*R v Eyakfwo*, 2021 NWTSC 5 S-1-CR-2020-000084

**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 Chief Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 27th day of January 2021.**

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**APPEARANCES:**

M. Fane: Counsel for the Crown

J. Casebeer: Counsel for the Defence

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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*.**

**(DECISION)**

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

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

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

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

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

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

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

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

 The Crown and defence entered into resolution discussions after the charge was laid. The pretrial process did take its course and a trial date was set at one point, but I was advised by counsel that the resolution discussions took place from an early stage. Because of the possibility of resolution, the Crown held off on telling the victim about the trial date, so she was never told that she would have to testify on a specific date for this.

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

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

 Normally, a sentencing judge has a very broad discretion on sentencing and ultimately is responsible for deciding what a fit sentence is. Even Courts of Appeal must show deference to a sentencing judge’s decision on sentencing. But that legal framework is substantially altered when a joint submission is presented. In those situations, the Supreme Court of Canada has decided that the sentencing court must follow the joint submission, unless it is complete unreasonable and against the public interest. As a result, my discretion in this matter is significantly curtailed.

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

 The sentence he received for his last sexual assault was 30 months, most of which was absorbed by his remand time. The sentence I am asked to impose today, in effect, is just slightly over that for a similar and arguably even more serious crime. But I have to follow the law, and I cannot say that the joint submission is unreasonable or contrary to the public interest, based on everything I have heard because there are some unique features to this case.

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

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

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

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

 Of significant concern to me is that Mr. Eyakfwo was sentenced by this Court for another serious sexual assault only on December 18, 2018. That decision is reported at *R v Eyakfwo*, 2019 NWTSC 5. On that occasion, Mr. Eyakfwo had sexual intercourse with a woman while she was sleeping. He pleaded guilty. He had spent a fair bit of time on remand and was given credit for it, as I have already referred to.

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

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

 The evidence before the Court then, which is also before this Court now, is that there are no programs in the territorial system that are suited to him given those needs. The sentencing judge was concerned about this in December 2018. She was concerned that Mr. Eyakfwo, an untreated sex offender, was not going to be able to get meaningful programming within a nine-month sentence. Unfortunately, those concerns proved justified. Mr. Eyakfwo was released from that sentence on early release in June 2019, and, within a few weeks, he committed this further sexual assault.

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

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

 Counsel referred to Mr. Eyakfwo’s background and personal circumstances extensively in their submissions, and aspects of that were also referred to in the 2018 sentencing decision, which is a reported decision. I will not go into all these details again here. I will simply refer to this background in broad terms.

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

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

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

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

 I heard some good things about him. I heard that he is good on the land. I heard that he has artistic abilities, and I saw that for myself as I had the opportunity to look at some of his drawings earlier this week, which, I repeat, are beautiful. I heard that he is close to his language, and his culture are important to him. So obviously he has talents and skills. There is a lot that he can do to lead a more productive life.

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

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

 When sentencing Mr. Eyakfwo in 2018, the sentencing judge noted that despite her concerns about whether the sentence she was imposing would assist Mr. Eyakfwo, she was, in a way, stuck. He had a lot of remand time; he had to be sentenced based on sentencing principles, taking into account the seriousness of the offence and his criminal record but also his guilty plea; his circumstances as an Indigenous offender; and factors that reduced his blameworthiness, including his cognitive deficits.

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

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

 The Crown would still have to have proven how the sexual contact occurred, and that it was without the victim’s consent. The Crown would have had to call her to testify to talk about those things. Sparing her that was sparing her a lot, as anyone who has sat through a sexual assault trial well knows, and it is especially so given that I have heard that the victim in this case had particular vulnerabilities that might have added challenges to her recounting these events. As a result the guilty plea must be given significant weight.

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

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

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

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

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

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

 If ever another court has to sentence him, especially for an offence like this or another serious crime for hurting someone else, chances are the Court will not have a lot of options. Restraint is a very important sentencing principle, but it can only go so far. And even the deference that a sentencing judge must extend to a joint submission has its limits.

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

 It is very positive that he has family support. It is very positive that for a few months before his arrest after he returned to Whatì he was doing well and was not getting into trouble. Whatever happens with his sentence, and where he serves it, Whatì will be there for him when he is released. Those supports will be there for him. And hopefully, he can go back and pick up where he left off, but with more tools, a better understanding of what he needs to do and not do to never find himself hurting another person again.

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

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

 I do feel I must add that, while I hope Mr. Eyakfwo benefits from programming during his sentence and that he will succeed, particular care should be taken when he reaches the point when he is eligible for release, whether it is parole, statutory release, or warrant expiry. Assessing his progress and whether he still presents a risk to others will be the responsibility of others down the road. It is not something that the Court can direct at this time. They are not issues for the sentencing court, but I can only say that, in my respectful view, meaningful, ongoing risk assessments by all the levels of authorities that have a say in it will be particularly important in this case, given Mr. Eyakfwo’s history.

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

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

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

 Mr. Eyakfwo has 172 days of remand time attributable to this charge because some of his time in custody, I was told, was applied to sentences he received for other offences. Credited at a ratio of 1½ day of credit for each day of remand, that adds up to 258 days. The joint submission was framed as one suggesting that I impose a further imprisonment term of 2½ years, so I have to calculate backwards what the sentence would have been without the remand time.

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

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

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

**CERTIFICATE OF TRANSCRIPT**

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

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



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Kim Neeson

Principal