*R v Tingmiak*, 2023 NWTSC 31 **S-1-CR-2022-000080**

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

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**- v -**

**RUFUS TINGMIAK**

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**Transcript of the Facts and Sentencing held before the Honourable Deputy Justice W.G. Grist, sitting in Yellowknife, in the Northwest Territories, on the 20th day of November, 2023**

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**APPEARANCES:**

**S. Straub: Counsel for the Crown**

**M. Malone: Counsel for the Defence**

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Charges under s. 271 and 264.1(1)(a) 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*.**

**I N D E X**

**PAGE**

SUBMISSIONS BY S. STRAUB 6

SUBMISSIONS BY M. MALONE 24

**EXHIBITS:**

**NO. DEFINITION PAGE**

S-1 VICTIM IMPACT STATEMENT 4

S-2 CRIMINAL RECORD OF R. TINGMIAK 5

**RULINGS, REASONS**

Reasons for decision 37

Decision 42

Ancillary orders 42

Removal order re attendance to Territorial Court 43

**(VIDEOCONFERENCE COMMENCES)**

**(TELECONFERENCE COMMENCES)**

THE CLERK: Order. All rise. This sitting of the Supreme Court of the Northwest Territories is now in session, the Honourable Justice Grist presiding. Please be seated.

THE COURT: Yes, counsel.

S. STRAUB: Good morning, Your Honour. It’s Stephen Straub appearing for the Crown. Your Honour, Mr. Tingmiak is present by video via the Inuvik courthouse. The intention originally was to have him appear personally in Yellowknife for today’s sentencing. The flight that he was scheduled to take on Sunday was cancelled due to weather, and so he is before the Court by video from the Inuvik courthouse this morning. I understand that is on the consent of my friend in terms of his appearance today for sentencing remotely.

THE COURT: Ms. Malone?

M. MALONE: To that point, Your Honour, I just want to indicate that I spoke with Mr. Tingmiak yesterday and this morning to canvas his preference whether he wished to be present in person for this sentencing. This morning he advised me that he’s content to proceed by video, meaning that he did not wish to adjourn the proceedings for him to attend in person. Is that right, Mr. Tingmiak? You’re ‑- you want to proceed today by video?

THE ACCUSED: Yeah. I’m good.

M. MALONE: Thank you.

THE COURT: All right. Ms. Malone, you have been able to receive appropriate instructions, have you?

M. MALONE: I have. The only issue will be I understand that a victim impact statement has been filed. Counsel has not yet seen that.

THE COURT: Okay.

M. MALONE: I will need to review that with Mr. Tingmiak before we proceed after we receive the victim impact statement.

THE COURT: All right.

M. MALONE: And so I’ll need to stand down briefly just for that purpose.

THE COURT: All right. All right. Mr. Straub?

S. STRAUB: Yes. So, Your Honour, I’m in your hands when you want to stand down for that purpose. I’ll just …

THE COURT: Well, let’s proceed until you get to the point where you make reference to it, and that might be a time to stand down.

S. STRAUB: I have not seen it myself either.

THE COURT: Oh, you have not seen it yourself?

S. STRAUB: It’s sealed on the court file.

THE COURT: Oh, I see. All right. Well, look, I will stand down and, counsel, you will have an opportunity to, you know ‑- I will unseal it. You can have a look at it, and you can take some instructions on it, if you like, Ms. Malone.

M. MALONE: Yes.

THE COURT: And so we will take, oh, say, 15 minutes or so for that purpose?

M. MALONE: Thank you.

S. STRAUB: Thank you.

THE COURT: All right.

THE CLERK: All rise. Court is adjourned for 15 minutes.

**(PROCEEDINGS ADJOURNED AT 10:40 AM)**

**(PROCEEDINGS RECONVENED AT 11:06 AM)**

THE CLERK: Order. All rise. Court is reconvened. Please be seated.

THE COURT: Yes.

S. STRAUB: Your Honour, thank you for that adjournment. My friend and I have reviewed the victim impact statement. Does Your Honour have a copy before him?

THE COURT: Yes. I have a copy.

S. STRAUB: All right, Sir. There was just one issue that I will advise the Court of, and it is the last two sentences in the first paragraph under the heading “Emotional Impacts.”

THE COURT: Yes.

S. STRAUB: All right. And so those last two sentences beginning with the words “the worst” and ending with “our relationship.”

THE COURT: All right. Take me to that again.

S. STRAUB: Sorry. That is the first paragraph of the first page under the heading “Emotional Impacts.”

THE COURT: Yes.

S. STRAUB: The last two sentences that begin with “the worst was that after” and then it ends with “a real strain on our relationship.” Those two sentences.

THE COURT: Yes.

S. STRAUB: Those can be disregarded, and the reason is after confirming with Ms. A., it’s referring to some confusion on her part. That is Mr. Tingmiak’s uncle she’s referring to. He had passed away prior to ‑-

THE COURT: Yes.

S. STRAUB:  ‑- the offence in this case, and so I think there was just some chronological confusion and so that can be disregarded. And the rest is admissible as the parties agree. The only other comment I’ll make on the victim impact statement is that I confirmed with Ms. A. that with those ‑- subject to that amendment ‑-

THE COURT: Yes.

S. STRAUB:  ‑- she is content with Your Honour simply reading the victim impact statement himself or yourself.

THE COURT: All right. It will be the first exhibit, then.

S. STRAUB: Thank you.

**EXHIBIT S-1: VICTIM IMPACT STATEMENT**

S. STRAUB: Did you want a moment to review that, Your Honour?

THE COURT: No, I have read it.

S. STRAUB: Okay. Thank you. I’ll just advise that Ms. A. is also present on the telephone listening in from Inuvik with a Victim Services worker ‑-

THE COURT: Yes.

S. STRAUB: Eva Kratochvil. They’re both on the line right now.

THE COURT: Yes.

S. STRAUB: All right. So, Sir, the only other exhibit the Crown intends to file is a copy of Mr. Tingmiak’s criminal record. It’s four pages. I’ve provided a copy to my friend already.

THE COURT: Yes.

S. STRAUB: If that could be S-2.

THE COURT: Thank you.

**EXHIBIT S-2: CRIMINAL RECORD OF R. TINGMIAK**

THE CLERK: [indiscernible].

THE COURT: Okay. I will move the microphone closer here. Is that better, Madam Reporter?

THE CLERK: It’s [indiscernible].

S. STRAUB: Oh, I see. In Inuvik. Okay. I’ll do my best to speak up.

THE COURT: Yes?

**SUBMISSIONS BY S. STRAUB:**

S. STRAUB: So I’ll just summarize that briefly myself, Your Honour. It was referenced in the pre-sentence report as well, but this criminal record by my count contains 34 convictions. We have a span of time encompassed by the criminal record of 1997 to 221. You’ll note there are significant gaps. I see one between 1997 and 2008, as well 2009 to 2013.

The last violent conviction, of which there are eight on Mr. Tingmiak’s criminal record, was in 2019. That was an offence under section 266 of the *Criminal Code*. The sentence that resulted from that was 60 days and 12 months’ probation. As well, there were two prior uttering threats convictions: 2013 for 45 days, and then the last one was quite some time ago in 1997.

Importantly as well, there are no prior entries for sexual violence on his criminal record. I have eight violent convictions, three related to property offences, 17 against the administration of justice, four for driving, one weapon-related conviction and one involving resisting arrest.

THE COURT: Yes.

S. STRAUB: So I raise this ‑- I mean, much of his record is dated, though there is a somewhat recent violent conviction. There are a number of violent entries on his record, so I am raising it not to suggest that he ought to be punished again for his criminal record but to highlight that this is ‑- Mr. Tingmiak is not before the Court as a first offender.

THE COURT: Yes.

S. STRAUB: He has a fairly lengthy criminal record, though dated. And so it sort of reinforces in the Crown’s submission the primacy of the objectives of denunciation and deterrence that I’ll refer to later in my submissions, given that he is not before the Court as a first-time offender and that he indeed has a history of violent offending.

And that’s really the extent to which I was going to comment on Mr. Tingmiak’s record. I’ll advise what the Crown is suggesting as a fit and appropriate sentence in this case. With respect to count 1, the sexual assault charge, three years and eight months; in other words, 44 months. With respect to count 2, uttering threats, I’m suggesting six months concurrent to that. So the total sentence being proposed is a 44‑month sentence. That can also be characterized as 1,320 days.

I’ll advise the Court of the ancillary orders being sought, many of which are mandatory, in any event. The first would be DNA. The next is a mandatory section 109 weapons prohibition, and the minimum duration and the duration being sought is 10 years. There is a 20-year *SOIRA* order, Sex Offender Registry order being sought. This is presumptive, not mandatory under the new amendments in Bill S12. I can give further submissions if required, but it is presumptive and the period would be 20 years, given the election and the likely term of imprisonment.

As well, the final order being sought is a 743.21 no-contact order for the duration ‑- if Mr. Tingmiak is sentenced to a period of custody for the duration of that period, the Crown is seeking that no‑contact endorsement on the warrant of committal, and the subject of that would of course be Ms. A. And those are the ancillary orders being sought.

THE COURT: Is there time in custody to be taken into account?

S. STRAUB: So there is a little bit.

THE COURT: Yes.

S. STRAUB: And I’ll provide the Court the dates that I was able to calculate based on my file. This is the Crown’s best estimate, and it’s subject to correction. August 11, 2021, Mr. Tingmiak spent one day in jail on this matter; that’s one actual day. April 4-6, 2023, three actual days. And then he was arrested November 18th of this year, just a few days ago until today’s date; that’s November 20th. That’s three additional actual days.

So the total number of actual days that I’ve calculated based on my file which is not obviously as official as something from sentence administration, which we rarely have in this jurisdiction, but seven actual days, 11 enhanced days. And so I was going to suggest that those 11 enhanced days be subtracted from any custodial sentence Your Honour might impose on Mr. Tingmiak.

And this could perhaps be revisited if my friend has other comments or … So that is the picture of Mr. Tingmiak’s presentence credit, as I see it. Finally, before I sort of launch into the meat of my submissions, I sent to the Court the authorities the Crown intended to rely upon. I understand they’re essentially being jointly relied upon to a large extent. I was asked to provide a hard copy as well for filing purposes.

THE COURT: Yes.

S. STRAUB: I have that in my hand. I’m just going to pass it up to Madam Clerk.

THE COURT: All right. Thank you.

S. STRAUB: Before discussing the cases, Your Honour, I’ll speak briefly to the pre-sentence report.

THE COURT: Yes.

S. STRAUB: That should be on the court file. As the writer of the PSR noted, the ability to conduct sort of a fulsome and thorough and insightful pre-sentence report was compromised to a large extent by the lack of any collateral sources, including anyone in Mr. Tingmiak’s personal orbit who is ‑- who would be willing to speak to the PSR writer. Essentially, she sort of hit a dead end at every point.

And so apart from any self-reported information, minimal as that was by Mr. Tingmiak, the rest is sort of it albeit valuable but not so much individualized focus as it relates to sort of a geographical history, the Indigenous history of that region so, certainly, valuable information for the Court to have. But as it relates to Mr. Tingmiak’s sort of personal antecedents as conveyed by people other than him, fairly minimal.

And so I think fairly and accurately the writer commented that that compromised the ability to complete as helpful a report as perhaps we all might have wanted. However, we do have information that is of some use in there. We know that his adoptive parents, Abel and Marcy Tingmiak, attended residential school. We know that despite that, Mr. Tingmiak self‑reported a stable and loving upbringing with them as a child that was unmarred by familial abuse, at least as he reported to the writer.

He advised the writer that he was raised in a very traditional lifestyle and that his ties to the land were sort of inculcated at a very early age and certainly ‑- as I think the evidence at trial disclosed, certainly persists to this day and that aspect of his culture seems to remain very important to him. We also know that he began drinking alcohol at a very young age, 15 years old, I believe, was what he self reported and that the best information the writer could acquire was that this became a problem for him when he was in his 30s.

I think it’s fair to say that perhaps there is somewhat of a lack of insight as to the impact of alcohol on Mr. Tingmiak’s life. As he self-reports, judging by his monthly expenditures on alcohol being approximately $400 per month, it seems that he still struggles with significant alcohol addiction.

That is what the Crown was able to highlight as perhaps the most salient features of self‑reported individualized information in the pre‑sentence report. And I don’t have many more comments on that document. It was relatively brief as these go, again, given the fact that there was very little other sources of information, and Mr. Tingmiak did not seem willing to participate to a significant degree in that process.

So then moving to sort of the legal aspect of my submissions, the objectives that apply, the primary objectives that apply in this case, indeed, in any allegation of major sexual assault, are denunciation and deterrence. That is really by virtue of the common law and how these cases are decided, not only in this jurisdiction but across the country. But also by virtue of 718.04 of the *Criminal Code*, which makes those objectives primary where the victim is vulnerable because of his or her personal circumstances. In this case Ms. A. is female and Indigenous, and that is of course one of the enumerated bases for that section applying.

There are a number of aggravating circumstances in this case. The most obvious one is that Ms. A. was sleeping and vulnerable when the offence took place, or at least when it began. That is a very, very common occurrence, particularly in this jurisdiction with major sexual assault allegations.

There is not much that needs to be said as to why that is aggravating. Of course, when someone is asleep, they are at the mercy of those around them, and they are in an extremely vulnerable state and that vulnerable state was taken advantage of in this case. And so that is a significant aggravating feature in this file.

Also aggravating is the violence and force that was used in the commission of the offence. So Ms. A,. as she testified, she awoke to Mr. Tingmiak forcefully covering her mouth with his hand while having sexual intercourse with her. She tried to push him off, but she could not. She described the impact on her ability to breath that Mr. Tingmiak’s hand over her mouth resulted in.

She also described him persisting in this behaviour and the sexual assault while her holding her mouth the entire time for ‑- three to four minutes was her estimate as to how long this sexual assault occurred for. And it was only after Mr. Lester pulled Mr. Tingmiak off that his sexual assault ceased.

So we have a persistent over a period of several minutes, Mr. Tingmiak covering Ms. A.’s mouth to the point where she’s having difficulty breathing and continuing to force himself upon her after she wakes up to finding him engaging in sexual intercourse with her, despite her attempts to push him off. And so that is an additional dimension of violence apart from what is already obvious in any sexual assault that aggravates the ‑- or that ought to aggravate the sentence and be taken into account.

I’m also suggesting that there was if not a position of trust, a position of near trust in this case that existed between them, at least on that night, that was violated by Mr. Tingmiak and as such is aggravating and ought to be reflected in the sentence. And I’ll justify the Crown’s position for suggesting this.

So we know that they knew each other, Mr. Tingmiak and Ms. A., for a reasonably long period of time, around 10 years, according to Ms. A. For years she described being neighbours with Mr. Tingmiak while she was staying at Mr. Tingmiak’s uncle’s cabin, which was, as we heard during trial, the nearest neighbour to him, to his camp.

She described having been to Mr. Tingmiak’s cabin before, more than 10 times, as she testified. She recalls having passed out there before as well at Mr. Tingmiak’s cabin. On ‑- in terms of this offence, we know Mr. Tingmiak, according to her evidence, invited her to his remote camp. We know that he had the sole means and controlled the sole means by which she could go there and leave, if necessary, namely, his boat. When she told him, Mr. Tingmiak, that she intended to pass out later on in the night we know that Mr. Tingmiak offered his bed to her.

So we have those factors, and we know that whether or not a position of trust existed or near trust, it’s a fact‑dependant exercise. A position of trust, in the Crown’s submission, it need not be some longstanding formal sort of employer/employee relationship or parent/child, teacher/student type of relationship.

The circumstances can create a position of trust or a position of near trust. It can be created and violated on the same day, in the Crown’s submission, and that’s exactly what happened here. Obviously, it’s not sufficient solely that a victim trust the accused. It’s not solely from that perspective or that subjective analysis that the question is determined.

We need to look at the actual relationship in the surrounding circumstances and ask ourselves, is the relationship founded on notions even temporarily of safety, confidence, reliability, such that a reasonable expectation exists that these aspects of the relationship will not be breached.

And so in the Crown’s submission when someone invites their long-time friends to their remote cabin accessible only by a 30-to-45-minute boat ride by which the accused controls the only means of transport, all parties consume alcohol and a victim ‑- the victim communicates that she needs to pass out and the host offers her bed ‑- or her his bed, which she accepts, then in all of those circumstances a position of trust, in the Crown’s submission, has been created at least while the host/vulnerable house guest sort of relationship exists or persists.

So those are aggravating circumstances that the Crown submits exist in this case. In terms of mitigating circumstances, I see none. And I submit that there are none. I’ll move to the Crown authorities, Your Honour, if you’re prepared.

THE COURT: Yes.

S. STRAUB: So in this jurisdiction the three-year starting point in *Arcand* applies to a post-trial finding of guilt for a major sexual assault on an adult victim. That is three years. Our Court of Appeal adopted that in a decision called “*A.J.P.J.*” in 2011. My friend filed *Parranto*. Certainly, that case and other Supreme Court of Canada decisions hold to that failure to apply, strictly apply a starting point is not an error in principle, and I don’t obviously take an issue with that.

What I’m suggesting is that through the 10 decisions provided to the Court in the Crown’s book of authorities on sentencing, you can see a range that very clearly not only sort of runs alongside the *Arcand* starting point, but very clearly sets a range for a major sexual assault on an adult sleeping victim between around two and four years. That is the range encapsulated by the authorities that the Crown submitted.

And in my submission the 10 decisions provided are a thorough and representative sample showing the range of sentences for this type of offence in this jurisdiction. You’ll note that throughout almost all of these decisions the comment is made over and over again how prevalent this offence is particularly in the Northwest Territories, not only sexual assault but the manner in which this offence was carried out is extraordinarily common unfortunately and sadly in this jurisdiction.

We see a few things from these decisions and this range in the Northwest Territories. One is that when sentences at or below two years result, oftentimes there is a lengthy period of probation that attaches to them. So at or two years ‑- and when I say that, I mean after taking into account presentence credit.

Indeed, where there are rehabilitative prospects in a given case, that’s usually part of the justification; of course, where that objective takes more importance and primacy in an individual case or a given case, that is part of the rationale for imposing that lesser jail sentence at the expense of a more rehabilitative component attached to it.

We see that the cases falling at the lower end ‑- so those would be, for example, the case of *M.N.* at Tab 2 that resulted in 20 months plus three years’ probation, the case of *Cli*, two years less a day and the case of *Kiktorak* at Tab 5, that’s two years plus two years’ probation. Those are sort of the low watermark in terms of the range of local jurisprudence for this type of offence.

And then we see at the higher end the cases that sort of capture that are *Kasook* at Tab 8; that’s four years’ jail. *K.M.J.* at Tab 4, that’s three years, 10 months. And then *Roberts* at Tab 9, three years, six months. And, Your Honour, as I said, the Crown is seeking three years and eight months in this case as an appropriate sentence. And I’ll just highlight sort of what differentiates those cases towards the lower end from the ones at the higher range.

First, the ones falling at the lower end of the range almost ‑- well, they all involve guilty pleas, for one, which is an extremely significant and mitigating factor that’s absent in this case. It’s of course not aggravating, but it is the absence of what would have been a significant mitigating circumstance. Those ‑- or that is perhaps the most salient feature of the decisions that fall towards the lower end of the range.

Usually, the guilty plea in those cases involved the victim not having to testify as well, which is obviously a ‑- it ought to obviously be accorded significant value at any sentencing. It’s not the case here. Second and related to the first point, the decisions involving the cases falling towards the upper range generally involve convictions after trial where that significant mitigation does not exist of a guilty plea.

There’s often additional aggravating factors present in the cases falling towards the higher range. So in *K.M.J.*, for example, the offender had a record with a prior violent ‑- or with prior violent convictions, and he was on a release for another major sexual assault allegation.

In *Kasook* the offender who had FASD held the victim down during the sexual assault as she resisted and had a recent conviction for sexual assault. So the additional violence used mirrors what happened in this case. Obviously, the significant aggravating factor of a prior sexual entry on his record is not present in this case.

In *Roberts* the offender seriously assaulted the victim during the sexual assault after she attempted to push the offender off of her. In that case I believe he punched her several times in the face, resulting in her losing consciousness.

I should stress that no two cases are alike, of course. I’m not submitting any of these cases to suggest that this case is just like the one before the Court, and therefore you should sentence Mr. Tingmiak to the same thing. You know, in the Crown’s submission sentencing precedents are useful for assisting the Court in imposing an individualized sentence in a given case by showing what the application of the relevant sentencing objectives are, the relevant principles for a case like this.

It’s pretty clear in this case, as I’ve already indicated. But also understanding how these types of offences are treated in a particular region. And then almost reasoning by comparison, so we know that most of the sentences that receive lenient sentences are the result of extremely mitigating circumstances like a guilty plea, an early guilty plea.

We know that the ones that tend to result in higher sentences do not have those features, and they often have additional aggravating features, as I submit are present in this case. And so these cases and these ranges assist the Court in situating this file, this case, this offence within those two sort of extremes, from the low end of around two years plus probation to the higher range of around four years.

And then of course the individualized assessment has to come into play as well and needs to be adjusted within that range accordingly. And it’s obviously not a scientific mathematical process, but what I hope I have assisted the Court with by providing these 10 authorities is that it is clear, in the Crown’s submission, that Mr. Tingmiak does not fall towards the lowest range.

And that whether you are simply using this range-based sort of sentencing or applying the starting point from *Arcand*, given the aggravating features in this case and the lack of mitigating features, he ought to fall indeed towards the upper range. And so what I am suggesting as fit and appropriate is a significant sentence near the top of that, which takes the form of three years and eight months, or 44 months.

So to sort of wrap up the Crown’s submissions, in this case Ms. A. thought she was going to have an enjoyable night socializing at a long-time friend’s house with another long-time friend. When she fell asleep, as is depressingly common in this jurisdiction, she was used as an object of Mr. Tingmiak’s sexual gratification when she was in an extremely vulnerable state.

When she attempted to put a stop to this, when she woke up to this horrific offence being perpetrated on her, she had her mouth covered and she was physically restrained, and this went on for a matter of minutes. And the only reason it stopped is because a third party intervened.

To ‑- when she wanted to leave that area of which her options were very limited, she overheard a threat to her own life that Mr. Tingmiak uttered to Mr. Lester inside the cabin while she waited outside where he said he would shoot them. I cannot imagine that she ‑- Ms. A. would not have felt terrified in that moment and certainly would have felt that Mr. Tingmiak had the means and ability to make good on that threat if he so wanted.

And so she waited. And they waited with ‑- together, Mr. Lester and Ms. A., until Mr. Tingmiak fell asleep, and then they made good their escape. Sometimes the terror that attaches to these types of offences in these types of criminal transactions is lost in the wording and in the legal nuance that we apply to them.

But I invite the Court to conclude that this would have been an extremely terrifying situation for Ms. A. to have found herself in, particularly given the very remote setting she was in, the lack of any ready assistance apart from Mr. Lester who I imagine would have been quite frightened himself.

So the offences are serious. The sexual assault, it is extremely serious. The aggravating factors are serious. There are no mitigating factors, in my submission. We see from the victim impact statement that the offence has had an emotional impact on Ms. A. She describes being filled with anger, I believe were the words that she used.

We describe her coping with what happened by consuming alcohol, abusing alcohol. And we talk about sort of avoidant behaviour she engages in, the change of behaviour that the fear of encountering Mr. Tingmiak caused her to engage in the community, worried about whether she would see him if she went out, trying to structure her day so that she would not encounter him.

All of these things are entirely human, natural and understandable responses to a traumatic situation, and they speak to the impact that the offence has had on Ms. A. So the ‑- in the Crown’s submission, it needs to be a meaningful sentence, particularly with respect to count 1. It needs to be towards the top of the range, given the aggravating factors.

And in the Crown’s submission it really is the lowest sentence that would be appropriate in the circumstances and that would still achieve the operative objectives and the principles of sentencing. Those are my comments, Sir. I can certainly go into more detail about the cases if Your Honour requires …

THE COURT: No. I have had the opportunity to read these cases, all but two, and so I think I am fairly well versed in the authorities that you have cited.

S. STRAUB: Those would be my submissions, and unless Your Honour had any questions about any aspect of my submissions ‑-

THE COURT: No, that is fine.

S. STRAUB:  ‑- those are the Crown submissions.

THE COURT: Thank you.

S. STRAUB: Thank you.

THE COURT: Ms. Malone?

M. MALONE: Your Honour, I am prepared to proceed. There was one point of argument that my friend raised that I would appreciate just a moment to collect my thoughts in respect of.

THE COURT: Yes.

M. MALONE: I'd ask for ‑- if we could take a break of five to 10 minutes.

THE COURT: Yes. Well, let’s take a break, and so we will take say, a 15-minute break?

M. MALONE: Sure. Thank you.

THE COURT: Yes. All right.

THE CLERK: All rise. Court is adjourned for 15 minutes.

**(PROCEEDINGS ADJOURNED AT 11:38 AM)**

**(PROCEEDINGS RECONVENED AT 12:00 PM)**

THE CLERK: Order. All rise. Court is reconvened.

THE COURT: Yes. Ms. Malone?

M. MALONE: Thank you. Thank you for that indulgence, Your Honour.

**SUBMISSIONS BY M. MALONE:**

M. MALONE: I’ll start out with addressing the presentence custody that Mr. Tingmiak has. By my calculation, he was in custody on August 12, 2021, for a single day on the initial arrest in respect of this matter. He was also in custody on August 29th and 30th of 2022, and that resulted in his release order being amended. So that would be two additional days.

And then, as my friend said, Mr. Tingmiak was in custody between April 4th and 6th, 2023, for three days, and finally, in speaking with my friend, it was not clear whether Mr. Tingmiak was arrested this past Friday night or if he was arrested early Saturday morning. My ‑- I assumed when I read my friend’s email that he had been arrested on the 17th.

It could be that he was arrested on the 18th, but my friend and I in speaking said in the event of ambiguity, perhaps this should be resolved in favour of Mr. Tingmiak. So that would give him four days between Friday and today. So my calculation would be 10 actual days in custody, giving him a credit of 15 days on an enhanced basis.

THE COURT: Yes.

S. STRAUB: And I’ll just indicate that the Crown’s content with that calculation, Your Honour.

THE COURT: Yes. All right. Thank you.

M. MALONE: I’ll say at the outset that the defence position with respect to sentence is that a sentence between 34 months and 38 months would be appropriate in the circumstances of this case. As most of the case law refers to years and months, I’ll say that’s two ‑- a suggestion that the sentence be between two years and 10 months or three years and two months. And my reasoning behind that will be evident in my submissions, but that’s our position.

My friend started out his submissions in addressing Mr. Tingmiak’s pre-sentence report, and I just have a few comments in respect of that. My ‑- the pre-sentence report writer indicated that her ability to provide an insightful and fulsome report was limited by the interaction ‑- or lack of interaction that she had with Mr. Tingmiak’s personal collateral sources of information.

I’ll note that in the report it does not give an explanation why those individuals don’t wish to participate. The writer seems to suggest that this is somehow indicating fault with Mr. Tingmiak or his relationships with them, but in the absence of any comments or quotes from those individuals ‑-

THE COURT: Yes.

M. MALONE:  ‑- as to why they declined to participate, I would encourage the Court not to adopt the conclusion ‑-

THE COURT: Yes.

M. MALONE:  ‑- of the pre-sentence report writer.

THE COURT: I did not take from what the ‑- from the writer’s comments that she was finding anything negative in that fact; she just was perhaps somewhat frustrated in not having much by way of resources in writing the report, and I think that is the proper attitude towards the fact ‑-

M. MALONE: Sure.

THE COURT:  ‑- of the lack of contact.

M. MALONE: Uh-hmm. I think otherwise there is a lot of information that we can glean from the pre-sentence report, and I would suggest that one of the most important features of this report is found on page 4.

THE COURT: Yes.

M. MALONE: Where the pre-sentence report writer recounts the conversation that she has with Peggy Day. Peggy Day is the regional outreach coordinator with the Inuvialuit Regional Corporation, and she advised that she had assisted Mr. Tingmiak with applying for addictions treatment, that further that she advised that Mr. Tingmiak appeared willing and ready to attend. However, he was denied entry to that program as a result of his pending charges before the Court. Ms. Day informed me that the treatment centre would reconsider Mr. Tingmiak’s application once his matters before the Court were resolved.

I think it’s fair to say that in reading the pre-sentence report, we hear a narrative of Mr. Tingmiak’s experience of difficulty and loss as something that he’s not had an ability to engage with. He hasn't had the opportunity or not ‑- sorry. I shouldn’t state it that way. He’s not been able to engage meaningfully in counselling or alcohol treatment.

And I think it’s very important that on his own initiative unrelated to the court proceeding, he has made that application to attend a residential treatment program for his alcohol condition and that he indicated to someone outside of the court process who’s not Probation that he is willing and ready to attend. I think that this is important as it points to some rehabilitative prospects for Mr. Tingmiak that outside of the court process he is willing to engage in treatment.

The pre-sentence report also describes that Mr. Tingmiak experienced an upbringing that certainly would have an impact on the *Gladue* factors that the Court is required to apply ‑-

THE COURT: Yes.

M. MALONE:  ‑- specifically, his adoptive parents experienced residential school. He himself attended a school that had been formerly designated an Indian day school.

THE COURT: Yes.

M. MALONE: And that he was ‑- while he doesn't acknowledge that the alcohol use by his adoptive father impacted him, external sources does indicate that that was a significant event that was occurring in his home. And perhaps it’s Mr. Tingmiak’s unwillingness to engage in counselling or reflection on that, but it is an important factor to take into account that it could very well have had a significant impact on Mr. Tingmiak.

I think it’s also important for the purpose of applying *Gladue* principles ‑- and I’ll speak in further detail about how those principles are to be applied, but in what we can take from the pre-sentence report, it’s important to note the historical background of the town of Inuvik, how it was established quite recently, that there were very negative impacts by colonization on the town of Inuvik and the individuals, specifically Inuvialuit people who live in Inuvik.

THE CLERK: Excuse me, Your Honour. Mr. Tingmiak is having trouble hearing you.

M. MALONE: I’m sorry ‑-

THE COURT: Yes.

M. MALONE: If I move the microphone closer, is that better? Okay. He’s indicating on the video that it is better.

THE COURT: Yes.

M. MALONE: Thank you. The last features of the pre‑sentence report that I wish to highlight is that we have information about Mr. Tingmiak’s adoptive father’s current circumstances, that some years ago ‑- a few years ago he was diagnosed with Parkinson’s, and he’s residing in a long-term care home. I’m advised by Mr. Tingmiak that that remains to be the case for his father, and in recent months Mr. Tingmiak’s father has been in decline and so his health is declining, and Mr. Tingmiak does visit him regularly at that long-term care facility.

I agree that in this case denunciation and deterrence are the primary objectives to be achieved by the courts in position of a sentence with respect to Mr. Tingmiak. And I agree with my friend that by virtue of 718.04, that also reinforces the importance of denunciation and deterrence in this case. Section 718 of the *Criminal Code* also states that the fundamental purpose of sentencing is to contribute to respect for the law and maintenance of a just and peaceful society by imposing just sanctions.

So along with that primary objective, the Court has to be guided by the other purposes of sentencing. So the other objectives to be achieved is to deter the offender and other persons from committing a similar ‑- committing offences, to separate offenders from society when necessary, importantly, to assist in rehabilitating offenders, to provide reparations for harm done to victims and to promote a sense of responsibility in the offender.

718.1 of the *Criminal Code* sets out the fundamental purpose as follows that:

The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Degree of responsibility has often been described in the case law as the moral blameworthiness of the offender.

In terms of arriving at a proportionate sentence, the Supreme Court has stated many times that in practice parity gives effect to proportionality. A proportionate sentence for a given offender cannot be deduced simply from first principles; we must look at the landscape of sentence offending ‑- or sentence imposition in a given territory. Sentencing precedents reflect the range of factual situations and embody the collective experience and wisdom of the judiciary.

Finally, while ‑- in addition to denunciation and deterrence, we also must consider the principle of restraint that’s set out in section 718.2(d) of the *Criminal Code* and *Gladue* principles.

Speaking about *Gladue* principles, it is very easy for a Court sentencing an Indigenous person for a serious crime to simply fall back on the general rule that the more serious the ‑- or violent the offence, the less difference there will be between sentences imposed on Indigenous and non-Indigenous people.

Unfortunately, in this jurisdiction we see a lot of individuals coming before the Court to be sentenced who are Indigenous themselves, and so there is an element of *Gladue* factors being present in the precedents that we are looking at, but I do think in this particular case the Court needs to be mindful of Mr. Tingmiak’s experience as an Inuvialuit man growing up in Inuvik experiencing adoption to family members and not being brought up by his birth parents.

And also, the experience of his caregivers as having gone through the residential school system. It’s not simply an exercise of trying to determine how Mr. Tingmiak himself was impacted by those factors, but we also need to look at the systemic effect of colonization on a particular community.

I disagree when we’re looking at aggravating features of this offence that my friend has suggested that the concept of the breach of trust be applied in this particular case. Certainly, there is some authority for that given in the cases that my friend has provided. The Court does mention that when an offence is perpetrated between parties who have known each other for a long time, there is a breaking of trust in respect.

But I would disagree that in this particular case that is present. The victim in this matter was known to the ‑- to Mr. Tingmiak for a long time. They knew each other. They had a relationship of strong familiarity, but the nature of that relationship was that Mr. Tingmiak, his uncle was in a relationship with Ms. A.

And so the element of protectiveness or security that Ms. A. could expect at Mr. Tingmiak’s residence I would suggest is not ‑- does not give rise to a relationship of trust that is beyond any other person who might know another person quite well due to their living in the same community.

I would also suggest that if this offence had taken place between individuals who did not know each other well at all or were complete strangers to one another, that would also be equally concerning to the Court in terms of trying to assess the appropriate sentence and denunciation to be applied.

In looking at the case law that deals with sexual offences in the territory in recent years, we see a relatively narrow range of sentences that have been applied. My friend’s characterization of the offences at the lower end of the spectrum as having been accompanied by a guilty plea, which is a strong signal of remorse, is correct.

We also see that in some of those cases, those sentences were as a result of a joint position that was reached between the Crown and the defence. In order to arrive at a sentence between three and four years, we have to consider the factors that were present in those particular cases. First, looking at the case of *K.M.J.*, we see that the accused person received a sentence of 10 ‑- three years and 10 months in jail.

Some of the aggravating features of that case are present in this case, including that the victim was vulnerable because she was sleeping at the time, that the accused person had a criminal record, including prior convictions for violence and that there were no salient mitigating factors present. This was a conviction after trial.

That case is different in two respects. One being at the time of the offence the accused in that case was on release for another sexual ‑- another major sexual assault. And the Court found ‑- and it was supported in the case law ‑- that the age difference between the accused and the victim being over 20 years was an aggravating feature.

I think it’s also important in that case that there was a less discrete aggravating feature, that being that the accused person had invited the victim in that case to stay at his home because she had locked herself out of her house, and she had no other place to go. And so that invitation to come to a place of safety when the victim had no other place to go, I would suggest, enhances the aggravating nature of that offence.

Another case at the upper end of the spectrum is *R v Lafferty*. In that case the accused received a sentence ‑- well, two separate sentences: the first one being for three years’ jail and the second one for four years and nine months to be served concurrently. With respect to the first offence for which the accused received three years’ jail, there are some very significant differences between these cases.

In that case the victim was, again, asleep or unconscious as a result of alcohol intoxication. However, the important distinction in that case is that the accused had a criminal record for a prior sexual assault. Now, the mitigating feature in that case was that the accused had entered a guilty plea, but I do think that it’s important that he had a prior conviction for sexual assault, which justified ending at the higher end of the spectrum.

And finally, at the upper end of the spectrum is the decision *R v Kasook*. In that case the accused was convicted of assaulting the victim who had fallen asleep after a party at her house. The sexual assault occurred in the victim’s home; that was found to be aggravating. The victim was more vulnerable because she was sleeping.

A mitigating feature in that case was that there was a guilty plea. But I would suggest that the important distinguishing feature between that case and this case is, again, the accused had a criminal record, including a recent conviction for sexual assault that he had just been released on at the time that he committed the assault for which he was being sentenced.

The imposition of a quantum of sentences is not a scientific application, but Mr. Tingmiak comes before the Court without a conviction for a sexual assault. He has not been convicted for a sexual assault in the past. When we look at his criminal record, it’s clear that he has a criminal record for which he’s received jail in the past, but those jail sentences have been less than four months.

This will be the first time if Your Honour accepts either the defence or Crown’s position that Mr. Tingmiak is sentenced to a period of federal custody. I’m not suggesting that that invokes the jump principle in the sense that we should not be looking at penitentiary time for an offence of this nature. It’s clear that denunciation and deterrence requires the Court to strongly denounce the offence by imposing a sentence in the range that has been imposed by this Court previously.

But I do think it’s important to take into account that restraint must be exercised for an offender who has not experienced significant periods of custody. There are minimal mitigating factors in this particular case. Mr. Tingmiak was convicted after trial. The pre‑sentence report does not disclose any insight that is helpful for this Court to take into consideration, but it does disclose that Mr. Tingmiak is willing and able to go to treatment and has actually sought out that treatment on his own. It discloses that Mr. Tingmiak does have rehabilitative prospects.

So in distinguishing Mr. Tingmiak’s case from the other cases where a sentence of between three and four years has been imposed, I would suggest that two factors are particularly salient that justifies the Court imposing a sentence closer to the starting point of three years: that being that he has no prior convictions for sexual offences and that there is this rehabilitative prospect that if he receives a custodial sentence and is able to access treatment, he may find himself with the tools that prevent him from coming back before the Court.

That in addition to the application of *Gladue* principles I would submit justifies a sentence between 34 and 38 months.

THE COURT: All right. Thank you, Ms. Malone.

M. MALONE: Thank you.

THE COURT: Mr. Tingmiak, is there anything you want to say on your own behalf before I pass sentence today? All right.

This sentencing hearing proceeds after Mr. Tingmiak was found guilty of sexual assault and uttering threats. The victim of the sexual assault was Ms. A., a person I will refer to as “Ms. A.” and who was known to Mr. Tingmiak for a number of years from a time she was in a relationship with Mr. Tingmiak’s late uncle.

Ms. A. is in her 50s, and Mr. Tingmiak is 48. Both Mr. Tingmiak and Ms. A. have problems with alcohol abuse. Ms. A. describes herself as an alcoholic. Mr. Tingmiak believes he can control his consumption but admits to consuming two 40-ounce bottles of vodka with friends each second weekend and spending about $400 per month on alcohol consumption.

On the day of the offence Ms. A. was drinking with people she knew in Inuvik. Mr. Tingmiak and a friend, Mr. L., had come to town in his boat that morning to buy more vodka after drinking the day before. Mr. Tingmiak was living at his camp at a site on a side channel in the McKenzie River about 30 to 40 minutes west of Inuvik.

Ms. A. met up with Mr. L. and Mr. Tingmiak, and she was asked if she wanted to go with them and stay over at Mr. Tingmiak’s camp. The three travelled to the camp where they began to drink. That evening while they were drinking in his cabin, Ms. A. felt she had to go to sleep, or as she put it, pass out. She was told she could use the bed.

She left Mr. Tingmiak and Mr. L. drinking at the table and woke to find Mr. Tingmiak had pulled down her clothing and was laying on top of her with his hand over her mouth having intercourse with her and stating that Mr. L. would be next. She tried to get him off her, but he was too strong and she was having difficulty breathing.

Mr. L. who had been asleep at the table woke and pulled Mr. Tingmiak off. He told Ms. A. to get her things and they were leaving. After they left the cabin, Mr. Tingmiak threatened to shoot them if they took his boat. Mr. L. went back inside for a time and came back apparently after Mr. Tingmiak had fallen asleep stating they should leave before he woke up.

This is a case of an all-too-familiar violent sexual assault on an Indigenous woman asleep until attacked in the bed she occupied. Ms. A.’s judgment in this matter was likely impaired by alcohol. If she were not so dependent, she may never have gone to Mr. Tingmiak’s camp, but she likely felt she knew Mr. Tingmiak through her relationship with his uncle and would be safe enough with him.

None of what happened was her fault. Mr. Tingmiak took advantage of the situation to satisfy himself without regard to her personal integrity, resorting to violence when she resisted. Ms. A. was entitled to be safe from such an attack, and the Court needs to denounce and deter like conduct. This is a serious offence, and the impact on Ms. A. was pronounced. She continues to be fearful of Mr. Tingmiak and strongly wants to avoid contact.

The Crown cites 10 authorities which establish the starting point for sentences of similar sexual assaults at three years’ incarceration and a range from two years to four years. Mr. Tingmiak has a criminal record. There are quite a number of convictions. Some are for lesser assaults, but no convictions for sexual violence. The last of note is a 2019 conviction for assault and resisting a police officer resulting in his longest custodial sentence of 60 days.

There is little offered in mitigation in this case. Mr. Tingmiak seems to have few close family connections. He continues to have little insight into what he has done or the effect on Ms. A. He has offered little cooperation through the preparation of the pre-sentence report. His sole concern seemed to be the jail time he was likely to receive.

Mr. Tingmiak is an Indigenous person and while he himself does not give a history of abuse through residential schools, many of his family likely were survivors. His early family life was marked by a custom adoption by his grandparents. There was alcohol in the home; however, he also remembers positive times with his family, mostly while the family was providing for themselves on the land or on the river or the ocean.

Mr. Tingmiak has maintained employment from time to time but has not been offered work for a number of months. He has moved into town from his camp, but I think he would prefer his previous lifestyle. It is clear alcohol has been a problem in Mr. Tingmiak’s life for many years without his acknowledgement of the fact. The one hopeful element of the pre-sentence report is the report of the outreach coordinator who offers the view that he is now willing and ready to participate in substance abuse treatment.

The overrepresentation of Indigenous people in Canada’s jails is striking. In *Gladue* and *Ipeelee* ‑- the Supreme Court of Canada instructs that the sentencing of Indigenous people should be accompanied by restraint and by employing incarceration options designed to promote rehabilitation. But at the same time offences like this one call out for stiff sentences to denounce and deter. This conundrum was commented on by Chief Justice Charbonneau in *Kasook* where she said at page 6:

Applying these principles in a meaningful way is especially challenging when a person who has been exposed to these challenges gets to the point because of their own issues of being dangerous and seriously harming others. Sentencing courts are directed to exercise restraint in sentencing Aboriginal offenders, take these broader circumstances into account to search for ways to make sentencing more restorative and more meaningful.

But courts are also responsible to ensure that the public is protected, and once a person becomes dangerous for others or the community, once they hurt others, the court’s options become very limited.

And that often is the judicial conundrum presented by a case such as this. On balance weighing the aggravating features of the offence and primarily the violence involved and threats, and at the same time, taking account of *Gladue* factors, I view the starting point sentence to be appropriate although somewhat restrained.

Mr. Tingmiak, if you will stand. I sentence you to three years incarceration less 15 days credit for time served for sexual assault and three months concurrent for the threats. You can now take your seat again.

There will be a 10-year section 109 prohibition from possessing the items indicated in that section, most notably firearms. There will be a 20-year *SOIRA* registration as a sexual offender, and Mr. Tingmiak will be required to provide a sample suitable to identify his DNA. In the circumstances the victim impact surcharge will be waived, and there will be a no‑contact provision in respect of Ms. A. through the duration of the sentence. By my calculation three years less 15 days indicates 1,065 days to be served. Anything further, counsel?

M. MALONE: Nothing further, Your Honour.

S. STRAUB: Nothing for the Crown ‑- actually, just in ‑- not related to the sentence but in terms of next date.

THE COURT: Yes.

S. STRAUB: I understand that Mr. Tingmiak’s required in Inuvik Territorial Court on Wednesday at 9:30 a.m. on another matter.

THE COURT: Yes.

S. STRAUB: So to avoid him potentially being transported south as a result of this sentence, the Crown’s seeking a removal order for his personal attendance in Territorial Court at 9:30 a.m. on November 22nd.

THE COURT: Yes. All right. I think that is appropriate, Ms. Malone.

M. MALONE: No issue.

THE COURT: All right. That will go. Court will stand down.

THE CLERK: All rise.

**(VIDEOCONFERENCE CONCLUDES)**

**(TELECONFERENCE CONCLUDES)**

**(PROCEEDINGS ADJOURNED TO 9:30 AM, NOVEMBER 22, 2023, INUVIK)**

**CERTIFICATE OF TRANSCRIPT**

Veritext Legal Solutions, Canada, 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.

Dated at the City of Toronto, in the Province of Ontario, this 4th day of December, 2023.

Veritext Legal Solutions, Canada

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