

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HIS MAJESTY THE KING

- v -

ANDREW SCOTT

Transcript of the Decision delivered by The
Honourable Deputy Justice D. Gates, sitting in
Yellowknife, in the Northwest Territories, on the
24th day of May, 2024.

APPEARANCES:

A. Piché	Counsel for the Crown
J.K. Bran	Counsel for the Defence

Charge under s. 271 Criminal Code

1 THE COURT: On December 14, 2023, the
2 accused Andrew Scott was convicted of a sexual
3 assault on J.M. that took place on March the 27,
4 2019 at Yellowknife. J.M. is the mother of their
5 ten-year-old son and a former intimate partner of
6 the accused. He is here to be sentenced today.

7 The offence of sexual assault carries a
8 maximum sentence of ten years' imprisonment. No
9 minimum sentence is prescribed. The defence
10 urges me to impose a sentence of two years less a
11 day to be served in the community by way of a
12 conditional sentence followed by two years'
13 probation. The Crown, on the other hand,
14 maintains that an appropriate sentence would be
15 three-and-a-half years' imprisonment.

16 Facts. The facts relating to this matter
17 are set out in my oral reasons for decision
18 delivered on December 14, 2023. Briefly stated,
19 the accused forced unprotected sexual intercourse
20 on the victim while attending her home in
21 response to her invitation to come and smoke
22 marijuana together. The accused and the victim
23 separated in October 2018, so an informal
24 shared-parenting arrangement between them had
25 only been in place for a few months at the time
26 of the offence. They were in regular contact
27 with one another because the victim did not drive

1 and, as such, regularly relied on the accused to
2 drive her to work and their son to school.

3 On the date of the offence the accused was
4 looking after their son while he was on his
5 school break notwithstanding that it was the
6 victim's week to have the child in her care.

7 After having returned their five-year-old
8 son to his mother's care, the accused returned to
9 her residence later that evening. After smoking
10 a joint outside, they went inside the residence.
11 In the living room they discussed some behavioral
12 issues exhibited by their child. At one point
13 the accused grabbed the victim and tried to pull
14 down her pants. He told her that she was lonely
15 and that she needed his comfort. The victim
16 repeatedly said "no" and attempted to pull up her
17 pants. The accused then flipped her around,
18 pushed her head and shoulders down towards the
19 couch and proceeded to have unprotected sexual
20 intercourse with her without her consent. She
21 was upset and crying. She told the accused that
22 he was disgusting and to stop but he would not
23 listen. She felt helpless and could not fight
24 him any longer. She did not scream as she did
25 not want to wake up their sleeping child. After
26 repeatedly telling him "no" and to "stop" the
27 victim told him to just be done and to leave.

1 After the sexual activity had ended, the accused
2 made comments about how wet the victim got and
3 how much she needed and enjoyed the sex. The
4 accused left the residence after the victim again
5 told him that he was disgusting and that he was
6 to leave.

7 The Principles of Sentencing. The
8 principles of sentencing are set out in
9 Section 718 of the Criminal Code. The section
10 reads as follows:

11 "The fundamental purpose of
12 sentencing is to contribute, along
13 with crime prevention initiatives,
14 to respect for the law and the
15 maintenance of a just, peaceful
16 and safe society by imposing such
17 sanctions that have one or more of
18 the following objectives:

- 19 (a) to denounce unlawful conduct;
20 (b) to deter the offender and
21 other persons from committing
22 offences;
23 (c) to separate offenders from
24 society where necessary;
25 (d) to rehabilitate offenders;
26 (e) to provide reparations for
27 harm done to victims and to the

1 community; and
2 (f) to promote a sense of
3 responsibility in offenders, and
4 acknowledgement of the harm done
5 to victims and the community".

6 I note that Section 718.2 is applicable in this
7 instance:

8 " A sentence should be increased
9 or reduced to account for any
10 relevant aggravating or mitigating
11 circumstances relating to the
12 events or the offender;
13 (b) evidence that an offender, in
14 committing the offence, abused the
15 offender's intimate partner or a
16 member of the victim or offender's
17 family, shall be deemed to be an
18 aggravating circumstance;
19 (c) a sentence should be similar
20 to sentences imposed on similar
21 offenders for similar offences
22 committed in similar
23 circumstances; and
24 (d) an offender should not be
25 deprived of liberty, if less
26 restrictive sanctions may be
27 appropriate in the circumstances".

1 It is a fundamental principle of sentencing
2 that a sentence must be proportionate to the
3 gravity of the offence and the degree of
4 responsibility of the offender. In *R. v. Lacasse*
5 the Supreme Court explained, at paragraph 12, that,

6 "proportionality is the cardinal
7 principle that must guide
8 appellate courts in considering
9 the fitness of the sentence
10 imposed on an offender. The
11 more serious the crime and its
12 consequences or the greater the
13 offender's degree of
14 responsibility the heavier the
15 sentence will be. In other words,
16 the severity of a sentence depends
17 not only on the seriousness of the
18 crime's consequences but also on
19 the moral blameworthiness of the
20 offender. Determining a
21 proportionate sentence is a
22 delicate task".

23 Further guidance is found in the decision of
24 Renke, J. in *R v Pettitt*, 2021 ABQB 773, at
25 paragraph 28:

26 "The 'gravity' aspect of
27 proportionality focuses on the act

1 and its consequences or on what
2 was done. The 'responsibility'
3 aspect focuses on the actor, the
4 offender's level of fault in
5 committing the offence, how the
6 act was done, why the act was
7 done, and by whom the act was
8 done".

9 These principles guide and direct courts in what
10 is one of the most difficult judicial tasks,
11 crafting a fit and proper sentence for an offence
12 and an offender.

13 In assessing the gravity of the offence I am
14 satisfied that the offence of sexual assault is a
15 very serious offence. It strikes at the essence
16 of an individual's dignity, sexual integrity and
17 personal safety. This case involves a
18 non-consensual act of sexual intercourse. As
19 such, the defence concedes that the circumstances
20 surrounding the commission of this offence
21 constitute a major sexual assault as that term
22 has been defined and interpreted by various
23 decisions of the Court of Appeal including *R v*
24 *Arcand* and *R v A.J.P.J.*, a decision of the
25 Northwest Territories Court of Appeal. The
26 starting point for a major sexual assault is
27 three years. From this three-year starting point

1 the sentence can be adjusted up or down to
2 account for aggravating and mitigating
3 circumstances.

4 These decisions must, in my view, be
5 considered in light of the Supreme Court's
6 decisions in *R v Friesen* and *R v Parranto*. The
7 impact of *Friesen* and *Parranto* is very thoroughly
8 canvassed by Justice S.E. Pepper of the Alberta
9 Court of Justice in *R v Hay*. I agree with her
10 conclusion that *Friesen* tells us that starting
11 points are guidelines only and not "hard and fast
12 rules". I also agree that *Parranto* tells us that
13 the starting points do not dispense with the
14 requirement for an individualized approach to
15 sentencing that "takes into account all relevant
16 factors and sentencing principles". In *Hay*
17 Justice Pepper suggested that the offence of
18 sexual assault exists on the spectrum of
19 seriousness. At paragraph 36 of her decision she
20 stated:

21 "While all sexual assault is
22 serious, like all crimes it exists
23 on a spectrum of seriousness.
24 Some factors will push a crime
25 towards a longer sentence often
26 involve planning and deliberation,
27 violence, injury, restraint,

1 multiple offenders, a young or
2 otherwise vulnerable complainant
3 or an unconscious complainant. A
4 crime of sexual assault that does
5 not contain these aggravating
6 elements can attract sentences of
7 shorter duration".

8 A review of the many cases cited by counsel
9 reveals that the violation of the integrity and
10 dignity of a victim of a major sexual assault is
11 so serious that it will almost always attract a
12 significant jail sentence.

13 Victim Impact Statement. In accordance with
14 Section 722.1 of the Code, the victim, J.M., read
15 her Victim Impact Statement during the sentencing
16 hearing. Victim Impact Statements allow the
17 victims of crime to take an active and meaningful
18 role in the sentencing process. Through their
19 participation in the sentencing process we gain a
20 broader understanding of how crime affects real
21 people. I want to thank S.M. for sharing with
22 the Court the physical and emotional harm as well
23 as the economic loss that she has experienced
24 because of this offence. It takes courage and
25 strength to come forward in a public setting to
26 share this very personal information.

27 It is clear from the Victim Impact Statement

1 that this offence has caused significant
2 emotional damage and profoundly affected J.M.'s
3 sense of personal security in her own home and in
4 her community. It is also very clear to me
5 that, notwithstanding the passage of almost
6 five years since the date of this offence, Ms. M.
7 continues to experience shame, disgust,
8 loneliness, and feelings of insecurity. I am
9 pleased to learn that she is receiving support
10 and assistance to help her address the
11 accompanying anxiety and depression.

12 Personal Circumstances of the Offender.
13 In addition to the submissions of counsel the
14 Court had the benefit of a Pre-Sentence Report
15 prepared in relation to Mr. Scott. The accused
16 is currently 39 years of age. He was born in
17 Woodstock, New Brunswick, and moved to St. John
18 at the age of five months where he remained until
19 he finished school. The accused's parents
20 separated prior to his birth, and he has had
21 virtually no contact with his father throughout
22 his life. At the age of 24, Mr. Scott met his
23 father for the first time. He has had some
24 contact with his father in the past 15 years but
25 his father's alcoholism was a barrier during the
26 first ten of these years. Mr. Scott reports that
27 there has been better contact in the past

1 five years. Mr. Scott has two stepbrothers, a
2 product of his father's union with another
3 partner, but he has never met them. The
4 accused's parents recently reconciled and have
5 resumed a relationship.

6 Mr. Scott had a stable and loving upbringing
7 and was surrounded by very supportive extended
8 family members during his youth and adolescence.
9 He cites them as a very positive force in his
10 life. Based on what I have seen and heard, it is
11 clear to me that the accused has a very strong
12 sense of family. After graduating with honours
13 from high school, and being named the top athlete
14 in New Brunswick, Mr. Scott attended university
15 for two years. He left his university program
16 and enrolled in a one-year machinist course at
17 New Brunswick Community College. He worked as a
18 personal trainer from the age of 17 to 24 years.
19 In 2009 he enlisted with the Canadian Armed
20 Forces as a linesman and was responsible for
21 building military communications towers. He was
22 posted to Dartmouth, Nova Scotia, in 2010 and
23 then to Yellowknife in 2015. He left the
24 military in 2016.

25 The accused began a relationship with the
26 victim J.M. in 2006 in New Brunswick. Their
27 son was born in 2014. The family moved to

1 Yellowknife the following year but the accused
2 and the victim separated, as I mentioned a few
3 moments ago, in October of 2018. After leaving
4 the military the accused took two years off to
5 recover from PTSD and be a stay-at-home parent.
6 When he returned to work he did self-contracting
7 work for various communications companies. In
8 2023 he commenced employment with Northview as a
9 renovator. Unfortunately, Mr. Scott was
10 terminated a few months ago once his employer
11 learned of the matter now before the courts.

12 Mr. Scott commenced a new relationship in
13 2020. Together with his new partner they have a
14 three-month-old son. His spouse also works for
15 Northview as a cleaner. She is currently on
16 maternity leave and collecting Employment
17 Insurance maternity benefits and expects to
18 return to work. They share in the household
19 expenses. In addition to his full-time
20 employment at Northview, the accused and his wife
21 recently started a construction company.
22 Mr. Scott's goal is to become fully self-employed
23 at some point in the future.

24 Mr. Scott has one previous criminal
25 conviction in Halifax, Nova Scotia, in 2014 for
26 conspiracy to traffic in a Schedule 2 substance.
27 He received a 12-month conditional sentence in

1 relation to this matter. According to the
2 defence, Mr. Scott got involved with a friend in
3 the unlawful distribution of steroids.
4 Mr. Scott's counsel asks the court to place
5 minimal, if any, weight on this conviction given
6 the age of the entry, the fact that it did not
7 involve an offence of violence, and that it
8 resulted in a conditional sentence. The Crown
9 concedes that little, if any, weight should be
10 placed on this prior conviction. I agree. In my
11 view, the age of the conviction and the nature of
12 the offence provide little assistance in the
13 assessment of Mr. Scott's moral blameworthiness
14 for the current offence.

15 It is clear to me from the Pre-Sentence
16 Report that Mr. Scott is a very good father to
17 both of his sons and committed to supporting both
18 of his children. While he continues to maintain
19 his innocence notwithstanding the conviction
20 entered this past December, he told the author of
21 the Pre-Sentence Report that he fully accepts the
22 decision of the Court.

23 The Pre-Sentence Report paints a very
24 positive picture of the accused's current
25 relationship. However, the family is
26 experiencing some serious financial difficulties
27 and are several months in arrears on the rent for

1 their apartment. The accused is also carrying a
2 significant debt load. In addition, there are
3 hints in the Pre-Sentence Report that the accused
4 may be turning to alcohol to deal with the very
5 many stresses in his life. There is also some
6 suggestion that the accused disappears for
7 periods of time during which his current partner
8 has no idea where he is.

9 It is clear to me that Mr. Scott is subject
10 to significant sources of stress in his life.
11 He has been diagnosed and is being treated for
12 PTSD. In addition, he carries the stress of
13 family debt as well as the ongoing conflict
14 relative to a shared parenting arrangement with
15 the victim. He is, doubtless, also suffering
16 stress flowing from the fact that this matter has
17 been hanging over him for nearly five years.
18 Further, he is a new father and in a relatively
19 new relationship. Finally, up until quite
20 recently he was working two jobs to try and
21 provide for his various family responsibilities.

22 By the terms of release on this charge
23 Mr. Scott was prohibited from having contact with
24 the victim except through a third party and then
25 restricted to matters pertaining to their shared
26 parenting of their son. I will have more to say
27 about that in a moment.

1 The Crown relies on a series of authorities
2 including *R v A.J.K.*, *R v A.J.P.J.*, *R v D.J.A.*, *R*
3 *v H.P.M.*, and *R v T.S.I.* The defence asked me
4 to consider the decision in *R v Hudson*, a
5 decision of Justice Shaner, dated November the
6 15, 2023. In addition, I invited counsel to
7 consider the decision of both the Court of Appeal
8 and the Alberta Court of Justice in *R v Hay*,
9 previously mentioned.

10 Conditional Sentences. As previously
11 indicated, the defence seeks a sentence of two
12 years less a day to be served in the community.
13 Section 742.1 sets out the circumstances in which
14 a court may impose a conditional sentence of
15 imprisonment. Certain conditions apply. First,
16 the section requires that the court impose a
17 sentence of less than two years in relation to
18 the offence. Second, the offence must be one for
19 which no minimum term of imprisonment is
20 prescribed. Third, the offence must not be one
21 for which a maximum term of imprisonment of
22 14 years or life may be imposed. In addition,
23 the court must be satisfied that serving the
24 sentence in the community would not endanger the
25 safety of the community and would be consistent
26 with the fundamental principles set out in
27 Section 718 to 718.2. While the section in the

1 Code which provides for conditional sentences
2 also sets out other limits, counsel agree that
3 none of these other limits apply in this
4 instance.

5 In *R v Hay*, Justice Pepper provides a very
6 comprehensive history of the availability of
7 conditional sentences in cases of sexual assault.
8 I am grateful to her for this very helpful review
9 set out at paragraphs 48 to 57 of her decision.
10 I do not propose to repeat this entire section of
11 her judgment but would summarize her review as
12 follows:

13 1) Conditional sentences were introduced
14 in September 1996;

15 2) In 2000, the Supreme Court found that
16 parliament's intention in introducing conditional
17 sentences was to enhance restorative justice
18 principles in the sentencing process and to
19 reduce reliance on the use of prison. The
20 authority for that is *R v Proulx*;

21 3) From 1996 to 2007, Section 742.1
22 conditional sentence orders were available for
23 any offence, including sexual assault, if the
24 proposed sentence was less than two years and the
25 other preconditions referred to above had been
26 met;

27 4) In 2007 the Criminal Code was amended

1 to restrict conditional sentences and, as such,
2 they were no longer available for serious
3 personal injury offences including sexual
4 assault;

5 5) The Criminal Code was further amended
6 in 2012 to remove the phrase "serious personal
7 injury offences" but the amendment specifically
8 precluded conditional sentences for the offence
9 of sexual assault when prosecuted by indictment;

10 6) In November 2022 a further amendment
11 to the Criminal Code reinstated the option of
12 conditional sentences for sexual assault
13 offences, again subject to the various conditions
14 described above;

15 7) A conditional sentence order is a
16 form of incarceration served in the community
17 under strict conditions for up to two years less
18 a day.

19 In Proulx the Supreme Court found that a
20 conditional sentence can provide significant
21 denunciation and deterrence,

22 "particularly so when onerous
23 conditions are imposed and the
24 duration of a conditional sentence
25 is extended beyond the duration of
26 the jail sentence that would
27 ordinarily have been imposed in

1 the circumstances",
2 and that's found at paragraphs 102 and 127 of
3 Proulx. However, the court also recognized that
4 there may be some instances where the requirement
5 for denunciation and deterrence is so pressing
6 that only a custodial sentence will be a suitable
7 sentence. In my view this is one of those cases.

8 Hay was a case involving a consensual sexual
9 encounter where consent was withdrawn when the
10 offender initiated a new form of sexual activity
11 without having first obtained the victim's
12 consent. At that point the victim abruptly moved
13 away, got angry and asked the offender to leave
14 her house. Hay immediately apologized to the
15 victim and made no attempt to continue the sexual
16 activity. He was acquitted at trial but the
17 acquittal was overturned by the Court of Appeal.
18 The Court of Appeal entered a conviction and the
19 matter was remitted back to the trial judge for
20 sentence. He received a sentence of two years
21 less a day to be served in the community on a
22 conditional sentence order. Of note, the court
23 found that the very brief duration of the assault
24 was a neutral factor, not a mitigating factor as
25 advocated by the defence, but that it was a
26 factor in assessing the moral blameworthiness of
27 the offender.

1 The case relied on by the defence Hudson
2 involved facts that are similar to those in Hay
3 though Hudson involved a guilty plea. In that
4 case the offender and the victim were intimate
5 partners. As in Hay, Mr. Hudson penetrated the
6 victim's anus without first having obtained her
7 consent to that sexual activity. Both the
8 offender and the victim were Indigenous, and the
9 offender had significant Gladue factors that the
10 court found diminished his moral blameworthiness
11 relative to the offence. A sentence of 18 months
12 to be served in the community was imposed in that
13 instance.

14 Returning to Hay, Justice Pepper identifies
15 three types of cases involving major sexual
16 assault. While not determinative I find her
17 analysis to be helpful. At paragraph 58 she
18 states:

19 "There are three main types of
20 cases cited by the Crown, all of
21 which involve major sexual
22 assault. There are cases
23 involving an unconscious victim,
24 cases with significant acts of
25 overcoming resistance through
26 force, and cases where consent
27 is removed but the assault is

1 discontinued with no act of
2 overcoming resistance".

3 In my view, both Hay and Hudson fall into the
4 third category discussed by Justice Pepper. As
5 such, both cases involve situations where consent
6 had previously been given but subsequently
7 withdrawn. In both instances the offender
8 immediately discontinued the sexual activity.

9 In my view, this case does not fall within
10 this same category. Rather, this case involved
11 significant acts on the part of Mr. Scott in
12 overcoming the resistance of J.M. The decisions
13 in Hay and Hudson are, in my view, readily
14 distinguishable from the matter before me.

15 Aggravating Circumstances. I agree with the
16 Crown that there are several aggravating
17 circumstances in this case. First, this was a
18 case where Mr. Scott persisted in a sexual
19 assault after the victim made it clear that she
20 was not consenting to his actions. As such, I
21 agree that this case is, as I mentioned a moment
22 ago, readily distinguishable from the line of
23 cases involving an offender who immediately
24 desists from sexual activity once he becomes
25 aware of his partner's lack of consent. This is
26 clearly not such a case, and the assault took
27 place over a significant period of time. I also

1 find aggravating the fact that the victim was
2 Mr. Scott's former intimate partner and that he
3 engaged in unprotected sexual intercourse with
4 her. Also aggravating is the fact that the
5 offence took place in the victim's home, a
6 location where she was entitled to feel safe.
7 The fact that the child was present and sleeping
8 at the time is also a somewhat aggravating
9 circumstance. I agree that the impact on the
10 child of witnessing his mother being sexually
11 assaulted by his father would, doubtless, have
12 been very negative. Fortunately this did not
13 occur. Finally, the significant continuing
14 impact of this offence on the victim is an
15 aggravating circumstance in this instance.

16 One of the terms of Mr. Scott's release on
17 these charges was that he is not to communicate
18 directly or indirectly with the victim except
19 through a sober third party to arrange child care
20 access. He entered into this undertaking on
21 January 21, 2021. During the sentencing hearing
22 the Crown introduced copies of text messages
23 exchanged between Mr. Scott and the victim in
24 October 2023. These are found in Exhibit S-2 and
25 Exhibit S-3. The defence consented to the
26 introduction of this evidence.

27 On October 12, 2023, J.M. sent a text to

1 Mr. Scott seeking his agreement to a form of
2 medical treatment recommended for their son.
3 J.M. initiated this direct communication in the
4 mistaken belief that the parties were permitted
5 by the terms of Mr. Scott's release conditions to
6 communicate in relation to their son. Several
7 messages were exchanged between the parties.
8 Mr. Scott's hostility towards J.M. is quickly
9 revealed. His messages are aggressive and filled
10 with profanity and veiled threats while J.M.
11 remains relatively calm. A second exchange of
12 text messages was initiated by Mr. Scott relating
13 to his request for the return of clothing items
14 he had purchased for their son. Again, the tone
15 of Mr. Scott's messages is aggressive, even
16 hostile. As with the first text messages he
17 makes threats against J.M. and members of her
18 family. I am advised that Mr. Scott was charged
19 with breach of undertaking but the Crown has
20 elected not to proceed with those charges. The
21 Crown does, however, points to this conduct and
22 urges the Court to find that he is not a suitable
23 candidate for a community-based sentence.

24 While I find Mr. Scott's failure to comply
25 with the terms of his release to be an
26 aggravating circumstance, I place limited weight
27 on this evidence. First, these two text messages

1 took place while Mr. Scott was in Edmonton with
2 his new partner and involved in medical
3 complications relating to the birth of their
4 child. Second, no other breaches over the very
5 extended period of time that he was subject to
6 these release conditions were noted.

7 Nevertheless, the content of Mr. Scott's messages
8 is concerning, particularly the threats directed
9 towards J.M. and members of her family.

10 Mitigating Circumstances. I find that
11 various aspects of Mr. Scott's background to be
12 mitigating in this instance. First, he is
13 reported to be a loving and caring father to his
14 two sons. While the victim, the mother of his
15 elder son, gave evidence during the trial of the
16 toxic nature of her relationship with Mr. Scott
17 post separation, she acknowledged that he was a
18 good father. The various individuals who
19 provided input into the Pre-Sentence Report all
20 spoke highly of Mr. Scott as a parent. Second,
21 Mr. Scott has a solid Record of Employment
22 including ten years as a member of the Canadian
23 Armed Forces. He served overseas in Kuwait,
24 Syria, Afghanistan and the United States. While
25 not directly involved in combat, his time with
26 the Armed Forces certainly involved service in
27 combat zones. He has been diagnosed with PTSD

1 arising from his military service. In addition
2 to his service in combat zones, Mr. Scott has
3 lost former colleagues to suicide because of
4 PTSD. To his credit, Mr. Scott is reported to
5 regularly access on-line counselling through
6 Veterans Affairs to address his trauma and PTSD.

7 Collateral Consequences. At the request of
8 the court counsel had provided supplementary
9 written submissions on the impact of collateral
10 consequences on Mr. Scott's two children as well
11 as his current family if he were to receive a
12 penitentiary term of imprisonment as requested by
13 the Crown. In *Pham* the Supreme Court recognized
14 that collateral consequences flowing from an
15 offender's personal circumstances, including the
16 impact on the offender's family, may be relevant
17 in the determination of an individualized
18 sentence in appropriate circumstances. If
19 applicable, collateral consequences are not,
20 however, mitigating factors as they do not relate
21 either to the seriousness of the offence or the
22 offender's degree of responsibility.

23 In *R v Suter*, the Supreme Court explained
24 that collateral consequences may be found to
25 relate to the sentencing principles of
26 individualization of sentences and sentencing
27 parity. In both instances the court explained

1 that the presence of collateral consequences
2 cannot take a sentence outside of the appropriate
3 range of sentences the offender would otherwise
4 receive. At paragraph 53 of Suter the court
5 stated:

6 "I agree with the Court of Appeal
7 that the fundamental principle of
8 proportionality must prevail in
9 every case - collateral
10 consequences cannot be used to
11 reduce a sentence to a point where
12 the sentence becomes
13 disproportionate to the gravity
14 of the offence or the moral
15 blameworthiness of the offender.
16 There is, however, no requirement
17 that the collateral consequences
18 emanate from state misconduct in
19 order to be considered as a factor
20 in sentencing".

21 In *R v Kogvik*, the decision of the Nunavut
22 Court of Appeal, the offender entered a plea of
23 guilty to aggravated assault and was sentenced to
24 a three-year suspended sentence. He viciously
25 attacked a stranger while she was out hiking,
26 inflicting serious injury including a broken arm,
27 multiple other fractures and head wounds. The

1 offender was the primary care-giver and income
2 earner for his partner and children. His
3 incarceration would also deprive his parents of
4 his assistance. The Nunavut Court of Appeal
5 found the sentence to be demonstrably unfit and
6 substitute a sentence of seven months
7 imprisonment followed by probation for a period
8 of one year. At paragraph 34 they outline the
9 proper approach to the inclusion of collateral
10 consequences in the sentencing process:

11 "It is an unfortunate reality that
12 collateral consequences flow from
13 most criminal convictions, their
14 seriousness increasing in step
15 with the seriousness of the
16 offence and consequent sentence.
17 Those sentenced for serious crimes
18 may lose their employment and
19 housing. Professional licenses
20 and designations may be revoked.
21 Their standing in the community
22 may be diminished and their
23 reputation destroyed. Their
24 future opportunities may be
25 limited by a criminal record.
26 As here, those for whom an
27 offender is responsible may be

1 forced to adapt to the loss of a
2 care-giver or provider. These are
3 not irrelevant considerations,
4 however, collateral consequences,
5 no matter how sympathetic, must
6 not eclipse the overarching duty
7 of a sentencing judge to impose a
8 proportionate sentence in
9 consideration of all of the
10 circumstances".

11 In this instance Mr. Scott points to the
12 very damaging effect of sending him to the
13 penitentiary on his family responsibilities, both
14 as 50/50 parenting arrangement for his
15 ten-year-old son with the victim of this offence
16 and his new son and new partner who is currently
17 on maternity leave. During the sentencing
18 hearing he reported that he had recently lost his
19 current employment because of his outstanding
20 legal matter. While he is still developing his
21 construction company, his ability to support his
22 children and partner would be compromised if he
23 were to be sentenced to a penitentiary term of
24 imprisonment.

25 As previously indicated, Mr. Scott never
26 knew his own father until he was 24 years of age.
27 While he now has some relationship with his

1 father that obviously was completely missing in
2 Mr. Scott's life during his formative years. I
3 am mindful that sending Mr. Scott to the
4 penitentiary as requested by the Crown will lead
5 to two other young boys being deprived of their
6 father for a significant period. It will also
7 result in two other mothers being left to care
8 for children on their own. Ironically, it would
9 also result in the victim being left to carry a
10 significantly greater burden in terms of child
11 care.

12 I cannot ignore these collateral
13 consequences, particularly the risk it creates
14 for two young children. Mr. Scott's current
15 partner was previously employed as a cleaner
16 at Northview, the same company that employed
17 Mr. Scott. While I do not have detailed
18 information before me, there is some financial
19 information in the Pre-Sentence Report relating
20 to Mr. Scott's current financial circumstances
21 that include reference to his partner's
22 contribution to the support of the family. As
23 such, it is reasonable to conclude that her
24 current employment would not provide an adequate
25 basis for her to support herself and her son.

26 I am very sympathetic to the potential
27 impact that a sentence of two years or more will

1 have on Mr. Scott's family and his relationship
2 with his two sons. However compelling this
3 argument may be, I cannot allow these collateral
4 consequences to displace what is otherwise a
5 proportionate sentence in this instance. Sexual
6 assault is a very serious offence in which the
7 primary sentencing objectives are denunciation
8 and specific and general deterrence given the
9 generally very high moral blameworthiness
10 associated with the offence.

11 All of the circumstances relating to this
12 offender as well as the circumstances relating to
13 the offence have been carefully considered in
14 this sentencing process in assessing Mr. Scott's
15 degree of responsibility for moral
16 blameworthiness. I have very carefully
17 considered the various cases cited by counsel.
18 While the sentencing authorities are helpful, I
19 would observe that no two cases are alike and
20 that the role of the court is not to dissect
21 sentencing authorities to find a perfect fit.
22 The sentencing process is not a mechanical one
23 but rather the delicate balancing of sentencing
24 principles, the unique circumstances of both the
25 case and the offender and the application of
26 relevant and mitigating and aggravating
27 circumstances.

1 Again, having carefully considered both the
2 aggravating and mitigating circumstances that
3 exist in this case, I am not persuaded that a
4 sentence of less than two years would be
5 appropriate. As such, I cannot accede to the
6 defence request for a conditional sentence to be
7 served in the community in this instance.

8 Would you please stand up, Mr. Scott. On
9 the charge of the sexual assault of J.M. I
10 sentence you to three years of imprisonment. In
11 addition, I direct the following ancillary
12 orders: There will be a DNA Order pursuant to
13 Section 47.051 subsection (1) of the Criminal
14 Code. You are to provide a sample of your DNA
15 within 72 hours of having been taken into custody
16 which is now. In addition, there will be a
17 Firearms Prohibition Order for ten years. I
18 further make an order under Section 743.21 of the
19 Code that you are to have no communication,
20 directly or indirectly, with J.M. during the
21 course of your sentence of imprisonment except
22 via a third party and in relation to issues
23 pertaining to your child. Have a seat,
24 Mr. Scott.

25 Counsel, we had a brief discussion during
26 the sentencing hearing about the potential
27 application of the provision of the Code dealing

1 with a SOIRA Order. Forgive me but my
2 recollection, Ms. Piché, is that you sought a
3 SOIRA Order and, Mr. Bran, you took the position
4 that it was not mandatory, that it should not be
5 made in this instance.

6 J. BRAN: That's correct, Sir.

7 A. PICHÉ: I only pointed to the fact
8 that it is presumptive in this case under the new
9 legislation, and the burden is on the defence to
10 convince the court it shouldn't be made.

11 THE COURT: Mr. Bran, what do you want to
12 say about that, if anything?

13 J. BRAN: I agree with my friend the
14 burden is on the defence, and in my respectful
15 submission this is an individual with no record
16 of any relevance. His background and the
17 circumstances of this case I would suggest inform
18 us that this is not something that would be in
19 the best interest to have him on a SOIRA Order.
20 The order is -- is not required under the
21 circumstances would be my position, Sir.

22 THE COURT: Ms. Piché?

23 A. PICHÉ: I don't really have comments.

24 I -- I don't disagree with Mr. Bran.

25 THE COURT: Thank you. Under the
26 circumstances I decline to make a SOIRA Order in
27 relation to this matter.

1 Mr. Bran, one of the points that you made in
2 your brief was your client's concern that on
3 sending him to the penitentiary, likely down
4 south, I'm going to ask you about that in a
5 moment, would have a negative impact on the
6 relationship between the two step-siblings -
7 the ten-year old that Mr. Scott has with J.M. and
8 the much younger child that he has with his new
9 partner. I'm concerned about that. In my view
10 the relationship that you have with your siblings
11 is the only relationship you have for your entire
12 life, and so in my view it's a very important
13 relationship. What, if anything, do you have to
14 say to me about how we can address that issue?

15 J. BRAN: Sir, I'm not sure that, that
16 this court given the decision that it just made
17 is in a position to do that. I've recently been
18 advised by my client that the mother of his
19 eldest child is actively making plans to remove
20 that child from this jurisdiction to be sent back
21 east to live with her family. I've not been able
22 to confirm that, but this is the information that
23 I've been provided. This is something that I
24 mentioned in -- in my brief in regard to not only
25 Mr. Scott losing that day-to-day contact with his
26 children but also his two children losing that
27 contact between them. It is a concern.

1 Mr. Scott has advised me that he's going to, of
2 course, take steps to protect his interest
3 through the family courts, but again, what this
4 court may be able to do I'm not sure. There's
5 nothing before the court so I'm not sure
6 there's anything --

7 THE COURT: Of course not. I can't make a
8 Family Law order. I'm not suggesting that that's
9 even in my contemplation, but I am concerned
10 about it.

11 J. BRAN: As we are.

12 THE COURT: As I understand your client is
13 as well. The other thing that I want to ask you
14 about is do you want me to make a recommendation
15 that he serve his sentence in the Territories?

16 J. BRAN: I would ask that the Court
17 make that recommendation. I know it's not
18 binding but I can advise my understanding is that
19 when those recommendations are reviewed by the
20 correctional authorities they do take them
21 seriously and they do look into those requests
22 diligently. So I would ask the Court to make a
23 judicial recommendation that if at all possible
24 Mr. Scott have the opportunity to serve that
25 sentence here in the community.

26 THE COURT: Okay. Thank you. Ms. Piché,
27 do you have anything you want to say about that?

1 A. PICHE': No.

2 THE COURT: Okay. I am going to direct

3 that a copy of these reasons and a copy of the

4 Pre-Sentence Report be - obviously these reasons

5 will have to be transcribed, they can't be done

6 immediately - but they should accompany the

7 Warrant of Committal or they should be sent to

8 the Correctional Service of Canada so that they

9 are aware of what this case is about. They also

10 need a copy of the Pre-Sentence Report in my

11 view, so a copy of the Pre-Sentence Report should

12 be appended to the Warrant of Committal.

13 Mr. Scott, this is a very, very sad case.

14 I found you guilty of sexually assaulting your

15 former partner. It is a very serious matter.

16 But today the focus is on you, and my concern for

17 you, Mr. Scott, is, reading between the lines,

18 looking at the content of your text messages,

19 hearing what is in the Pre-Sentence Report, the

20 limited information that I have about the

21 counselling that you are getting for PTSD, I am

22 seriously concerned about your well-being. You

23 are a very angry man. I am not saying you do not

24 have good reason to be angry. Your experience in

25 the military, your other life experiences, may

26 well explain this anger that I see in you. But

27 you are a young guy. You have your whole life

1 ahead of you, and being angry for the rest of
2 your life is not what I think you want to be
3 because you can not be the kind of father that I
4 know you want to be if you spend the rest of your
5 life in anger. Angry parents create angry
6 children and it goes on and on and on, and we
7 never break the vicious circle.

8 I am sure you think that this is the worst
9 day of your life. I understand that. I hope in
10 the next short while that you will come to see
11 this as the first day of the second part of your
12 life, and that the second part of your life is
13 going to be a much happier one. You are going to
14 deal with your demons. You are going to take
15 whatever counselling is available to you in the
16 correctional system. You are going to come to
17 terms with your own issues and that you will take
18 every single course or program that is offered to
19 you while in the prison system. Do not waste a
20 single day, Mr. Scott, by sitting in your cell
21 and not doing anything. Use the time to better
22 yourself, to heal, and to figure out how you are
23 going to navigate the second part of your life.
24 I believe that you can do that but you need to
25 deal with your demons first.

26 Thank you very much, Counsel, for your
27 assistance. Ms. Piché, is there anything else?

1 A. PICHE: Just the victim of crimes
2 surchage --
3 THE COURT: Oh, I'm sorry. What's your
4 position on that?
5 A. PICHE: Should be waived considering
6 your order.
7 THE COURT: Thank you. Mr. Bran, I'm sure
8 you are not going to object to that. Crown says
9 that I should waive the victim crime surcharge.
10 J. BRAN: Yes, thank you. I missed
11 that. I appreciate that.
12 THE COURT: No, that's okay. So ordered.
13 I want to thank you both very much, particularly
14 you, Ms. Piché, for stepping in at the last
15 minute on a case where you did not do the trial.
16 Thank you.
17 (PROCEEDINGS CONCLUDED)

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CERTIFICATE OF TRANSCRIPT

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

Dated at the City of Edmonton, Province of Alberta, this 11th day of June 2024.

Darlene Sirman, CSR(A)
Official Court Reporter