

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**FRANKIE JAMES EYAKFWO**

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Transcript of the Reasons for Sentence delivered by The Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 18th day of December, 2018.

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**APPEARANCES:**

Mr. M. Fane: Counsel for the Crown  
Mr. P. Harte: Counsel for the Accused

(Charges under s. 271 of the 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

1 THE COURT: Frankie James Eyakfwo pled  
2 guilty to a sexual assault contrary to  
3 Section 271 of the *Criminal Code*. He entered his  
4 guilty plea on May 7th, 2018, and it is now my  
5 task to sentence him for this offence.

6 The facts of the offence arise from  
7 October 7th, 2015. The victim in this matter  
8 contacted the RCMP in Fort Smith to report that  
9 she thought she had been sexually assaulted. The  
10 victim had been drinking the night before with  
11 people at her residence. She fell asleep and  
12 awoke to her pants undone and lowered a bit.  
13 When she awoke, she noticed Mr. Eyakfwo was  
14 standing in the living room fully clothed. She  
15 yelled at him, and he denied knowing what she was  
16 talking about. The victim could feel some  
17 vaginal pain and went to the health centre where  
18 a sexual assault examination was completed. As  
19 part of that examination, a vaginal swab and a  
20 rectal swab were obtained and were later sent for  
21 forensic analysis. In November 2016, the lab  
22 results showed an unknown male profile which was  
23 identified in February 2017 as belonging to  
24 Frankie Eyakfwo. That was subsequently confirmed  
25 with a DNA warrant which was obtained from  
26 Mr. Eyakfwo's DNA.

27 One of the concerns in sentencing

1 Mr. Eyakfwo for this offence is his history.  
2 Mr. Eyakfwo is 29, and he has a criminal record  
3 of prior related convictions. He has 12  
4 convictions starting in 2003 in youth justice  
5 court and continuing through to 2016.  
6 Mr. Eyakfwo's first conviction was in 2003 when  
7 he was 14 and convicted of sexual interference.  
8 At that time, he received a sentence of 18 months  
9 in custody and 9 months' community supervision  
10 which was varied on appeal to 16 months custody  
11 and 8 months' community supervision. This was  
12 the maximum sentence available at the time.

13 In 2005, Mr. Eyakfwo was sentenced again in  
14 youth justice court for two counts of sexual  
15 assault. He received a sentence of eight months'  
16 custody and four months' community supervision on  
17 each charge followed by 18 months of probation.  
18 There are other convictions for offences of  
19 violence in 2011 and 2014 as well as convictions  
20 for offences against the administration of  
21 justice. The most recent convictions on  
22 Mr. Eyakfwo's criminal record come from November  
23 2016, and they post date this offence. At the  
24 time of this offence, Mr. Eyakfwo was on  
25 probation from an assault conviction that was  
26 entered in September 2014.

27 The Crown's position, as I understand it, is

1           that a custodial sentence needs to be imposed,  
2           and the sentence should be one of two years  
3           followed by three years of probation, and that  
4           would not take into account remand time, or  
5           alternately that a three-year sentence be imposed  
6           taking into account the remand time leaving a  
7           sentence of approximately two years. The defence  
8           position is that taking into account the remand  
9           time, the sentence should be one of time served.  
10          Mr. Eyakfwo has been in custody on this and  
11          another charge for over a year. The other charge  
12          was ultimately stayed.

13                 While he was in custody on these matters,  
14          Mr. Eyakfwo attempted with the Crown's consent to  
15          attend Poundmaker's Lodge for treatment while he  
16          was awaiting dealing with these charges.  
17          Ultimately he was unable to be placed there as a  
18          result of his cognitive limitations and the  
19          requirements for treatment there.

20                 Mr. Eyakfwo's time in custody has been since  
21          October 16th, 2017, which is 429 days and amounts  
22          to 14 months, 3 days. I do not see why  
23          Mr. Eyakfwo should not get credit for his remand  
24          time. It is specifically addressed in the  
25          *Criminal Code*, and I am required to consider it  
26          as well as consideration of remand time is  
27          required to be included on the warrant of

1 committal. I have not heard as well any valid  
2 reason why Mr. Eyakfwo should not receive credit  
3 of one-and-a-half days for every one day in  
4 custody which would amount to 21 months and 5  
5 days of custody.

6 Counsel have filed a number of reports and  
7 materials that provide insight into Mr. Eyakfwo's  
8 background and circumstances. A number of  
9 reports have been created about Mr. Eyakfwo over  
10 the years. When Mr. Eyakfwo was in custody as a  
11 young offender for the sexual offences he  
12 committed, a number of assessments and reports  
13 were completed. There was a Pre-Disposition  
14 Report from April 2003; a psychological  
15 assessment from August 2003 that was reissued in  
16 August 2004, although I am not sure what it means  
17 for a report to be reissued; and a Pre-Sentence  
18 Report from 2005. As well, I have been provided  
19 the Court of Appeal decision from 2003 and a  
20 transcript of the sentencing from August 2005 for  
21 the sexual assaults. More recently an assessment  
22 was completed on December 29, 2017, and a  
23 Pre-Sentence Report was completed for this  
24 matter.

25 Mr. Eyakfwo is an indigenous offender, so  
26 this also requires me to consider  
27 Section 718.2(e) of the *Criminal Code* and the

1 principles that have been discussed by the  
2 Supreme Court of Canada in consideration of that  
3 section in the cases of *Gladue* and *Ipeelee*.

4 It is clear from the materials provided, and  
5 I do not intend to review them in detail, that  
6 Mr. Eyakfwo has had significant long-term issues,  
7 issues that make rehabilitation a challenge and  
8 issues that I am not certain can be addressed  
9 through the criminal justice system.

10 When Mr. Eyakfwo was 14, the Pre-Disposition  
11 Report referred to a number of issues that were  
12 greatly concerning. Even at 14, there were  
13 issues that had started years earlier, long  
14 before Mr. Eyakfwo became involved with the youth  
15 justice system.

16 I am somewhat at a loss at how to adequately  
17 describe Mr. Eyakfwo's background, but it is a  
18 troubling one. In his childhood, there were  
19 serious concerns with his use of violence against  
20 teachers, his aggression towards other students,  
21 and sexual deviance towards other children. His  
22 living conditions were less than ideal but  
23 perhaps not unusual for a small town in the  
24 Northwest Territories, living in a one-room log  
25 cabin with no electricity or running water.  
26 Those conditions are not unheard of. What is  
27 more troublesome is the presence of violence in

1 the household, the presence of alcohol abuse, the  
2 sexual abuse inflicted on Mr. Eyakfwo, and the  
3 exposure to inappropriate sexual materials and  
4 sexual activities.

5 Social Services were involved with the  
6 family, and it appears that some efforts were  
7 made to place Mr. Eyakfwo in treatment.  
8 Arrangements had been made at one point it  
9 appears from one of the earlier reports.  
10 However, his family did not cooperate, and there  
11 were indications that they did not want to have  
12 him involved or going to treatment, that they  
13 down-played the seriousness of the allegations  
14 against him and sometimes denied the allegations.  
15 The lack of cooperation appears to have resulted  
16 in Social Services not taking any action or not  
17 pursuing the efforts to place Mr. Eyakfwo in  
18 treatment, and it is not clear why Social  
19 Services did not take action at the time, even  
20 though the family was not cooperating or  
21 agreeing. In hindsight, it definitely seems like  
22 a missed opportunity. Mr. Eyakfwo, from what has  
23 been described and what I have read, needed help,  
24 and other children and members of the community,  
25 for their safety, needed Mr. Eyakfwo to receive  
26 some form of treatment. Unfortunately, that did  
27 not occur.

1           The assessments that were completed then and  
2 more recently show that Mr. Eyakfwo has major  
3 intellectual deficits. Mr. Eyakfwo suffered  
4 brain atrophy as a child as a result of an  
5 untreated illness, and Mr. Eyakfwo suffers from  
6 some of the same characteristics as individuals  
7 diagnosed with fetal alcohol spectrum disorder,  
8 and it is not known if that is a result of the  
9 brain atrophy that he suffered or from the use of  
10 alcohol by his mother during pregnancy or some  
11 combination of both.

12           The most recent conclusion by Merrill Dean in  
13 the December 2017 assessment is that Mr. Eyakfwo  
14 falls within the range of a mild to moderate  
15 intellectual delay and that he experiences  
16 considerable difficulty understanding and using  
17 language to express his ideas, feelings, and  
18 emotions. His ability for expressive language is  
19 at a level of a 6-year-old and of a 7-year-old  
20 for receptive language. The author of the report  
21 indicates that he requires a very structured and  
22 disciplined living environment.

23           The most current Pre-Sentence Report  
24 demonstrates that Mr. Eyakfwo continues to lack  
25 insight into his offending, and this perhaps is a  
26 reflection of his limited cognitive abilities,  
27 but it is also concerning when you consider



1 rehabilitation and public safety.

2 The writer of the most recent report has  
3 dealt with Mr. Eyakfwo on and off for over a  
4 decade, and the report is valuable in the sense  
5 of reflecting that long-term involvement with the  
6 offender and the insights that come from that  
7 experience. The author of the Pre-Sentence  
8 Report concludes that it is not clear if  
9 Mr. Eyakfwo grasps the severity of the situation  
10 he is facing and it is not clear why he keeps  
11 getting charges with similar offences and/or how  
12 he is going to curtail his behaviour in the  
13 future, and that is a concern.

14 One of the issues that arose during  
15 sentencing submissions was what programs were  
16 available to Mr. Eyakfwo through corrections that  
17 could assist in his rehabilitation given his  
18 limitations, and the matter was adjourned for  
19 additional information to be provided to the  
20 Court. I have received that information and have  
21 reviewed it.

22 What was provided was a report from the  
23 Public Prosecution Office of Canada on  
24 Mr. Eyakfwo by Scott Mills, assistant warden at  
25 the North Slave Correctional Complex, and  
26 detailed the programs that might be available to  
27 Mr. Eyakfwo both within NSCC as well as the

1 federal correctional system. It is brief. It  
2 does not include a lot of detail with respect to  
3 the programs or what they involve but provides a  
4 general description. I have read the  
5 information, and it appears that there are some  
6 programs available at NSCC, but given  
7 Mr. Eyakfwo's limitations, it is not clear that  
8 any of those programs could realistically offer  
9 him any significant benefit in terms of sex  
10 offender or violence prevention programming.  
11 Many of the programs require a basic level of  
12 literacy that Mr. Eyakfwo does not have, and it  
13 is not clear based on what I have been provided  
14 that Mr. Eyakfwo would actually be effectively  
15 case managed if he were at NSCC.

16 There is also a program that was described  
17 that might be more appropriate which is offered  
18 at the Regional Psychiatric Centre in  
19 Saskatchewan. That is a program normally  
20 available to federal offenders, but it appears  
21 that offenders serving territorial sentences that  
22 are sentenced to 15 months or more imprisonment  
23 and assessed as high intensity may be transferred  
24 to attend the federal programming. It is not  
25 clear from the materials how often that occurs or  
26 how easy it is for territorial prisoners --  
27 someone serving a territorial length of

1 imprisonment, how easy it is for them to access  
2 that federal programming. So all I know is that  
3 it is potentially available in certain  
4 circumstances, and I will not go into the details  
5 of the specific programs, but there are options,  
6 although they are limited.

7 Ultimately Mr. Eyakfwo must be sentenced on  
8 the basis of the applicable sentencing principles  
9 and his circumstances. A sentence cannot be  
10 imposed simply to make a certain program  
11 available to him if it is not an otherwise  
12 appropriate sentence.

13 I have struggled with what an appropriate  
14 sentence is in this situation. Mr. Eyakfwo is  
15 essentially an untreated sex offender who now has  
16 14 months of remand time. He has entered a  
17 guilty plea. He has significant *Gladue* factors,  
18 and his moral blameworthiness for the offence  
19 must be assessed having regard to his cognitive  
20 abilities. Mr. Eyakfwo is also a repeat sexual  
21 offender. He has been convicted for the fourth  
22 time of a sexual offence, and this is a serious  
23 sexual offence. This was a sexual assault on a  
24 sleeping victim where Mr. Eyakfwo's DNA was  
25 located on the vaginal and rectal swabs taken  
26 from the sexual assault examination kit conducted  
27 on the victim. Mr. Eyakfwo was as well on

1           probation at the time of the offence for an  
2           assault.

3           Deterrence and denunciation are sentencing  
4           principles that are frequently considered in  
5           sentencing for sexual assaults. The protection  
6           and safety of the public have to be  
7           considerations as well as the rehabilitation of  
8           the offender.

9           It has been noted many times that sexual  
10          assaults occur far too frequently in this  
11          jurisdiction, and assaults on sleeping or  
12          unconscious victims also occur far too often.

13          So those are all factors that I have to take  
14          into account in considering the sentence for  
15          Mr. Eyakfwo and I have considered them.

16          I will deal first with the ancillary orders  
17          that have been requested by the Crown, and the  
18          defence has not taken any issue with them, and  
19          they are all mandatory in any event. First is  
20          the firearms prohibition order pursuant to  
21          Section 109 of the *Criminal Code*. That will be  
22          imposed, so it will begin today and end ten years  
23          following Mr. Eyakfwo's release from  
24          imprisonment. This is a primary designated  
25          offence, so there will be a DNA order as well,  
26          and because this is a sexual offence, the SOIRA  
27          order is also mandatory, and because of the prior

1 convictions, it is for a period of life.

2 So I have taken into account the positions  
3 that have been advanced both by the Crown and the  
4 defence as well as the circumstances of the  
5 offence and of Mr. Eyakfwo. I am concerned that  
6 the sentence that I am about to impose is not  
7 sufficient to permit Mr. Eyakfwo to complete any  
8 programs designed to address his offending, at  
9 least not to take them in a meaningful way, if  
10 that is even possible. I also need to consider  
11 the safety of the public as much as the sentence  
12 can accomplish that objective.

13 So taking into account the principles  
14 enunciated in *R. v. Arcand* with respect to the  
15 classification of major sexual assaults and the  
16 appropriate starting point in sentences for those  
17 offences as well as I have considered the case of  
18 *R. v. Ramsay, 2012 ABCA 25*, which was filed in  
19 the materials which discuss sentencing for  
20 offenders with FASD and other cognitive deficits,  
21 and I am satisfied that based on a consideration  
22 of the *Gladue* factors and Mr. Eyakfwo's cognitive  
23 deficits that Mr. Eyakfwo should receive a  
24 reduction from the sentence that I would  
25 otherwise impose on an offender in his situation  
26 with his history of sexual offending.

27 Mr. Eyakfwo, please stand.

1           Taking all of that into account, for the  
2 offence of sexual assault, I am imposing a  
3 sentence of 30 months' imprisonment. You will  
4 receive a credit of 21 months for your  
5 presentence custody leaving a sentence of nine  
6 months to serve. You can have a seat.

7           I have also considered whether to impose a  
8 probation order, and I have decided to do that as  
9 the probation officer may be able to assist  
10 Mr. Eyakfwo in accessing programs that will  
11 assist him with his rehabilitation and programs  
12 that he might not otherwise be able to access on  
13 his own. They will be able to take that into  
14 consideration and look at programs that might be  
15 of benefit to Mr. Eyakfwo. So there will be a  
16 probation order for 18 months. It will have the  
17 statutory conditions. It will also include  
18 additional conditions, so he will report to a  
19 probation officer within two days of his release  
20 and thereafter as directed; he will have no  
21 contact directly or indirectly with the victim of  
22 this offence; he will attend counselling as  
23 directed, and as long as he consents, he will  
24 attend any treatment program that might be  
25 arranged for him to attend.

26           The terms of conditions of probation,  
27 counsel, are there any other conditions you think

1           that might be of benefit to Mr. Eyakfwo?

2       MR. FANE:                    Given the nature of the  
3           offence, I would request that he not attend at  
4           any residence or place of employment of the  
5           victim if known to him.

6       THE COURT:                 Okay. Mr. Harte?

7       MR. HARTE:                 I have nothing to say in  
8           response to that.

9       THE COURT:                 Okay. I will include that  
10          condition as well.

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**CERTIFICATE OF TRANSCRIPT**

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 8th day of January, 2019.

Certified Pursuant to Rule 723  
of the Rules of Court



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Kim Cloutier  
Court Reporter