

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

FRANKIE JAMES EYAKFWO

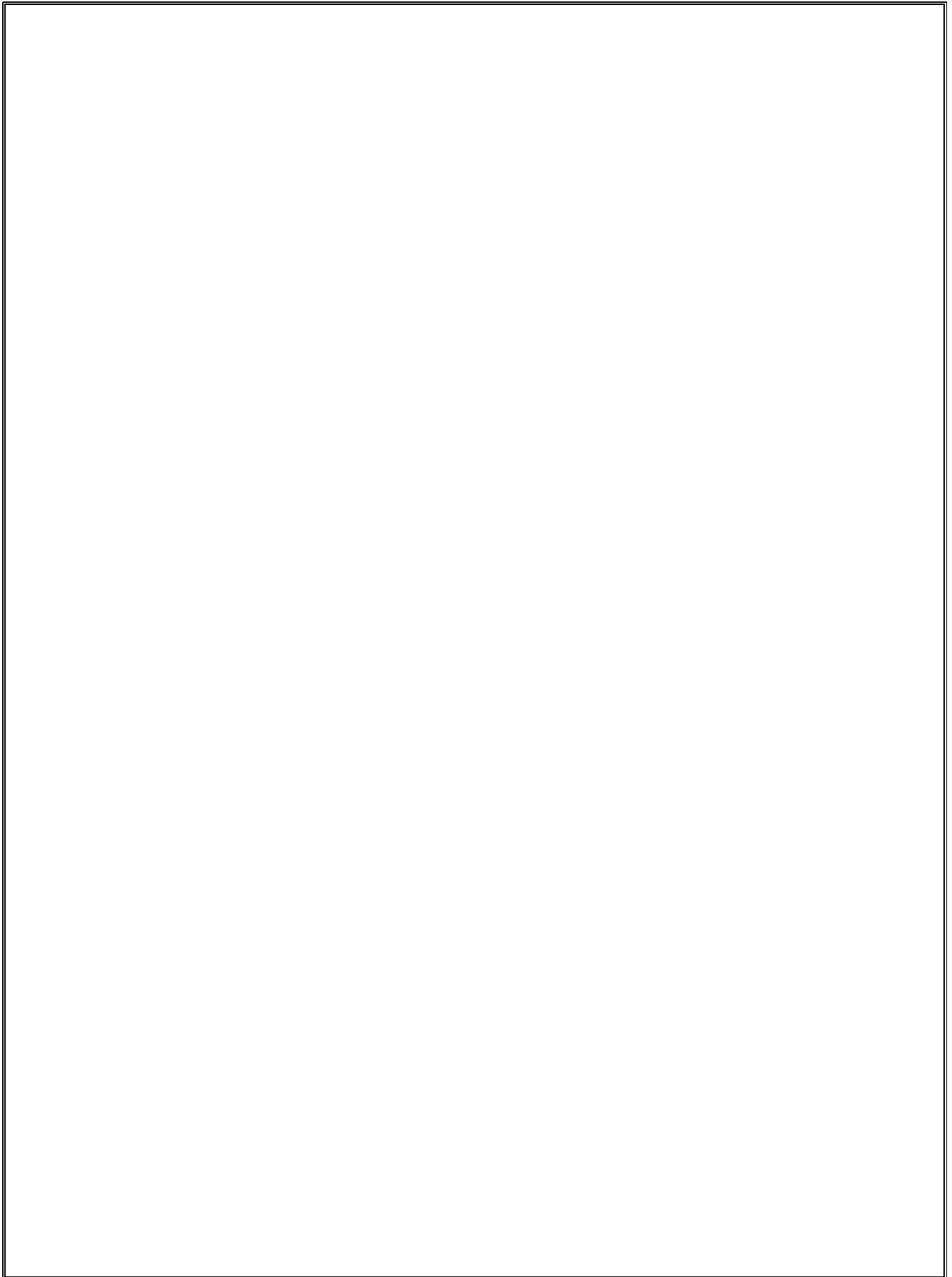
Transcript of the Reasons for Sentence delivered by the Honourable Chief Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 27th day of January 2021.

APPEARANCES:

M. Fane:	Counsel for the Crown
J. Casebeer:	Counsel for the Defence

Charge under s. 271 of the *Criminal Code*

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



1 **(DECISION)**

2 **THE COURT:** Today it is my responsibility to impose a
3 sentence on Mr. Eyakfwo for a serious sexual assault
4 that he committed on July 1, 2019.

5 The victim lives in Nunavut. She and Mr.
6 Eyakfwo had never met before. In July 2019, she was
7 visiting Yellowknife. She was walking on the street,
8 heading to the place where she was staying near the
9 downtown core. Mr. Eyakfwo approached her and
10 offered to walk her home.

11 While they were walking in an alley, he
12 pulled her pants off and then his own. He had sexual
13 intercourse with her without her consent and also put
14 his fingers in her vagina. After that, he left.

15 She reported this to the Yellowknife
16 RCMP. She was taken to the hospital, but once there
17 she did not want to tell the nurse what happened, and
18 she also did not want to undergo a sexual assault
19 examination. Although she had told the officer what
20 happened, she also did not wish to provide a formal
21 recorded statement.

22 Later that day, she returned to her home
23 community. She went to the health centre in that
24 community with her mother. There, she did agree to
25 undergo a sexual assault examination, and various
26 samples were seized during that examination including
27 a vaginal swab.

1 Male DNA was identified on that swab. It
2 was run against the National DNA Data Bank, and Mr.
3 Eyakfwo came up as a match. Investigators were
4 informed of this in October 2019.

5 The RCMP then proceeded to the next
6 step, which was to obtain a DNA warrant to obtain a
7 comparison sample from Mr. Eyakfwo. This is the
8 standard procedure that they have to follow in those
9 kinds of circumstances. That sample was obtained in
10 March 2020. It was examined, and the testing
11 confirmed that it was indeed Mr. Eyakfwo's DNA that
12 was found on the vaginal swab. Those results came in,
13 in June 2020.

14 On June 15th, Mr. Eyakfwo was arrested
15 and charged with a sexual assault of the victim. He
16 was remanded in custody and remained in custody
17 ever since. So because of how the investigation
18 unfolded, there was quite a bit of delay between the
19 commission of the offence and the time when Mr.
20 Eyakfwo was charged.

21 The Crown and defence entered into
22 resolution discussions after the charge was laid. The
23 pretrial process did take its course and a trial date was
24 set at one point, but I was advised by counsel that the
25 resolution discussions took place from an early stage.
26 Because of the possibility of resolution, the Crown held
27 off on telling the victim about the trial date, so she was

1 never told that she would have to testify on a specific
2 date for this.

3 I heard from the prosecutor, and I do not
4 doubt, that the resolution of this matter without trial, in
5 addition to the identification of the perpetrator, was a
6 great relief for the victim. Because of where she is, she
7 would have had to travel over a period of two days to
8 come to Yellowknife to testify. I also heard the
9 prosecutor say that she was described as having
10 special vulnerabilities. The prosecutor felt that she may
11 have had some difficulties explaining some of the
12 details of what happened to her had she been required
13 to testify.

14 The joint submission that I am presented
15 with basically is that I impose a sentence that will result
16 in a further term of imprisonment of two and a half
17 years once Mr. Eyakfwo is given credit for his remand
18 time. This would be a federal sentence, and it would
19 give Mr. Eyakfwo access to federal programming,
20 including the possibility of placement at the Regional
21 Psychiatric Centre in Saskatchewan. That institution
22 offers programming that, according to the materials
23 filed, might be the most appropriate for him.

24 Normally, a sentencing judge has a very
25 broad discretion on sentencing and ultimately is
26 responsible for deciding what a fit sentence is. Even
27 Courts of Appeal must show deference to a sentencing

1 judge's decision on sentencing. But that legal
2 framework is substantially altered when a joint
3 submission is presented. In those situations, the
4 Supreme Court of Canada has decided that the
5 sentencing court must follow the joint submission,
6 unless it is complete unreasonable and against the
7 public interest. As a result, my discretion in this matter
8 is significantly curtailed.

9 The joint submission that I am presented
10 with can only be characterized as extremely restrained.
11 It is likely not the sentence I would have imposed had
12 there not been a joint submission, given Mr. Eyakfwo's
13 extensive criminal record and especially how soon after
14 his release from his last sentence for a sexual assault
15 he committed this one. He remains today an untreated
16 sex offender. In my view, and without doubting at all
17 his sincerity when he says he wants to change his life,
18 he currently does present a significant public safety
19 risk.

20 The sentence he received for his last
21 sexual assault was 30 months, most of which was
22 absorbed by his remand time. The sentence I am
23 asked to impose today, in effect, is just slightly over that
24 for a similar and arguably even more serious crime.
25 But I have to follow the law, and I cannot say that the
26 joint submission is unreasonable or contrary to the
27 public interest, based on everything I have heard

1 because there are some unique features to this case.

2 Counsel have carefully and thoroughly
3 explained how they arrived at this position and why
4 they believe it is sufficient to address the objectives of
5 sentencing. I sincerely hope that they are right and that
6 a further two and a half years imprisonment will give the
7 correctional authorities enough time to ensure that Mr.
8 Eyakfwo receives meaningful programming that will
9 reduce his risk.

10 Even though I will follow the joint
11 submission, I do find it important to make certain
12 observations and comments about this case.

13 Without doubt, this is a very sad and very
14 difficult case. I am very grateful to counsel for the
15 extensive materials that they filed at the sentencing
16 hearing and for their very thorough submissions.

17 Mr. Eyakfwo has other convictions for
18 sexual assault dating back to when he was a youth.
19 His first conviction in 2003 when he was only 14 years
20 old was for a very serious sexual assault on a young
21 child. He received the maximum disposition available
22 under the *Youth Criminal Justice Act*. He was
23 convicted of a further sexual assault in 2005, again, as
24 a youth. His criminal record also includes other
25 convictions for crimes of violence.

26 Of significant concern to me is that Mr.
27 Eyakfwo was sentenced by this Court for another

1 serious sexual assault only on December 18, 2018.
2 That decision is reported at *R v Eyakfwo*, 2019 NWTSC
3 5. On that occasion, Mr. Eyakfwo had sexual
4 intercourse with a woman while she was sleeping. He
5 pleaded guilty. He had spent a fair bit of time on
6 remand and was given credit for it, as I have already
7 referred to.

8 The sentence imposed was the
9 equivalent of 30 months imprisonment. He was given
10 21 months credit for the time he had already spent on
11 remand, so the further jail term imposed was only 9
12 months. The sentencing judge added a period of
13 probation for 18 months after his release primarily for
14 rehabilitative purposes.

15 It is very clear from the sentencing
16 decision and from the materials that were placed before
17 the judge at that time, which were also placed before
18 me this week, that a term of nine months imprisonment
19 was not expected to afford any meaningful possibility of
20 treatment for Mr. Eyakfwo because of some of his
21 special needs.

22 The evidence before the Court then,
23 which is also before this Court now, is that there are no
24 programs in the territorial system that are suited to him
25 given those needs. The sentencing judge was
26 concerned about this in December 2018. She was
27 concerned that Mr. Eyakfwo, an untreated sex offender,

1 was not going to be able to get meaningful
2 programming within a nine-month sentence.
3 Unfortunately, those concerns proved justified. Mr.
4 Eyakfwo was released from that sentence on early
5 release in June 2019, and, within a few weeks, he
6 committed this further sexual assault.

7 As I said, the materials that were filed before
8 me were also before the sentencing judge in December
9 2018. They include the pre-disposition report and
10 psychological assessment that were prepared for Mr.
11 Eyakfwo's sentencing in 2003, the pre-sentence report
12 that was prepared for his sentencing in 2005, the pre-
13 sentence report in another psychological assessment,
14 as well as a report prepared for the Crown also for the
15 2018 sentencing. The report prepared for the Crown
16 addressed the programming needs and the effect that
17 the duration of the sentence would have on Mr.
18 Eyakfwo's ability to access different programs.

19 At this sentencing, I was also provided
20 support letters that were prepared more recently and
21 material confirming that Mr. Eyakfwo engaged in
22 counselling sessions while he was at the Forth Smith
23 institution. I heard that a few months before he was
24 arrested on this charge he had returned to live in Whatì,
25 his home community, and was doing much better there
26 than he had been in Yellowknife.

27 Counsel referred to Mr. Eyakfwo's

1 background and personal circumstances extensively in
2 their submissions, and aspects of that were also
3 referred to in the 2018 sentencing decision, which is a
4 reported decision. I will not go into all these details
5 again here. I will simply refer to this background in
6 broad terms.

7 As the Court noted in 2018, Mr. Eyakfwo's
8 background is a troubling one. He has some cognitive
9 challenges, possibly the result of having had untreated
10 meningitis when he was very young. He was exposed
11 to violence as a young person and more recently
12 disclosed having been sexually abused as a youth. He
13 was exposed to pornographic materials at a young age
14 as well. He manifested very troublesome behaviour,
15 violent behaviour, threats, and sexual misconduct at a
16 young age, even before he committed the first offence
17 that brought him before the courts.

18 As was noted at the 2018 sentencing, this
19 was a child who needed intervention, needed help, and
20 unfortunately did not get it. His family did not want him
21 to be taken from them and actually fled the community
22 with him at a time when Social Services were
23 attempting to arrange a placement for him. As his
24 counsel pointed out earlier this week, the legacy of
25 residential schools may well in part explain that
26 reaction, which is very sad.

27 Based on what I have read and heard, it

1 also appears that there was considerable dysfunction in
2 the family at the time. It does not seem that at the time
3 Mr. Eyakfwo's parents accepted the fact that their son
4 was in need of serious help and intervention. Even in
5 the face of the very serious crime he had committed
6 against a young child, they could not or would not
7 acknowledge that something very serious was going on
8 and that professional intervention was needed. That is
9 especially sad. And reading the various reports, on
10 more than one occasion there are references to the
11 need for significant intervention, and comments by
12 various authors to the effect that without that
13 intervention Mr. Eyakfwo would grow up to spend his
14 life in and out of jail. So far this is what has happened.

15 As his counsel pointed out during
16 submissions though, it is important not to lose sight of
17 positive aspects of the situation that could be a
18 foundation for a different future. Mr. Eyakfwo is 31
19 years old, which is still young. He says he wants to
20 change. He says he does not want to spend the rest of
21 his life in jail, and he says he is sorry. I believe that he
22 is sincere when he says that, as I am sure he was
23 when he said it in the past. There is probably a long
24 road ahead of him to change his life.

25 I heard some good things about him. I
26 heard that he is good on the land. I heard that he has
27 artistic abilities, and I saw that for myself as I had the

1 opportunity to look at some of his drawings earlier this
2 week, which, I repeat, are beautiful. I heard that he is
3 close to his language, and his culture are important to
4 him. So obviously he has talents and skills. There is a
5 lot that he can do to lead a more productive life.

6 He now has considerable support from his
7 mother whose own life is more healthy than it was in
8 the early 2000s. He has support from other family
9 members, including a sister who has written a letter of
10 support that talks about how well he did after he
11 returned to Whatì before his arrest. Of course, that was
12 not a lengthy period of time, but it does show some
13 hope for different types of behaviour, and it does show
14 that he did better in his home community and with
15 supports than he did when he was in Yellowknife. All of
16 those things are positive.

17 The longstanding issues that he has
18 stemming from his past must also be addressed,
19 however. And in my view, they can only be addressed
20 with professional assistance and will require effort and
21 perseverance on his part.

22 When sentencing Mr. Eyakfwo in 2018,
23 the sentencing judge noted that despite her concerns
24 about whether the sentence she was imposing would
25 assist Mr. Eyakfwo, she was, in a way, stuck. He had a
26 lot of remand time; he had to be sentenced based on
27 sentencing principles, taking into account the

1 seriousness of the offence and his criminal record but
2 also his guilty plea; his circumstances as an Indigenous
3 offender; and factors that reduced his blameworthiness,
4 including his cognitive deficits.

5 She concluded that those circumstances
6 warranted a reduction of the sentence for what it would
7 be for an offender without those circumstances, and I
8 am in the same position today. She also noted that she
9 could not impose a longer sentence than what was
10 warranted simply to ensure that certain programs would
11 be available to Mr. Eyakfwo. In many ways, I am faced
12 with a very similar situation, in addition to the fact that
13 there is a joint submission.

14 The fact is that Mr. Eyakfwo has pleaded
15 guilty. His plea is a significant mitigating factor. The
16 DNA evidence would obviously have been helpful to
17 the Crown to prove parts of its case, but it could not
18 prove its whole case.

19 The Crown would still have to have
20 proven how the sexual contact occurred, and that it was
21 without the victim's consent. The Crown would have
22 had to call her to testify to talk about those things.
23 Sparing her that was sparing her a lot, as anyone who
24 has sat through a sexual assault trial well knows, and it
25 is especially so given that I have heard that the victim in
26 this case had particular vulnerabilities that might have
27 added challenges to her recounting these events. As a

1 result the guilty plea must be given significant weight.

2 I also find that Mr. Eyakfwo's difficult
3 circumstances as an Indigenous offender reduces
4 blameworthiness. And also, based on the analysis set
5 out in the case of *Ramsay* from the Alberta Court of
6 Appeal, his cognitive difficulties further reduce that
7 blameworthiness (*R v Ramsay*, 2012 ABCA 57). All
8 that has to be taken into account and weighed against
9 the aggravating factors and the concern that his
10 criminal history raises about public safety.

11 I will open a short parenthesis here about
12 the fundamental difference between a sentencing that
13 proceeds under the regular sentencing regime as this
14 one and sentencing that proceeds under Part 24 of the
15 *Criminal Code* when application is made by the Crown
16 to have an offender designated a long-term offender or
17 a dangerous offender.

18 Provided that the evidence establishes
19 that the criteria are met for one or the other designation,
20 the sentencing courts have more options and more
21 tools on sentencing. Rehabilitation remains a
22 sentencing objective, but under Part 24 the protection
23 of the public takes on added significance and
24 importance. The reason I say that, and it was raised
25 briefly during submissions, is that Mr. Eyakfwo needs to
26 understand that given his criminal history for sexual
27 offending he is very lucky not to be facing a long-term

1 offender application or a dangerous offender
2 application for this most recent sexual assault.

3 Some offenders with comparable criminal
4 records and comparable tragic personal histories in this
5 jurisdiction have received such designations. Because
6 no matter how sad, difficult or unfortunate a person's
7 background and history is, there comes a point where if
8 the person continually harms others the criminal justice
9 system does not have a choice, and removing that
10 person from the community, protecting others from that
11 risk for as long as possible, as long as is needed,
12 becomes the focus of the sentencing.

13 I, and everyone in this room I am sure,
14 hopes that Mr. Eyakfwo will succeed, that he will not be
15 back in court, that he will not face another sentencing
16 for a serious charge again. I mean it. I really sincerely
17 wish that for him.

18 But I would not be doing him a favour if I
19 was not honest in my comments today. I have a lot of
20 sympathy for his situation, for the struggles he has had.
21 It is hard to imagine anyone getting through life with
22 those kinds of struggles and that kind of weight, but this
23 is his last chance in many ways.

24 If ever another court has to sentence him,
25 especially for an offence like this or another serious
26 crime for hurting someone else, chances are the Court
27 will not have a lot of options. Restraint is a very

1 important sentencing principle, but it can only go so far.
2 And even the deference that a sentencing judge must
3 extend to a joint submission has its limits.

4 That being said, the sentence that is
5 jointly proposed today is one that will, for the first time,
6 enable the federal correctional authorities to examine
7 Mr. Eyakfwo's programming needs and, if they so
8 decide, enable him to access programs he has not so
9 far had any access to. I do understand that he and his
10 family would prefer that he remain in the North. That is
11 not for me to decide, as counsel has pointed out. It is
12 for the correctional authorities. But I also think, for what
13 it is worth, that Mr. Eyakfwo needs to understand that,
14 in the long term, it is better for him to have access to
15 professional support and to the help he needs, even if
16 that means being away from the the NWT for a period
17 of time, if that is what he needs to move forward with
18 his life in a different way.

19 It is very positive that he has family
20 support. It is very positive that for a few months before
21 his arrest after he returned to Whatì he was doing well
22 and was not getting into trouble. Whatever happens
23 with his sentence, and where he serves it, Whatì will be
24 there for him when he is released. Those supports will
25 be there for him. And hopefully, he can go back and
26 pick up where he left off, but with more tools, a better
27 understanding of what he needs to do and not do to

1 never find himself hurting another person again.

2 Today, as was the case in December
3 2018, he is an untreated sex offender. I believe what
4 he says when he says he wants to change his life. But
5 it clear from the materials before me that professional
6 intervention and help are required for that sincere wish
7 to translate into concrete change, and I hope the
8 sentence I impose today will be sufficient to ensure that
9 he gets that help.

10 I think it is especially important in this
11 case that the correctional authorities have as much
12 information as possible about Mr. Eyakfwo and his
13 background. And to this end, I am directing that copies
14 of the materials filed at the sentencing hearing be sent
15 on to the correctional authorities, along with a transcript
16 of my decision. Hopefully, that will help them in
17 developing the correctional plan and making placement
18 decisions.

19 I do feel I must add that, while I hope Mr.
20 Eyakfwo benefits from programming during his
21 sentence and that he will succeed, particular care
22 should be taken when he reaches the point when he is
23 eligible for release, whether it is parole, statutory
24 release, or warrant expiry. Assessing his progress and
25 whether he still presents a risk to others will be the
26 responsibility of others down the road. It is not
27 something that the Court can direct at this time. They

1 are not issues for the sentencing court, but I can only
2 say that, in my respectful view, meaningful, ongoing
3 risk assessments by all the levels of authorities that
4 have a say in it will be particularly important in this
5 case, given Mr. Eyakfwo's history.

6 The Crown has sought a number of
7 ancillary orders. They are mandatory and will issue.
8 There will be a section 109 firearms prohibition order. It
9 will commence today and expire 10 years after Mr.
10 Eyakfwo's release.

11 There will be a lifetime order that he
12 comply with the requirements of the *Sex Offender*
13 *Information Registration Act*. And there will be a DNA
14 order, as sexual assault is a primary designated
15 offence.

16 With respect to the victim of crime
17 surcharge, having looked into the issue, at the time of
18 this offence, the date of this offence, there was no valid
19 provision in force to deal with victim of crime
20 surcharges. The new provision that was enacted in
21 response to the Supreme Court of Canada's decision
22 striking down the old version came into effect July 21,
23 2019. For that reason, the surcharge is not an issue
24 that I need to consider, but I probably would have
25 waived it in any event.

26 Mr. Eyakfwo has 172 days of remand
27 time attributable to this charge because some of his

1 time in custody, I was told, was applied to sentences he
2 received for other offences. Credited at a ratio of 1½
3 day of credit for each day of remand, that adds up to
4 258 days. The joint submission was framed as one
5 suggesting that I impose a further imprisonment term of
6 2½ years, so I have to calculate backwards what the
7 sentence would have been without the remand time.

8 The sentence without the remand time
9 would have been 38½ months. For the 172 days of
10 remand, I will give him credit for 8½ months, leaving a
11 further jail term of 30 months, which is 2½ years.

12 It will be obvious from everything else I have
13 said, but this sentence should not be taken as having
14 any precedential value or representing what this Court
15 views as a fit sentence for a major sexual assault such
16 as this one committed by someone who has this type of
17 related record, even taking into account the mitigating
18 factors and the circumstances that reduces
19 blameworthiness.

20 I will make an order that any exhibits
21 seized on this matter be returned to their lawful owner,
22 if that is appropriate. Otherwise, they are to be
23 destroyed at the expiration of the appeal period.

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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 amendments have been
6 applied to this transcript.

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8 Dated at the City of Toronto, in the Province of Ontario, this
9 2nd day of February, 2021.

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Kim Neeson

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Principal

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