

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

PETER CHARLIE TSETTA

**Transcript of the Reasons for Sentence held before the
Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in
the Northwest Territories, on the 18th day of November, 2019**

APPEARANCES:

A. Piché: Counsel for the Crown
E. McIntyre: Counsel for the Defence

Charge(s) under s. 271 and 279(2) *Criminal Code*

There is a ban on the publication, broadcast or transmission of any information that could identify
the complainant M.A. pursuant to s. 486.4 of the *Criminal Code*.

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REASONS FOR SENTENCING

1

1 THE COURT: Earlier this year, I found Mr. Tsetta guilty
2 after a trial of a sexual assault on M.A. on May 14,
3 2017, and a sexual assault and unlawful confinement of
4 Cynthia Grandjambe on June 17, 2017.

5 This afternoon it is my responsibility to
6 impose sentences on him for those crimes.

7 Throughout these proceedings there has
8 been a publication ban in effect that prohibits the
9 publication or broadcast of any information that could
10 identify M.A. and that ban is still in effect.

11 There had been a similar publication ban
12 in effect protecting the identity of Ms. Grandjambe, but
13 at her request that ban was lifted on October 3rd, so that
14 ban is no longer in effect.

15 Crown and Defence were very far apart
16 in their sentencing positions. There are a number of
17 points of contention that emerged from their
18 submissions, and I will try to address those as
19 thoroughly as I can.

20 In my decision finding Mr. Tsetta guilty,
21 which is now reported at *R v Tsetta*, 2019 NWTSC 35, I
22 referred to the trial evidence in some detail and I
23 explained my findings. I am not going to go into the
24 same level of detail today, but I do need to summarize
25 the circumstances of each of these offences so that
26 there is some context for the rest of what I will say.

27 First, the sexual assault of M.A. In May

1 2017, M.A. and Mr. Tsetta had known each other for a
2 long time. They had been in a spousal relationship
3 some years before. That relationship ended when he
4 committed a very serious assault on her. He was
5 charged with aggravated assault in conjunction with
6 that event and ultimately found guilty of that charge and
7 sentenced to a penitentiary term for it.

8 After he finished serving that sentence,
9 he returned to Yellowknife, and it appears that he and
10 M.A. saw each other from time to time and remained on
11 relatively friendly terms.

12 On May 14, 2017, M.A. was walking in
13 the downtown area in Yellowknife socializing and
14 drinking. At the time she was part of the community of
15 people who did this relatively regularly and Mr. Tsetta
16 was also part of that community.

17 M.A. ran into Mr. Tsetta. He invited her
18 and another woman to go back to his house in Ndilq to
19 continue drinking there. They accepted. M.A. recalled
20 getting to his house by cab and that once they were
21 there, they continued drinking. At some point during
22 the evening M.A. blacked out. When she woke up, she
23 was on Mr. Tsetta's bed and he was on top of her
24 having sexual intercourse with her. The other woman
25 was no longer at the house.

26 M.A. tried to fight him and get him off her
27 but he was too strong. She yelled, hoping that a friend

1 of hers who lived nearby would hear her. There was a
2 knock at the door. Mr. Tsetta put his hand over her
3 mouth to prevent her from screaming. It is not clear
4 how long this lasted for, but in her statement to police
5 she referred to him putting his hand over her mouth
6 when she tried to scream and also when there was the
7 knock at the door.

8 Eventually the assault stopped.
9 Mr. Tsetta started dozing off. M.A. got off the bed. She
10 went to the washroom and got ready to leave. While
11 she was doing this, Mr. Tsetta woke up. She asked
12 him to let her go and promised she would not tell
13 anyone about what happened. He let her go.

14 She walked to the Vital Abel Boarding
15 House a short distance away. She spoke to the night
16 receptionist and told him she had been sexually
17 assaulted. She was distressed and sobbing. He let her
18 inside the boarding home and called the police.

19 She got impatient waiting for the police to
20 arrive and she left. She went to her friend's house
21 which was also nearby. By the time she got there she
22 was no longer crying. Her friend noted that M.A. had
23 been drinking, but she did not notice her being upset or
24 there being anything out of the ordinary about her aside
25 from the fact she was showing up at her house in the
26 middle of the night.

27 It took a few months before M.A. actually

1 went to the RCMP detachment to give a statement
2 about what happened, but eventually on July 13th she
3 did. By then Mr. Tsetta had already been arrested for
4 the sexual assault on Ms. Grandjambe and was in
5 custody.

6 I turn now to the circumstances of the
7 sexual assault and unlawful confinement of
8 Ms. Grandjambe.

9 In June 2017 she had known Mr. Tsetta
10 for many years. She thought of him as a very good
11 friend and trusted him. On June 17th she had been
12 drinking at home with her common-law spouse. They
13 ran out of alcohol. She wanted to continue drinking so
14 she went out. She spent some time walking around on
15 the streets in the downtown core drinking and
16 socializing. At the time this was something she too did
17 on a regular basis.

18 She ran into Mr. Tsetta. He had a bottle
19 of Private Stock that he had bought earlier in the day.
20 He suggested that they go to his house to drink and
21 she agreed. After they arrived at his house, they drank,
22 talked, socialized. Everything was fine.

23 At one point she passed out. Her next
24 memory is waking up on Mr. Tsetta's bed. He was
25 having sexual intercourse with her. She struggled with
26 him. She tried to fight him off with her arms and her
27 legs. She asked him what he was doing, told him to

1 stop several times, but he continued.

2 Mr. Tsetta sexually assaulted her for
3 hours. He had forced intercourse with her multiple
4 times during this time. He was very rough with her.
5 She kept trying to fight him off. She asked him why he
6 would do this to her, and told him that she thought they
7 were friends. All he did in response was laugh at her.

8 At one point she was able to get away
9 from him. She went to the door intending to run outside
10 even without any clothes on to get away from him. The
11 door was locked and she was not able to open it. He
12 dragged her back to his bedroom and continued
13 sexually assaulting her. She begged him to let her go.
14 She promised him she would not tell anyone. He
15 eventually agreed to let her leave if she gave him oral
16 sex, and she did so.

17 After that was over he unlocked the door
18 and let her leave. Ms. Grandjambe's home was in the
19 downtown area at the time. Her memory of how she
20 got back there after leaving Mr. Tsetta's house is not
21 entirely clear. She remembered walking at least some
22 of the way. She thought she may have been picked up
23 somewhere along the way and given a ride but was not
24 sure.

25 One way or another she made it home.
26 She described herself as being in shock. When she
27 got home, her spouse noticed that she did not seem

1 like herself. She seemed in shock. They had a brief
2 conversation. She told him she had been at Mr.
3 Tsetta's house, but she did not tell him what he did to
4 her until the next morning. Once she did, they called
5 the police.

6 She was taken to the hospital and
7 underwent a sexual assault examination. She had
8 bruising on her arms, her neck, her legs. She also had
9 bruising to her cervix and a small tear on her vulva.

10 Mr. Tsetta was arrested on June 19,
11 2017, and has been in custody ever since. As of today
12 he has spent 29 months on remand. Crown and
13 Defence agree that he should be credited for that
14 remand time and that the credit should be calculated on
15 the usual ratio of one and a half days' credit for every
16 day of remand. There is enhanced credit for remand
17 time because people on remand do not accumulate
18 remission, which is something that serving prisoners
19 do. In other words, a day on remand represents a day
20 and a half of served time on a sentence.

21 At the time he committed both these
22 offences, Mr. Tsetta was on process for a number of
23 charges for events that were alleged to have happened
24 in March 2017. He had been released on a
25 recognizance with a number of conditions on April 3,
26 2017. One of these conditions was that he not possess
27 or consume alcohol.

1 stayed with one of his sisters for a short time but then
2 began living on the streets.

3 The report says that Mr. Tsetta attended
4 school until grade 9. He dropped out then as a result of
5 his alcohol and drug abuse. While on remand, he has
6 worked at his schooling to obtain his high school
7 diploma. This has been his focus and is something that
8 he is very proud of and rightfully so.

9 Mr. Tsetta has been able to have
10 employment from time to time, but it is also clear from
11 the report that while he can be a good worker and
12 values being employed, his consumption of alcohol has
13 caused problems and at times resulted in him losing his
14 job.

15 As was noted in Defence's submissions,
16 there are many things about Mr. Tsetta's circumstances
17 that are relevant for sentencing purposes, more
18 specifically in the analysis of how his circumstances as
19 an Indigenous offender have a bearing on his moral
20 blameworthiness for the crimes he committed.

21 Without attempting to paraphrase or
22 repeat or even summarize everything that is included in
23 the report, I note the following among other things. His
24 parents struggled with alcoholism and were abusive.
25 He grew up in poverty because the family relied almost
26 exclusively on his father's hunting for sustenance, and
27 hunts were not always successful. Tlicho was the

1 language spoken in the home but was lost for many of
2 his siblings. Many of his older siblings were taken from
3 the home and sent to residential school. He found
4 himself essentially homeless at a young age because
5 he fled the abusive environment of his home.

6 Mr. Tsetta has a criminal record that
7 dates back to 1987. That record includes convictions
8 for a variety of offences including some crimes of
9 violence, crimes against the administration of justice,
10 property crime and some drug offences.

11 In the context of this sentencing, the
12 convictions for crimes of violence are of the most
13 concern, and they include two convictions for assault
14 causing bodily harm in 1988, for which he received
15 short jail terms; a conviction for assault in 1989 for
16 which he received a nominal sentence of one day in
17 jail. Convictions for robbery and assault in 1991, for
18 which he was sentenced to a total of a year and a half
19 in jail. A conviction for sexual assault in 1992 for which
20 he was sentenced to four months. Convictions for
21 assault in 1993, 1995, 2001, and 2010 where he
22 received short jail terms counted in months. The
23 longest of these sentences was seven months. And
24 finally a conviction for aggravated assault in 2013 for
25 which he received a sentence of three years.

26 As counsel noted, there is a gap in the
27 record between 2003 and 2010 and after these

1 proceedings there will be a further gap between 2013
2 and 2019. But between 2013 and 2015, Mr. Tsetta was
3 serving a sentence and since June 2017 he has been
4 on remand, so that second gap is not a gap of six years
5 in actual fact.

6 Crown and Defence, as I noted already,
7 are quite far apart in their positions as to what would be
8 a fit sentence for these offences. Crown says the
9 global sentence before credit for the remand time is
10 applied should be ten years. Defence argues that a
11 global sentence before credit is applied for the remand
12 time should be five years.

13 There are certain principles that are
14 engaged in this matter and are not disputed. The first
15 is the principle of restraint and the special approach
16 that must be followed when sentencing Indigenous
17 offenders. That principle was explained in the well-
18 known and often cited cases of *R v Gladue*, [1999] 1
19 S.C.R. 688 and *R v Ipeelee*, [2012] 1 S.C.R. 433. This
20 approach is the one I must follow in this case.

21 The principles that emerge from these
22 two cases and many others are frequently engaged in
23 this jurisdiction, and they have been referred to in many
24 decisions of this Court. They are of fundamental
25 importance every time the Court has to impose a
26 sentence on an Indigenous offender, and I want to
27 spend a few minutes talking about these principles.

1 *Laboucane*, 2016 ABCA 176, I will not quote from it,
2 but there is also a discussion about the *Gladue* and
3 *Ipeelee* principles at paragraphs 50 to 73 of that
4 decision and in particular a very helpful summary at
5 paragraph 63.

6 One of the things mandated by these
7 principles is consideration of what sanction might be
8 appropriate to the offender given his Indigenous
9 heritage and connections. In some cases this may lead
10 to a decision not to impose incarceration. No one is
11 suggesting that a sentence other than incarceration is
12 appropriate in this case, but it is also clear that the
13 application of these principles may sometimes result in
14 a reduction of the jail term that would otherwise be
15 imposed. This is not a race-based discount on
16 sentencing: rather, it is the result of the proper
17 application of the principle of proportionality.

18 In the context of this case, the issue is to
19 what extent Mr. Tsetta's very unfortunate personal
20 circumstances and background reduce his moral
21 blameworthiness for the commission of these offences
22 and what impact this should have on the sentence.

23 As was noted during the sentencing
24 hearing, quantifying this is not an easy exercise and,
25 importantly, these are not the only sentencing principles
26 that are engaged in this case. There are other
27 principles to consider.

1 The second thing that is undisputed is
2 that both the sexual assaults that I have to sentence
3 Mr. Tsetta for fall into the category of what has been
4 termed “major sexual assault” by the Alberta Court of
5 Appeal in *R v Arcand*, 2010 ABCA 363, and this was
6 adopted in our court by our Court of Appeal in *R v*
7 *A.J.P.J.*, 2011 NWTCA 21

8 These offences engage a starting point of
9 three years imprisonment. As I and others have often
10 had occasion to say, a starting point is not a minimum
11 sentence nor is it a set tariff of sentence for any given
12 offence. It simply guides where the sentencing court
13 must start from in determining what the sentence
14 should be.

15 From the starting point, the sentence
16 must be adjusted to reflect mitigating and aggravating
17 features of the case. The starting point simply reflects
18 the inherent seriousness of an offence.

19 In the written submissions that were filed
20 on behalf of Mr. Tsetta, counsel raised the possibility
21 that the starting point may need to be adjusted to give
22 effect to the principles articulated in *Gladue* and
23 *Ipeelee*. More specifically, at paragraph 60 of those
24 submissions, counsel wrote:

25
26 The three-year starting point for a person
27 of prior good character exacerbates the

1 history of systemic racism against
2 Aboriginal offenders. All of the factors
3 which stem directly from the legacy of
4 colonialism, i.e. alcoholism, lower
5 education attainment, high incarceration,
6 contribute directly to lengthier criminal
7 records for Aboriginal offenders, which in
8 turn leads to an almost automatic
9 increase over the baseline starting points.
10 Isn't it time that sentencing courts in
11 starting point jurisdictions consider a
12 lower starting point for Aboriginal
13 offenders?

14
15 In oral submissions counsel refined this position,
16 explaining that he was not, in fact, asking this Court to
17 adopt a different starting point in this case. Given that, I
18 will not entertain this issue further other than to say that
19 in my view it would not, in any event, be open to this
20 Court to do so. I have not been referred to any case
21 that would support this proposition and, besides, the
22 *A.J.P.J.* decision that I have already referred to is
23 binding on this Court and was a matter involving an
24 Indigenous offender.

25 If a different starting point is to be
26 developed in sentencing Indigenous offenders on major
27 sexual assaults, that direction would have to come from

1 the appellate court.

2 Defence's revised position is that in the
3 context of assessing the aggravating and mitigating
4 factors that justify a departure from the three-year
5 starting point, an Indigenous offender's criminal record
6 should be given far less an aggravating weight than
7 might be the case for a non-Indigenous offender.

8 Crown and Defence do not entirely agree
9 on this, so I will address that issue later when I turn to
10 the contentious issues. But as far as the starting point
11 itself, I understood it to be agreed between Crown and
12 Defence that it is the three-year starting point that
13 applies.

14 The third principle engaged in this case
15 that is beyond dispute is the principle of totality
16 because I have to sentence Mr. Tsetta for several
17 offences, and I adopt here what I said in *R v Hein*, 2017
18 NWTSC 21, about totality, and I will repeat what I said
19 in that case because I do think it is important that
20 people understand what totality means:

21
22 Sometimes people have a hard time
23 understanding this because it seems like
24 a sentencing discount for people who
25 commit a lot of offences. This could be
26 seen, I suppose, as a reward for
27 committing many offences. I understand

1 that maybe how it seems but the
2 principle of totality is there to ensure the
3 overall effect of the sentence is not
4 crushing on the individual. And that is
5 important because ultimately the hope
6 always is that people will achieve
7 rehabilitation. That is ultimately one of
8 the best ways for the public to be
9 protected. So in our criminal justice
10 system in Canada we do not simply pile
11 up sentences on people without taking
12 into account what the global effect of that
13 sentence is going to be.

14
15 Other sentencing principles and objectives must also
16 be weighed. As I have already said, it is the Court's
17 duty to arrive at a sentence that meets the fundamental
18 principle of proportionality. General deterrence and
19 denunciation are the paramount sentencing principles
20 when dealing with crimes of sexual violence such as
21 these. This Court has repeatedly said that this is of
22 particular importance, given the prevalence of sexual
23 assaults in this jurisdiction.

24 Sexual assaults are a serious social
25 problem in many places. In this jurisdiction it is a
26 problem of epidemic proportion that continues to cause
27 incalculable harm to individuals and communities. It

1 perpetuates trauma from generation to generation. It
2 robs the victims of something that is very difficult to get
3 back.

4 The use of the word “survivor” to describe
5 those who live with this and have to carry on with their
6 lives carrying this with them is not an exaggeration. For
7 all those reasons continuing to denounce these crimes
8 is of paramount importance.

9 Of course I am well aware that imposing
10 stern sentences for these crimes does not address the
11 underlying causes of this social illness. But the reality
12 is that courts do not have the tools to do that.
13 Education, prevention, helping people and communities
14 heal, all of that is very important and is a huge piece,
15 probably the most important piece in addressing the
16 devastating harm that sexual assault causes.

17 But those are not things that the criminal
18 courts have any tools to achieve.

19 I have been talking about some of the
20 principles that are not disputed in this matter, but a
21 number of things are, and I will now address those and
22 explain my conclusions on those aspects. The gap
23 between the Crown and Defence positions as to what a
24 fit sentence is comes, in part at least, from
25 disagreement about a number of things.

26 The first issue is whether an excerpt of
27 the transcript of proceedings involving Mr. Tsetta back

1 in 2013 is admissible. Those proceedings were in
2 relation to the aggravated assault he committed on
3 M.A. The transcript includes the Territorial Court
4 judge's reasons for judgment finding Mr. Tsetta guilty,
5 submissions on sentence and the reasons for
6 sentence. Because its admissibility was an issue, it
7 was marked as a lettered exhibit at the sentencing
8 hearing on the understanding that I would rule on its
9 admissibility as part of my decision.

10 The Defence's position is the transcript is
11 irrelevant, inflammatory and inadmissible.

12 Details of past convictions are
13 admissible at a sentencing hearing as long as they are
14 relevant. Routinely, courts are told, for example, about
15 the fact that a past conviction was for a spousal assault
16 or was for a crime committed against the same victim
17 or was for a crime committed against children, if the
18 victim of the current offence is a child.

19 In this case, some aspects of that earlier
20 conviction for assault against M.A. came out during the
21 trial evidence. But even if this information had not
22 come out at trial, I cannot see how the Crown could be
23 prevented from referring to the particulars of
24 Mr. Tsetta's earlier conviction for the aggravated
25 assault of M.A.

26 First, this was a serious prior offence on
27 the same victim. Second, the particulars of that earlier

1 offence add important context to the May 2017 events,
2 in particular, with respect to how terrifying those events
3 must have been for M.A. She was in Mr. Tsetta's
4 house and pretty much at his mercy and she knew of
5 the violence he was capable of. In my view these
6 details are relevant. Filing a transcript of the
7 proceedings is simply the most accurate way to put
8 those particulars before the Court. For that reason, I
9 rule the transcript is admissible, and I direct the clerk to
10 mark it as the next full exhibit on the sentencing hearing
11 which I believe is S6.

12 The next issue, though, is what use can
13 be made of this information. It goes without saying, but
14 I will say it anyway, that Mr. Tsetta is not to be punished
15 again today for the crime he committed back then. But
16 as I said, the earlier incident adds important context to
17 the crime Mr. Tsetta committed against M.A. in 2017. It
18 sheds light on how terrifying the assault on M.A. must
19 have been for her. Having experienced in the past
20 being essentially trapped in Mr. Tsetta's house,
21 seriously injured and in pain and having him not call for
22 help, it must have been truly terrifying for her to know
23 she was again at his mercy as he was sexually
24 assaulting her.

25 It also puts context around what she did
26 to convince him to let her go, promising she would not
27 tell anyone. And similarly, it puts context around

1 something in her statement that struck me the very first
2 time I heard it: the part of her statement where she
3 said she was surprised he let her go. She did not think
4 he was going to let her go. That comment makes more
5 sense and is easier to fully understand with the
6 knowledge of the particulars of the earlier events.

7 But there is more. The particulars of his
8 earlier offence show that Mr. Tsetta did not show any
9 empathy towards M.A. on that occasion. She was
10 seriously hurt with two broken bones in her leg and a
11 broken forearm, in severe pain, asking him to call for
12 help and yet for several hours he refused to do so,
13 presumably because he did not want to face the
14 consequences of having assaulted her. He told her to
15 lie to the paramedics about how she got hurt and, in
16 fact, she did. That is relevant from a public safety point
17 of view. It shows that the callousness and lack of
18 empathy that Mr. Tsetta demonstrated toward
19 Ms. Grandjambe in June 2017 and to somewhat of a
20 lesser extent perhaps to M.A. in May 2017 is not an
21 isolated thing.

22 All that being said, and I want to
23 emphasize this again, Mr. Tsetta has already been
24 punished for that crime and must not in these
25 proceedings be punished a second time for it. So I
26 have cautioned myself about the importance of not
27 placing undue emphasis on this particular aspect of

1 Mr. Tsetta's criminal record.

2 The second contentious issue has to do
3 with the effect that the unlawful confinement should
4 have on sentencing. Defence has argued that because
5 the unlawful confinement of Ms. Grandjambe was part
6 of the same chain of events as the sexual assault, a
7 concurrent sentence should be imposed for it. But
8 Defence also argued that the element of confinement
9 cannot be treated as an aggravating factor on the
10 sexual assault because it was the subject matter of a
11 separate charge.

12 It would, of course, be an error to impose
13 consecutive sentence on the unlawful confinement
14 charge and then also consider it as an aggravating
15 factor justifying the imposition of a longer sentence on
16 the sexual assault charge because that would be
17 punishing Mr. Tsetta twice for the same thing.

18 But what Defence is asking me to do in
19 my view would also be an error because it would
20 amount to not punishing him at all for that aggravating
21 factor. The element of confinement is aggravating in
22 this case. The overall sentence must reflect that. It can
23 be reflected either by the imposition of a separate
24 sentence for that count that would be made
25 consecutive, or it can be reflected by increasing the
26 sentence on the sexual assault charge and making the
27 sentence on the unlawful confinement charge

1 concurrent. And in either situation, totality has to be
2 taken into account.

3 On this issue I entirely agree with the
4 comments of the Manitoba Court of Appeal in *R v*
5 *G.G.S.*, 2016 MBCA 109 at paragraphs 50 to 53. In my
6 view, it is proper to have the element of confinement
7 reflected in the sentence imposed on the sexual assault
8 charge and to impose a concurrent sentence on the
9 unlawful confinement charge.

10 The next point of contention is whether
11 the assault on M.A. can be characterized as having
12 occurred in a domestic context. The Crown has argued
13 that the sexual assault on M.A. should be treated as
14 having occurred in a domestic context, which would be
15 an aggravating factor. The Crown bases this on the
16 fact that Mr. Tsetta and M.A. used to be in a
17 relationship. Defence disagrees with this
18 characterization.

19 On that point, I agree with Defence. The
20 spousal relationship between M.A. and Mr. Tsetta
21 ended when he assaulted her in 2013, and it was clear
22 on the trial evidence that it never resumed. By the time
23 these events happened, the most you could say about
24 their relationship is that they were on friendly terms.

25 I agree with the Crown that in certain
26 circumstances violence that occurs after a spousal
27 relationship has ended can still be characterized as

1 domestic violence. For example, if the violence occurs
2 soon after the end of the relationship or if the violence
3 is rooted in the offender not accepting the end of the
4 relationship regardless of how long before that
5 relationship has ended, or if the offence is in some
6 other way connected to the past relationship. But here,
7 considering the whole of the evidence, I do not find the
8 sexual assault on M.A. can be treated as having
9 occurred in a domestic context.

10 The absence of any hint of a romantic
11 relationship or a rekindling of that relationship between
12 them was, as Defence counsel pointed out, one of the
13 reasons why I found aspects of Mr. Tsetta's version of
14 what happened between them that night completely
15 implausible. The facts that a sentence is based on
16 have to be consistent with the facts found at trial.

17 The next point of disagreement is on the
18 question of breach of trust. The Crown has argued that
19 the crimes against M.A. and Ms. Grandjambe are both
20 aggravated because they involved an element of
21 breach of trust.

22 Section 718.2(a) of the *Criminal Code*
23 deems certain things to be aggravating factors on
24 sentencing and at paragraph 3 it says that:

25
26 Evidence that the offender, in committing
27 the offence, abused a position of trust or

1 authority in relation to the victim is one of
2 those aggravating factors.

3
4 The question of breach of trust is not always a black-
5 and- white thing. Some circumstances are very clear.
6 For example, a parent or relative vis-à-vis a child or a
7 teacher vis-à-vis a student, or a boss vis-à-vis an
8 employee or a coach vis-à-vis an athlete. Other times it
9 is more nuanced.

10 It was very clear from Ms. Grandjambe's
11 evidence that in her own mind she trusted Mr. Tsetta:
12 she considered him a good friend. And as he was
13 sexually assaulting her, she could not believe he was
14 doing this to her and she felt completely and brutally
15 betrayed. The fact that she trusted him as a friend no
16 doubt was why she accepted his invitation to go to his
17 house. Even more so because as he did, he told her
18 she would be safe. She believed that and trusted him,
19 and he took advantage of that fact. Her trust in him
20 made her more vulnerable.

21 That does not mean that he was, legally
22 speaking, in a position of trust vis-à-vis her in the same
23 way as in those other examples I have given. And as
24 Defence put it, if he had done the same thing to a
25 stranger, it would not be any less serious. However,
26 the fact that he took advantage of the fact that she
27 trusted him and encouraged her to trust him does need

1 to be considered in the assessment of his overall moral
2 blameworthiness.

3 And irrespective of that, it is clear that the
4 fact that she did trust in the usual meaning of the word,
5 perhaps not the legal one, and felt terribly betrayed by
6 what he did added to the harm that resulted from this
7 for her.

8 The situation with respect to M.A. is
9 different. Although they had been in a relationship in
10 the past and on the evidence had preserved some
11 connection, it is not clear to me that there was any kind
12 of actual trust between them in May 2017. On the
13 contrary, considering her statement to police, it appears
14 not surprisingly, given how badly he had hurt her in the
15 past, that she did not fully trust him. She agreed to go
16 to his house, but there was someone else going with
17 them. When she was cross-examined at the
18 preliminary hearing, and the transcript was marked as a
19 trial exhibit, she talked about the fact that he invited her
20 and she figured if the other woman came with them,
21 then yes, she would go.

22 In her statement she also made
23 reference to having taken her chances. I am not
24 convinced there is any basis to say that there was any
25 particular trust relationship between them at that point.

26 The next issue is the relevance of the
27 criminal record. I have already talked about this.

1 Defence argues that it is largely irrelevant because
2 most of it is dated because there are gaps in it and also
3 because of Mr. Tsetta's background in light of the
4 *Gladue* and *Ipeelee* principles.

5 To put this submission in context, it is
6 true that the three-year starting point assumes an
7 offender of previous good character. A criminal record
8 is an aggravating factor that usually justifies an
9 increase from the starting point. Mr. Tsetta's counsel
10 argued that one concrete way to implement the *Gladue*
11 and *Ipeelee* principles is to give less of an aggravating
12 weight to an Indigenous offender's criminal record.

13 I do not disagree that the aggravating
14 effect of a criminal record must be carefully weighed
15 and this is for a number of reasons. The first is what I
16 have already said: A person should not be punished
17 over and over again for past convictions. The second
18 reason is, as Defence counsel noted, it is hardly
19 surprising that a person who is exposed to the type of
20 dysfunction that Mr. Tsetta faced from a young age and
21 to violence would develop substance abuse issues and
22 manifest violence in his own life. That is not what
23 happens to everyone who has been exposed to those
24 types of things, but it often does, and we see
25 manifestations of this virtually every week in our courts.

26 At the same time, I would not go as far as
27 to say that the criminal record should be disregarded

1 entirely, particularly where, as here, it includes a
2 number of convictions for crimes of violence and one
3 conviction for sexual assault. It is true that some of
4 these, including the sexual assault conviction, are quite
5 dated. They carry less weight than more recent
6 convictions do. But when a person has a steady
7 stream of convictions, the more dated ones do not lose
8 all relevance just because they are dated. Convictions
9 that form part of a steady pattern of criminality are
10 relevant to the need to protect the public.

11 The gap between 2003 and 2010 shows
12 that under certain circumstances Mr. Tsetta has been
13 able to stay out of trouble. The second so-called gap
14 between 2013 and now, as I have said, is not much of
15 a gap because Mr. Tsetta was released in 2015 from
16 the 2013 sentence and then was arrested and kept in
17 custody as of the middle of June 2017. So this is not
18 really a six-year gap.

19 Having said all of that, the question I
20 must decide is taking into account all of this and
21 weighing all of these things, what is a fit sentence?
22 The paramount sentencing principles, as I have said,
23 are denunciation and general deterrence, and since
24 Mr. Tsetta committed two serious sexual assaults within
25 the span of a month and in circumstances that have
26 some similarities, specific deterrence is also an
27 important principle.

1 preparation of the pre-sentence report when he was
2 reviewing it with the author that he said that treatment
3 might be of assistance to him. It is very positive that he
4 eventually recognized this, but it is of concern that this
5 was not immediately apparent to him, especially in the
6 face of his current situation.

7 The reality is that Mr. Tsetta has hurt
8 people, sometimes very badly, when drinking. He has
9 lost his freedom several times as a result and
10 sometimes for very lengthy periods of time. Yet to date
11 he has not taken any meaningful steps to try to address
12 his addiction to alcohol.

13 There are other things that he told the
14 author of the pre-sentence report that, in my respectful
15 view, demonstrate a lack of insight. Mr. Tsetta's
16 statement to the author of the report that he was hoping
17 to get time served is quite telling. I do understand that
18 from his perspective the two years and more he has
19 already spent in custody is a long time. I expect
20 anyone spending that much time incarcerated would
21 feel that it is a long time: that is normal.

22 But he knows he received a three-year
23 sentence for aggravated assault on M.A. back in 2013.
24 Now he has been found guilty of raping her as well as
25 raping and confining another person. For him to think
26 that he could get time served for these offences
27 suggests to me that he has a long way to go to

1 understand how serious these offences were.

2 Also of concern is his comment about
3 eventually wanting to be friends again with Ms.
4 Grandjambe and more specifically the comment that he
5 cannot hate forever. Even taking into account that his
6 position is that he did not do what she says he did, that
7 he is innocent of these charges, the fact remains that
8 he did sit through her testimony. He heard her testify;
9 he saw the hurt she showed and the anger. Yet when
10 discussing the possibility of a future friendship with her,
11 he referred to his feelings without any apparent regard
12 or thought about how she might view things. This
13 suggests to me that Mr. Tsetta will have considerable
14 work to do on himself to deal with the issues that he
15 faces with his addiction, with understanding why he
16 behaves the way he does in certain circumstances.
17 Hopefully he can access programs to assist him with
18 that during his sentence, but I expect it will be a long
19 road ahead for him.

20 As I have already said, the starting point
21 for these offences is three years. From this the
22 sentence must be adjusted to reflect aggravating and
23 mitigating factors. There are a number of aggravating
24 factors. The following are the ones I find aggravating
25 with respect to the sexual assault of M.A.

26 The first is that she was passed out and,
27 therefore, more vulnerable when Mr. Tsetta started

1 assaulting her. She was drinking before going to
2 Mr. Tsetta's house, and he supplied her with more
3 liquor and he knew she was intoxicated to the point
4 where she could not consent to sexual activity. He took
5 advantage of her in that highly vulnerable state.

6 The second is that he had committed a
7 very serious crime of violence against her in the past.
8 While I agree that the criminal record is not as a whole
9 a particularly significant factor in this case, that
10 conviction for aggravated assault against M.A. is very
11 aggravating.

12 The third aggravating factor is that
13 Mr. Tsetta used more force against her than what is
14 inherent in an act of sexual intercourse. Many sexual
15 assault victims do not struggle or attempt to fight their
16 attacker. Many sexual assaults on passed-out victims
17 end when the victim wakes up. But not this one. M.A.
18 tried to resist. Mr. Tsetta persisted. She tried to
19 scream, and he covered her mouth with his hand for a
20 period of time. I find this very aggravating. It could only
21 have added to the level of helplessness she would
22 have felt, especially considering what she had
23 experienced with him in 2013.

24 The fourth factor is that Mr. Tsetta was on
25 process when he committed this offence. He was on
26 conditions not to drink, which he flagrantly breached.
27 This is not the most significant aggravating factor, but it

1 is a factor.

2 There are also aggravating factors with
3 respect to the offences committed against
4 Ms. Grandjambe. Again, Mr. Tsetta used far more
5 force against her than what is inherent in an act of
6 intercourse and he caused injuries to her.

7 The second is that the sexual assault was
8 prolonged. It involved multiple acts of forced
9 intercourse, and he also forced her to give him oral sex.
10 We will never know how long this lasted exactly, but it
11 was for an extended period of time.

12 I find it aggravating as well that Mr. Tsetta
13 demonstrated extreme disregard and contempt towards
14 her during that assault. Obviously that is to an extent
15 true of any sexual assault, but this was particularly cruel
16 and callous conduct, laughing at her when she asked
17 him why he would do this to a friend, dragging her back
18 to the bed after she tried to get away, being rough with
19 her during the intercourse itself and extorting more sex
20 from her before he let her go. This was, in my view, a
21 very brutal offence.

22 The element of confinement is also an
23 aggravating factor. As I said before, my way of
24 addressing that is to treat it as an aggravating factor in
25 arriving at the sentence for the sexual assault and
26 make the sentence on the unlawful confinement charge
27 concurrent.

1 aggravating but for reasons I have already explained, I
2 do not find it to be a particularly significant factor in the
3 overall picture here. It remains relevant because
4 Mr. Tsetta has several convictions for crimes of
5 violence and the one dated sexual assault conviction.

6 There are no mitigating factors with
7 respect to either offence. Mr. Tsetta's background as
8 an Indigenous offender must be taken into account.
9 His is a clear case of having suffered the impact of
10 intergenerational trauma. His account of the conditions
11 he grew up in and some of the things his sister told the
12 author of the pre-sentence report are completely tragic.
13 The violence that he observed in the home between his
14 parents, the violence he was subjected to himself, the
15 harsh conditions he grew up with and the other
16 circumstances described in the report, all of that
17 probably goes a very long way in explaining the turns
18 that his life took.

19 There is no need for Indigenous
20 offenders to establish a causal link between their
21 circumstances and the crimes they are to be sentenced
22 for, but sometimes, as in this case, that link is fairly
23 apparent. It is important to understand this does not
24 excuse the conduct, but Mr. Tsetta's circumstances do
25 reduce his moral blameworthiness in comparison to
26 what that blameworthiness would be had he not gone
27 through all of that. Proportionality requires that this be

1 taken into account in deciding what the sentence to be.

2 The problem is to determine how this fits
3 in with other things I am also required to consider on
4 sentencing. How does Mr. Tsetta's reduced moral
5 blameworthiness intersect with the reality, abundantly
6 clear from the circumstances of these two offences,
7 that he presents a very real danger to the safety of the
8 members of this community? His reduced
9 blameworthiness does not reduce the need to protect
10 the public. The issue often comes up on sentencing.
11 What is the Court to do when it has to sentence a
12 person who today is dangerous even when it is clear on
13 the evidence that the person's past goes a long way to
14 explain how they came to be dangerous?

15 I bear in mind that these sentencing
16 proceedings are not dangerous offender proceedings.
17 The protection of the public is one of many sentencing
18 objectives to consider, but unlike what is the case in
19 dangerous offender proceedings, it is not elevated
20 above all other principles.

21 I have reviewed carefully all the
22 sentencing decisions that counsel have filed. I will not
23 refer to them in detail, not because I did not find them
24 helpful, but because sentencing is a highly
25 individualized fact-specific exercise. It is very difficult to
26 compare cases. Many of the cases I was referred to
27 involved serious sexual assaults. The facts in some of

1 the cases were more brutal than in some others, but
2 inevitably, some aggravating and mitigating factors are
3 present in some cases and not in others and that
4 makes comparisons very difficult.

5 Having given this matter considerable
6 thought, I conclude that for both these offences and
7 even taking into account the effect of Mr. Tsetta's
8 circumstances on his moral blameworthiness, the
9 sentence to be imposed for these offences must be
10 increased from the starting point in a way that reflects
11 the significant aggravating factors that are present.
12 And with respect to offences against Ms. Grandjambe,
13 given the number and significance of the aggravating
14 factors, that increase has to be more than nominal. It
15 has to reflect the seriousness of Mr. Tsetta's conduct
16 and the high degree of blameworthiness that attaches
17 to it.

18 I do have to apply the principle of totality,
19 which means I have considered the global effect that
20 the sentences will have. Because of this, I have
21 adjusted both sentences downwards. But I can only do
22 so to a point. The sentence I impose will be significant
23 and I fully realize that, but the application of totality
24 cannot result in imposing sentences that are
25 disproportionately low in relation to the crimes
26 committed.

27 The Crown has sought a number of

1 ancillary orders, and those will issue and they include a
2 DNA order, a firearms prohibition order commencing
3 today and ending 10 years after Mr. Tsetta's release,
4 an order that he comply with the *Sex Offender*
5 *Registration Act* for life, an order pursuant to section
6 743.21 that he is not to communicate with
7 Ms. Grandjambe during the custodial portion of his
8 sentence and an order that the exhibits be returned to
9 their rightful owner at the expiration of the appeal
10 period if no appeal is filed.

11 Counsel were very clear and transparent
12 in their submissions about what their positions would
13 have been if totality was not a factor. I want to be
14 equally transparent in the event that my decision is
15 reviewed by another court.

16 If I was sentencing Mr. Tsetta only for the
17 crime committed against M.A., I would have imposed a
18 sentence of four and a half years' imprisonment. If I
19 was sentencing him only for the sexual assault and
20 unlawful confinement of Ms. Grandjambe, I would have
21 imposed a sentence of six and a half years'
22 imprisonment. Together this would add up to 11 years.
23 I do think that the overall effect of such a sentence
24 would be crushing and is more than what is needed to
25 achieve the sentencing objectives. And that is the
26 reason why I have reduced both.

27 For the 29 months that Mr. Tsetta has

1 already spent in custody I am going to give him credit
2 for 43 months. For the sexual assault on M.A. my
3 sentence if there was no pre-trial custody would be four
4 years' imprisonment. For the 29 months of pre-trial
5 custody, as I have already said, I have applied a credit
6 of 43 months and that will leave a further five months to
7 be served on that count.

8 For the sexual assault on Cynthia
9 Grandjambe, the sentence will be five and a half years'
10 imprisonment consecutive and for the unlawful
11 confinement on Cynthia Grandjame, the sentence will
12 be one year concurrent.

13 The total jail term remaining to be served
14 by my calculation therefore on that sentence will be five
15 years and 11 months.

16 Have I overlooked anything from the
17 Crown's perspective?

18 A. PICHÉ: No, thank you, Your Honour.

19 THE COURT: Have I overlooked anything from the
20 Defence's perspective?

21 E. McINTYRE: No.

22 THE COURT: Thank you. Before we stand down, I
23 want to thank both counsel for their conduct of this
24 case, and their submissions throughout.

25 THE CLERK: All rise. Court is adjourned.

26

27 **(PROCEEDINGS CONCLUDED)**

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1 **CERTIFICATE OF TRANSCRIPT**

2 Neesons, the undersigned, hereby certify that the foregoing
3 pages are a complete and accurate transcript of the
4 proceedings transcribed from the audio recording to the best
5 of our skill and ability. Judicial edits have been applied to this
6 transcript.

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8 Dated at the City of Toronto, in the Province of Ontario, this
9 11th day of December, 2019.

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Kim Neeson

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Principal

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