R v Betsidea, 2018 NWTSC 8

 S-1-CR2016000088

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

 IN THE MATTER OF:

 HER MAJESTY THE QUEEN

 - vs. -

 ANTHONY BETSIDEA

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Transcript of the Reasons for Sentence by The Honourable

 Justice K. M. Shaner, at Yellowknife in the Northwest

 Territories, on January 12th A.D., 2018.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 APPEARANCES:

 Ms. J. Scott: Counsel for the Crown

 Mr. L. Moore: Counsel for the Accused

 ----------------------------------------

 Charge under s. 348(1)(b) and s. 271 Criminal Code

 No information shall be published in any document or

 broadcast or transmitted in any way which could identify

 the victim or a witness in these proceedings pursuant to

 s. 486.4 of the Criminal Code of Canada

 Official Court Reporters

 1 THE COURT: On November 6th, 2017,

 2 following a trial by judge alone, Anthony

 3 Betsidea was found guilty of two charges:

 4 First, breaking and entering with intent

 5 contrary to section 348(1)(a) of the Criminal

 6 Code; and secondly, sexual assault contrary to

 7 section 271 of the Criminal Code.

 8 These proceedings are subject to a

 9 publication ban with respect to information

 10 that would identify the victim. Accordingly,

 11 when I am talking about the victim in this

 12 case and in these reasons, I will refer to her

 13 as "the victim" rather than by her initials or

 14 her name.

 15 I have had an opportunity to hear from

 16 Crown and defence counsel with respect to the

 17 length of the sentence that they feel would be

 18 appropriate.

 19 I have also read and considered the

 20 pre-sentence report that was prepared by

 21 Probation Services on January 9th, 2018.

 22 Defence counsel's submission and the

 23 pre-sentence report were particularly helpful

 24 to me with respect to learning about Mr.

 25 Betsidea.

 26 And finally, I have considered the Victim

 27 Impact Statements that were submitted by the

 Official Court Reporters 1

 1 victim and her mother and which Ms. Scott read

 2 out in court yesterday.

 3 Sentencing is an individualized process.

 4 The sentencing objectives are set out in the

 5 Criminal Code and they apply with varying

 6 degrees of emphasis depending on the nature of

 7 the offence and the circumstances of it and

 8 the offender's circumstances. They include

 9 denunciation and deterrence, both specific and

 10 general, rehabilitation, reparation, and the

 11 promotion of a sense of responsibility in

 12 offenders.

 13 In both break and enter with intent and

 14 sexual assault the key objectives, and those

 15 which attract the most emphasis, are

 16 denunciation and deterrence. A sentence must

 17 be imposed in accordance with certain

 18 principles as well and these, too, are found

 19 in the Criminal Code.

 20 The fundamental principle of sentencing is

 21 proportionality. That is, the sentence must

 22 reflect the seriousness of the offence and the

 23 degree of responsibility of the offender.

 24 Other principles are parity; that is, that

 25 similar sentences must be imposed on similar

 26 offenders for similar crimes; and totality and

 27 restraint.

 Official Court Reporters 2

 1 Finally, when the Court is imposing

 2 sentence on an Indigenous offender, it must

 3 consider all available sanctions other than

 4 prison which are reasonable and consistent

 5 with the harm done to the victim and the

 6 community.

 7 The last principle must be applied with

 8 regard to what are referred to as Gladue

 9 factors in an offender's background. Those

 10 are systemic factors such as intergenerational

 11 trauma, poverty, addiction, food and housing

 12 insecurity, substandard education, and others

 13 which are all too often found in the

 14 backgrounds of Indigenous offenders. The

 15 stated purpose of that is to address the

 16 disproportionately high number of Indigenous

 17 offenders in the Canadian prison system.

 18 The Crown in this case is seeking a global

 19 sentence in the range of two and a half to

 20 three years. Defence counsel argues that

 21 these crimes together attract a more lenient

 22 sentence in the range of 16 to 18 months.

 23 The facts leading to the convictions were

 24 set out in my reasons for decision that I gave

 25 on November 6th, 2017, but I will summarize

 26 them here for the sake of context.

 27 In the early hours of March 27th, 2016,

 Official Court Reporters 3

 1 the victim, a young Dene woman, was sleeping

 2 on a couch in the livingroom of her house in

 3 Déline. She lived alone and when she went to

 4 sleep, there was no one else in the home. The

 5 door to the house was broken at the time and

 6 it could neither be shut all the way nor

 7 locked. The victim tried to make the door as

 8 secure as possible before she went to sleep

 9 that night.

 10 The victim and Mr. Betsidea knew each

 11 other. They lived in the same small community

 12 and the victim was friends with Mr. Betsidea's

 13 former common-law partner. The victim also

 14 testified that they were cousins albeit

 15 distantly related ones. Mr. Betsidea lived a

 16 short distance from the victim's home. It is

 17 fair to characterize their relationship as one

 18 of acquaintances.

 19 The victim awoke sometime after falling

 20 asleep on the couch because she felt someone

 21 touching her. She found that Mr. Betsidea was

 22 kneeling at the end of the couch by her feet

 23 and he was tugging at her pants. Mr. Betsidea

 24 said "please". The victim told him to get out

 25 and she kicked at him. She thought that he

 26 had left and she got up and went to the

 27 bathroom to check herself for mucous.

 Official Court Reporters 4

 1 When she returned to the livingroom Mr.

 2 Betsidea was there again. He asked her for a

 3 cigarette. She again told him to leave and

 4 this time he did.

 5 The victim then called a friend and asked

 6 him to start walking to her house and meet her

 7 en route. She left her house, met her friend,

 8 and they walked to his house where she went to

 9 sleep. Her friend testified that the victim

 10 was upset and angry when they met up.

 11 Later that day the victim gave a statement

 12 to the police at the RCMP detachment in

 13 Déline.

 14 The victim provided two Victim Impact

 15 Statements - the first in November of 2016,

 16 and the other in October of 2017. As I said,

 17 these were read out in court yesterday by the

 18 Crown prosecutor.

 19 In the first statement, the victim said

 20 that the event led her to drink and feel

 21 suicidal. In the second statement she said,

 22 among other things, that she continues to feel

 23 traumatized and scared. It is clear that

 24 these crimes have had a lasting negative

 25 impact on her.

 26 The effect on the victim's mother has also

 27 been significant. Among other things, she

 Official Court Reporters 5

 1 describes being unable to think, worrying

 2 about her daughter's safety, getting up and

 3 checking the windows, being sad and crying all

 4 the time, and isolating herself from her

 5 family and her community. She also said that

 6 the incident has made her feel like a failure.

 7 Information about Mr. Betsidea was

 8 provided through the pre-sentence report as

 9 well as through his counsel.

 10 Mr. Betsidea is a Dene man. He is 42

 11 years old and he has lived most of his life in

 12 Déline. He was in a common-law relationship

 13 for a fairly significant period of time and he

 14 has two children from that relationship.

 15 He spent his early years up until about

 16 age seven with his grandparents, learning

 17 traditional skills. He is fluent in both

 18 North Slavey and English and he practices many

 19 of the skills that he learned from his

 20 grandparents even now.

 21 Unfortunately, life became very chaotic

 22 when he returned to live with his parents,

 23 both of whom were victims of the residential

 24 school system themselves.

 25 The home was plagued by violence and

 26 substance abuse. At times Mr. Betsidea's

 27 mother would take the children and flee to the

 Official Court Reporters 6

 1 family's cabin to escape the violence. Mr.

 2 Betsidea and his siblings were also neglected

 3 and impoverished.

 4 Mr. Betsidea's family life was marked by

 5 tragedy in later years as well. There were

 6 seven children in the family - five boys and

 7 two girls. Of the five brothers, Mr. Betsidea

 8 is the only one who is still alive. Two of

 9 his brothers died from suicide, one died in an

 10 accident where alcohol was a factor, and one

 11 perished after becoming lost while hunting.

 12 Not only did Mr. Betsidea suffer the

 13 effects of the intergenerational trauma

 14 brought on by the residential school system,

 15 he is himself a direct survivor of the

 16 residential school experience.

 17 He left his home in Déline to attend high

 18 school in Inuvik for Grade 9. He had been a

 19 capable student. Tragically, while attending

 20 high school in Inuvik, he was sexually abused

 21 and this led him to quit. It also led him to

 22 start using alcohol and drugs. These have

 23 been part of his life consistently since that

 24 time and have led to his interactions with the

 25 justice system.

 26 That said, it appears Mr. Betsidea has

 27 gained insight into this and he has had a

 Official Court Reporters 7

 1 number of periods of sobriety.

 2 Mr. Betsidea has not ever had long term

 3 labour market employment in the traditional

 4 sense as we understand it, however it appears

 5 that this is a function of the limited

 6 opportunities in his community of Déline.

 7 He spends a significant amount of time on

 8 the land, he carves, he cuts and sells

 9 firewood in the community. He has certainly

 10 not been idle.

 11 To his credit, Mr. Betsidea has obtained a

 12 number of skills and certifications over the

 13 years as well and he has been working on

 14 upgrading his education.

 15 Mr. Betsidea has a criminal record dating

 16 back to 1991 when he was a youth. Convictions

 17 have been sustained roughly every two to three

 18 years since then. There are 32 convictions in

 19 all, excluding the ones in this case. Eleven

 20 of the convictions are for breaking and

 21 entering, four are for assault, including

 22 assault with a weapon, five are for uttering

 23 threats. The remaining ones include failing

 24 to comply with court orders, failing to attend

 25 court, possession of a weapon, and mischief.

 26 The break and enter convictions appear to

 27 be property-related. The most severe sentence

 Official Court Reporters 8

 1 that he received was 18 months in 2003 for

 2 breaking into a business.

 3 The last conviction for break and enter

 4 with intent was in 2010. Mr. Betsidea was

 5 sentenced to four months incarceration

 6 followed by 12 months probation.

 7 There are no convictions for sexual

 8 assault or other related crimes on his record.

 9 When asked to make submissions on his own

 10 behalf, Mr. Betsidea apologized for the grief

 11 these charges have caused the victim and her

 12 family. His apology was not taken as an

 13 admission of guilt and was not taken by me as

 14 accepting responsibility for what happened.

 15 There are a number of aggravating factors

 16 in this case and those must be taken into

 17 account as well as any mitigating ones in

 18 imposing sentence.

 19 The victim in this case was asleep and

 20 thus in a very vulnerable state. Further, she

 21 was asleep in her own home, a place where she

 22 had the right to be safe and to be without

 23 fear. Upon being awakened, the victim told

 24 Mr. Betsidea to leave. He either did not

 25 leave at all or he left momentarily and came

 26 back in. Either way, he continued to violate

 27 the sanctity of the victim's home.

 Official Court Reporters 9

 1 All of this was a terrifying ordeal for

 2 the victim. She was scared to the point of

 3 having to leave her home in the early hours of

 4 the morning and go to a friend's house. As

 5 she pointed out in her Victim Impact

 6 Statement, she continues to feel traumatized

 7 and scared.

 8 It will be recalled that during

 9 submissions yesterday there was discussion

 10 about the characterization of the sexual

 11 assault in this case and whether it is a

 12 "major sexual assault" or not.

 13 I emphasize again that the distinction

 14 between a sexual assault that falls into the

 15 category of a "major sexual assault" and one

 16 that does not fall into that category is not

 17 meant to, nor does it in fact, diminish the

 18 seriousness with which this Court views all

 19 sexual assaults.

 20 All sexual assaults are violations of the

 21 victim's sexual integrity and the consequences

 22 for the victims are serious regardless of the

 23 category into which the sexual assault in the

 24 particular case falls for the purpose of

 25 sentencing.

 26 By itself, the fact that formed the basis

 27 of the sexual assault, specifically that Mr.

 Official Court Reporters 10

 1 Betsidea was tugging on the victim's pants,

 2 means that it does not fall into the category

 3 of a "major sexual assault". That said, the

 4 circumstances surrounding it work to move it

 5 towards the more serious end of the spectrum.

 6 In R. v. T. L. G., 2006 ABCA 313, which

 7 was submitted by the Crown, the Alberta Court

 8 of Appeal discusses at paragraph 12 how what

 9 may appear to be a less serious sexual assault

 10 can turn into something more serious by reason

 11 of the circumstances under which it occurs.

 12 The Court stated:

 13 In those cases, a sentencing Judge

 must consider not only the actual

 14 nature of the sexual assault, that

 is the type of touching, but the

 15 context within which it takes

 place.

 16

 17 The fact that this sexual assault took

 18 place in the context of a break and enter

 19 makes it more serious. Again, the victim was

 20 asleep alone in her own home. Mr. Betsidea,

 21 having wrongfully entered her home, took

 22 advantage of her vulnerable state thereby

 23 violating her personal sexual integrity as

 24 well as the sanctity of her home. From any

 25 perspective, it would be terrifying to wake up

 26 and find someone tugging at your clothing and

 27 to not know what had happened beforehand or

 Official Court Reporters 11

 1 how long it had been occurring. That has got

 2 to have a lasting impact on anyone.

 3 The other aggravating factor is Mr.

 4 Betsidea's criminal record. It is aggravating

 5 particularly because of the number of

 6 convictions for break and enter. He knows it

 7 is wrong. He knows the consequences. Yet, he

 8 continues.

 9 I am unable to identify any mitigating

 10 factors in this case.

 11 Mr. Betsidea does have significant Gladue

 12 factors in his background, and I have taken

 13 them into account in my deliberations.

 14 He had a traumatic childhood characterized

 15 by violence, substance abuse and poverty, no

 16 doubt due in large part to his parents own

 17 experiences in residential school. He himself

 18 was a victim of sexual violence at a very

 19 young age and he left school as a result.

 20 It is not at all surprising to me that Mr.

 21 Betsidea started using drugs and alcohol at a

 22 young age, that he continues to struggle with

 23 alcohol addiction, that his educational and

 24 career opportunities have been limited, and

 25 that he has a long history of criminal

 26 behaviour.

 27 This background diminishes to some degree

 Official Court Reporters 12

 1 Mr. Betsidea's moral blameworthiness.

 2 Nevertheless, Mr. Betsidea has been found

 3 guilty of two very serious crimes.

 4 Breaking and entering into a dwelling

 5 house with intent is an indictable offence

 6 with a maximum penalty of life imprisonment.

 7 Parliament considers it very serious.

 8 Sexual assault carries with it a maximum

 9 sentence of ten years in the case of an adult

 10 victim. Moreover, sexual assault is a rampant

 11 crime in the Northwest Territories. It is

 12 something that we see in this Court all too

 13 often.

 14 The Crown filed a number of authorities in

 15 support of the length of sentence that she is

 16 seeking. She also fairly conceded that each

 17 of these cases has fairly different

 18 circumstances and that it is difficult to find

 19 anything that it completely on point.

 20 In R. v. Simpson, 2015 NWTSC 45, the

 21 offender had a criminal record that included

 22 four convictions for sexual offences including

 23 one against the same victim. In that case,

 24 the offender received a sentence of three

 25 years. This followed a guilty plea and the

 26 sentence imposed followed a joint submission

 27 by Crown and defence.

 Official Court Reporters 13

 1 In R. v. Sunrise, 2006 NWTSC 47, the

 2 offender was sentenced for breaking and

 3 entering and committing sexual assault and

 4 breaking and entering with intent to commit

 5 theft. He pleaded guilty to the latter and

 6 was found guilty of the former following a

 7 trial. The offender broke into his former

 8 partner's home and sexually assaulted her

 9 while she was passed out from intoxication.

 10 The offender received a sentence of two

 11 years for the sexual assault and one year

 12 consecutive for the other offence. He had a

 13 lengthy criminal record of some 30 convictions

 14 and it included three convictions for break

 15 and enter and one for sexual assault.

 16 R. v. Kochon, 2010 NWTSC 24, involved a

 17 very serious prolonged major sexual assault

 18 which took place in the victim's home in the

 19 presence of her 7-year-old daughter. The

 20 offender was sentenced to four years following

 21 a trial.

 22 The Crown also submitted cases from the

 23 New Brunswick, Manitoba and Alberta Courts of

 24 Appeal.

 25 In R. v. Flatfoot, 2009 MBCA 109, the

 26 Manitoba Court of Appeal sentenced a youthful

 27 offender with a minimal previous record to

 Official Court Reporters 14

 1 four years incarceration for a break and enter

 2 and a sexual assault on a minor. The

 3 circumstances of the sexual assault are not

 4 specified in that case, however, it was not

 5 characterized as a "major sexual assault".

 6 In R. v. Maisonneuve, 2014 NBCA 32, the

 7 New Brunswick Court of Appeal imposed a

 8 sentence of nine months incarceration followed

 9 by 18 months probation. The offender in that

 10 case broke into the victim's home through a

 11 basement window, went to her bedroom, and

 12 touched her breasts. The victim was

 13 profoundly affected, sustaining both financial

 14 and emotional harm. The offender was 21 at

 15 the time. There is little information about

 16 the offender's background or the criminal

 17 record in that case.

 18 In R. v. T. L. G., which I have mentioned

 19 previously, the offender was the victim's

 20 neighbor. He entered the house through an

 21 unlocked door, removed all of his clothing and

 22 climbed into bed with the two victims - a

 23 mother and her ten-year-old daughter. They

 24 were asleep at the time. He touched the

 25 mother all over her body, including her

 26 genitals, and he touched the daughter and

 27 tried to kiss her on the lips. The offender

 Official Court Reporters 15

 1 had pleaded guilty following a preliminary

 2 inquiry and he was sentenced initially to two

 3 years less one day followed by three years

 4 probation. The Court of Appeal set aside that

 5 sentence and imposed a sentence of four years.

 6 The case that I have before me is

 7 troubling, and it calls out for a sentence

 8 that sends a message to both Mr. Betsidea and

 9 society at large that this conduct cannot be

 10 tolerated.

 11 Entering someone's home without permission

 12 in the middle of the night is a serious crime.

 13 It violates profoundly one's sense of peace

 14 and safety. Touching the victim in a sexual

 15 manner exacerbates the seriousness even

 16 further. This type of contact has lasting and

 17 significant consequences for the victims,

 18 their lives, and their loved ones.

 19 That said, the circumstances of this

 20 particular case are distinguishable from those

 21 in Simpson, Sunrise, Kochon, Flatfoot and

 22 T.L.G. with respect to both the acts

 23 perpetuated on the victims and, in the cases

 24 of Simpson, Sunrise and Kochon, the nature of

 25 the offender's criminal history. Accordingly,

 26 that must be taken into account in the

 27 sentence that I ultimately impose.

 Official Court Reporters 16

 1 Factually, this case is much closer to

 2 Maisonneuve although there are significant

 3 differences in the offender profile.

 4 In my view, the amount of incarceration

 5 that the Crown seeks is not justified. At the

 6 same time, what defence counsel proposes will

 7 not achieve the goals of denunciation and

 8 deterrence nor will it sufficiently recognize

 9 Mr. Betsidea's degree of moral blameworthiness

 10 or the impact of this on the victim and her

 11 family. That Mr. Betsidea's last conviction

 12 for break and enter attracted a short sentence

 13 of under a year does not justify a shorter

 14 sentence in this case.

 15 Mr. Betsidea committed two serious crimes.

 16 They were prosecuted by indictment. In

 17 particular, breaking and entering with intent

 18 to commit an indictable offence must be

 19 prosecuted by indictment when it involves a

 20 dwelling house and that elevates it to a much

 21 higher level. The sentence has to reflect

 22 that.

 23 Taking into account the circumstances of

 24 this offence, the impact on the victim, Mr.

 25 Betsidea's circumstances and the jurisprudence

 26 from this jurisdiction and others, it is my

 27 view that with respect to the offence of

 Official Court Reporters 17

 1 breaking and entering with intent, a period of

 2 custody of two years less a day, followed by

 3 probation, will achieve the goals of

 4 denunciation and deterrence while recognizing

 5 both the impact on the victim and Mr.

 6 Betsidea's particular circumstances.

 7 The probationary aspect of the sentence

 8 will contribute structure and hopefully lead

 9 Mr. Betsidea to the resources required to keep

 10 him on a better path following his

 11 incarceration.

 12 It is further my view that the appropriate

 13 sentence for this offence of sexual assault in

 14 this case is eight months. And it is also

 15 appropriate that those two sentences be served

 16 concurrently, taking into account the totality

 17 principle.

 18 Mr. Betsidea, will you please stand.

 19 Mr. Betsidea, I sentence you to a term of

 20 two years less a day of imprisonment and 18

 21 months probation for the crime of break and

 22 enter with intent to commit an indictable

 23 offence.

 24 I further sentence you to a term of eight

 25 months for the crime of sexual assault.

 26 You will serve the prison terms

 27 concurrently and the probation will begin upon

 Official Court Reporters 18

 1 your release. Do you understand this

 2 sentence?

 3 THE ACCUSED: Yes, Your Honour.

 4 THE COURT: All right, you can sit down.

 5 From the two years less a day, 142 days

 6 will be deducted which represents credit for

 7 the time that you have spent in remand

 8 awaiting trial and then your sentence, and

 9 this is calculated on the basis of 95 days at

 10 a credit rate of 1.5 days for each day in the

 11 the pre-sentence custody.

 12 I will also impose an order that you

 13 provide a sample of your bodily fluids for DNA

 14 analysis and a lifetime SOIRA order.

 15 There will be a firearms prohibition as

 16 well, which will remain in effect for ten

 17 years. But, because you are a subsistence

 18 hunter, Mr. Betsidea, you may apply for an

 19 exemption to possess a firearm for that

 20 purpose pursuant to section 113 of the

 21 Criminal Code. Mr. Moore can explain that to

 22 you.

 23 The terms of your probation will be those

 24 that are found in the Criminal Code;

 25 particularly, you will keep the peace and be

 26 of good behavior. You will not communicate

 27 directly or indirectly with the victim without

 Official Court Reporters 19

 1 expressed permission of this Court. You will

 2 make appearances in court as required. You

 3 will notify your probation officer promptly of

 4 any change in your address, name or

 5 occupation. And you will report to a

 6 probation officer within two working days of

 7 your release.

 8 I am not going to impose any condition

 9 that you abstain from using substances because

 10 those are your choices to make for yourself.

 11 I would, however, encourage you to continue to

 12 work on yourself, Mr. Betsidea, as you have

 13 been doing, to address the trauma in your own

 14 life and importantly to learn how to deal with

 15 that trauma in a more constructive manner.

 16 Is there anything else, counsel?

 17 MS. SCOTT: Not from the Crown, Your

 18 Honour.

 19 MR. MOORE: Nothing further, Your

 20 Honour.

 21 -------------------------------------------

 22

 23

 24

 25

 26

 27

 Official Court Reporters 20

 1 Certified to be a true and

 accurate transcript pursuant

 2 to Rules 723 and 724 of the

 Supreme Court Rules,

 3

 4

 5

 6

 7 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 8 Lois Hewitt,

 Court Reporter

 9

 10

 11

 12

 13

 14

 15

 16

 17

 18

 19

 20

 21

 22

 23

 24

 25

 26

 27

 Official Court Reporters 21