similar offences are all too
23 common, often elevating denunciation and
24 deterrence to the predominant sentencing
25 principles to be applied in order to try to
26 provide some protection for other women who
27 might be similarly victimized.

1 The comments of Mr. Justice Vertes in
2 R. v. Kodzin are apposite. From paragraph 3,

3 Many times the Courts in this
4 jurisdiction have commented on the
5 prevalence of this type of crime,
6 specifically sexual assaults
7 committed against women while they
8 are either asleep or otherwise
9 unconscious. Courts have
10 repeatedly said that since this
11 particular type of sexual assault
12 is so frequent, sentencing must
13 emphasize deterrence,
14 denunciation, and a promotion of a
15 sense of responsibility in the
16 offender.

17 The victim impact statement provided by
18 the young woman assaulted in this case
19 provides a graphic account of her struggle to
20 live with the consequences of violation.

21 With respect to the authorities, R. v.
22 Arcand establishes a starting point of three
23 years incarceration for like incidents of
24 major sexual assault. From Arcand,

25 Sexually assaulting an unconscious
26 victim elevates an offender's
27 degree of responsibility for the
28 crime beyond the norm contemplated
29 by the three-year starting point.
30 An offender who sexually assaults
31 a person who is asleep or passed
32 out is treating that person as if
33 the person were an object to be
34 used and abused at will. Since
35 the offender knows full well that
36 the person is not consenting, this
37 reveals an enhanced degree of
38 calculation and deliberateness by
39 the offender. Further, at that
40 point the person is at their most
41 vulnerable, unable to defend
42 themselves in any way and unable

1 to call for help from others. The
2 offender knows this too, adding
3 further to the high level of moral
 blameworthiness for the illegal
 conduct.

4 The offence in Kodzin was committed in
5 similar circumstances to those that existed
6 here.

7 In that case, the accused was 25 years of
8 age, employed, without a criminal record and
9 otherwise of good character. In sentencing
10 Mr. Kodzin, Mr. Justice Vertes considered as a
11 mitigating factor, that the accused was a
12 relatively young offender, 22 at the time of
13 the offence. Mr. Blake, although with a
14 record for a similar offence, was 20 years of
15 age at the time and now is 22. Notwithstanding
16 the aggravating influence of the previous
17 youth conviction here, I think that the age of
18 the offender still has a moderating effect.

19 There is also the fact that the accused
20 did relatively well while under probation
21 supervision and the prospect of rehabilitating
22 his conduct by imposition of similar terms as
23 he was previously under remains, in my view,
24 viable.

25 The Crown submits a sentence of three to
26 three and a half years incarceration in a
27 penitentiary is appropriate, a sentence that

1 may have the dislocating effect of relocating
2 the accused to a prison in the south. The
3 defence suggests a sentence which would avoid
4 a penitentiary term with the addition of a
5 long period of probation.

6 In weighing the factors, I think the best
7 accommodation of these various considerations
8 is a significant period of incarceration but
9 one that allows for a lengthy period of
10 probation. Probation in these circumstances,
11 although imposed to promote a rehabilitative
12 objective, nonetheless adds to the punitive
13 effect of the sentence and overall length of
14 time the accused is subject to state
15 supervision.

16 Accordingly Mr. Blake, I sentence you to
17 two years less one day imprisonment to be
18 followed by two years probation on the terms
19 indicated on page 8 of the pre-sentence report
20 with the exception, and counsel, I exclude the
21 terms indicated in paragraphs 11 and 12 in
22 that listing of terms as this was not an
23 offence committed on a young victim, nor was
24 it one that had elements of predation.

25 There are additional terms:

26 First of all, there will be registration
27 for a term of 20 years, a registration

1 indicated by the SOIRA legislation, Sexual
2 Offender Information Registration Act.
3 Mr. Blake will provide a sufficient sample to
4 identify his DNA profile. And there will be
5 an order made under Section 109 of the
6 Criminal Code prohibiting Mr. Blake from
7 having in his possession the items indicated
8 in that section but most notably firearms,
9 ammunition, or explosives, for a period of ten
10 years.

11 I note from one of these cases, Mr.
12 Davison, that there was allowance given for
13 exception to that particular prohibition, in
14 the case of subsistence hunting.

15 MR. DAVISON: Yes, and we would ask for
16 the similar allowance be granted under
17 Section 113, please.

18 THE COURT: Do you take any exception to
19 that exception? Mr. MacPherson?

20 MR. MacPHERSON: No, Your Honour.

21 THE COURT: All right, that will be
22 included.

23 MR. DAVISON: In the circumstances, we
24 would ask as well the victim impact penalty be
25 waived here, please.

26 THE COURT: Yes. Well, hearing nothing
27 in reply to that, in the circumstances as I

1 know them, that will be waived.

2 THE CLERK: That was the victim crime
3 surcharge, sir?

4 THE COURT: Yes, the surcharge is
5 waived.

6 Now in addition to that, there is the
7 present circumstances of his grandmother
8 having died and a funeral being likely in the
9 near future. I will make the recommendation
10 that classification consider him for
11 compassionate leave to attend the funeral but
12 that matter will have to remain with
13 classification as to whether or not they deem
14 that appropriate.

15 Does that leave anything more, counsel?

16 MR. DAVISON: Not that I can think of.

17 MR. MacPHERSON: No, thank you, Your Honour.

18 THE COURT: All right then, we will
19 stand down.

20 (ADJOURNED)

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22 Certified to be a true and
23 accurate transcript pursuant
24 to Rules 723 and 724 of the
25 Supreme Court Rules,

26 _____
27 Lois Hewitt,
Court Reporter