Date: October 22, 2021
File: T-1-CR-2021-000866

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

EDWIN JOSEPH ANDREW AVIK

REASONS FOR SENTENCE
of the
HONOURABLE JUDGE DONOVAN MOLLOY

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	October 22, 2021
Counsel for the Crown:	Billi Wun
Counsel for the Accused:	Peter Adourian

[Section 264.1(1)(b) of the *Criminal Code*]
[Sentencing]

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A. INTRODUCTION

[1] On June 3, 2021, after being arrested by the police, Mr. Avik damaged some property at the Inuvik RCMP detachment. Mr. Avik also threatened to damage an airplane if he was denied bail and required to be flown from Inuvik to be held at a correctional facility in Yellowknife.

[2] Mr. Avik entered a guilty plea to an offence pursuant to section 264.1(1)(b) of the *Criminal Code*, the threat to damage the airplane. The Crown had previously elected the summary conviction mode of proceeding with respect to this charge. The Crown withdrew the mischief charge and I heard the parties sentencing submissions. There is a huge disparity between the parties' submissions as to what constitutes a fit sentence. For the reasons that follow, I conclude that the Crown's request that an 18 month sentence of imprisonment be imposed is grossly disproportionate to the circumstances of this offence and inconsistent with recognized sentencing principles.

B. CIRCUMSTANCES OF THE OFFENCE

[3] The facts as accepted by Mr. Avik and which form the basis of the guilty plea were read in by the Crown as follows:

> *On June 3rd, 2021, Mr. Avik was arrested for a CSO breach. During his hearing before a justice of the peace, he became very agitated while in the presence of the justice of the peace via telephone.*
>
> *He then proceeded to rip up the microphone and telephone off of the interview room table and out of the wall, damaging that property. At that time the justice of the peace directed that Mr. Avik be removed from the hearing and in the course of his removal, it's alleged that Mr. Avik uttered to Constable David Tyler of the RCMP that he would crash the plane if he was sent to Yellowknife.*
>
> *And then later on in the evening, when another officer was trying to facilitate Mr. Avik's access to counsel, Mr. Avik at that time confirmed that he had no interest in speaking with a lawyer, and then he said a number of other things, including confirming to the officer that he would ensure the plane would go down if he was ever sent to Yellowknife. And this incident was recorded. Those are the allegations.*

[4] Mr. Avik accepted those facts and through his counsel added, without objection by the Crown, the following:

> *I'm reading from the supplementary occurrence report of Constable Davie (phonetic). One of the points he makes when reviewing the video is that -- I'll just read it verbatim. During the course of this heated issue, he notes "Edwin then began yelling towards Constable Tyler, 'You want to try my life?' And then later --*
>
> *THE COURT: Sorry? "You want to try my life?"*
>
> *DEFENCE: "You want to try my life?" which I take to mean would you like to see what it's like to live my life?*
>
> *THE COURT: Oh, I see. Okay.*
>
> *DEFENCE: And subsequently, in the latter part where my friend noted that after he had been placed in the cell he continued to make similar comments about the plane. I'm just reading again from the supplementary report:*

> *Edwin did say that he was sick of suffering and that he would ensure the plane would go down if he was sent to Yellowknife. Constable Davie ended the talk by telling Edwin that if he wanted to continue the conversation, just to ask the guard for Brian (phonetic).*

C. THE OFFENDER'S CIRCUMSTANCES

[5] At the time of the offence, Mr. Avik was a 37 year-old Indigenous male with a significant prior criminal record. A portion of the history of his criminal convictions is reproduced in *R. v. Avik*, 2021 NWTTC 2. If Mr. Avik commits another primary designated offence he appears likely to face an application to have him declared to be either a dangerous or long-term offender.

[6] His personal circumstances have not changed since Janauary15, 2021 when the above noted decision was rendered. Those circumstances were described by Malakoe J. as follows:

> *Edwin Avik was born in May of 1983. At the time of sentencing, he is 37. He is Inuvialuit and was born in Inuvik, NT to Margaret Avingayoak (Avik) and Stanley Keevik Jr. He and his two siblings, Nathan and Jolene were raised in an environment where their parents abused alcohol and drugs and where their father was often incarcerated.*
>
> *At a relatively young age, Mr. Avik was custom adopted by his birth mother's parents, Mary and Joseph Avik. Between the ages of three to eleven, he spent time between the houses of this parents and his grandparents (his adoptive parents). He lived with his adoptive parents in Tuktoyaktuk. He was removed from the home at twelve years and placed in foster care. Mr. Avik was subject to physical, mental and sexual abuse at the hands of many of his relatives. He states that he was fondled by his adoptive father on two occasions when he was eight and nine. He also alleges that he was physically abused by both parents.*
>
> *Mr. Avik resided in various foster homes as well as the Territorial Treatment Centre. The following paragraph summarize this background:*
>
> *As stated earlier, he did not feel comfort and safety in his own home due to the emotional, physical and mental abuse that he was exposed to on a daily basis. He went to prison on a sexual assault when he was sixteen years old. He used to smoke weed and drink on a daily basis which he felt was a release from what and who he was becoming. He says if [he] had*

> *the chance he would like to be reborn and rid himself of the shame, guilt and regrets that he lives with on a daily basis.*
>
> *Mr. Avik has been involved in several intimate relationships. He has a 15 year old child with an ex-common-law partner. Mr. Avik was convicted of several assaults of this partner including the aggravated assault that led to his first federal term of incarceration.*

D. PARTIES' POSITIONS

[7] The Crown recommended a period of 18 months imprisonment. The Crown stresses protection of the public to be achieved by separating Mr. Avik from society by keeping him in prison. The Crown tendered 8 transcripts of reasons previously delivered by other judges in sentencing Mr. Avik and the above noted decision by Malakoe J. The Crown was advised that the Court did not view this material as sufficient on its own and was advised that the Crown had no other authority to offer. The Crown explicitly declined the Court's offer of an adjournment to attempt to determine what, if any, other relevant authority might exist to support the Crown's sentencing position.[1]

[8] The Defence maintains that the appropriate range of sentence here would be from a suspended sentence to a short period of imprisonment. The Defence stressed that there was absolutely no ability for the accused to carry out his threat, that there is no suggestion of any adverse impact on the police officers who received the threat and that Mr. Avik's comments, while meant to be taken seriously, were expressions of frustration as to the circumstances of his life and the pain and trauma he endures.

[9] The Defence tendered *R. v. Rogers*, 2020 ONCJ 288, *R. v. H.J.P.*, 1995 CarswellNfld 306 (NL CA) and *R. v. Stiliadis*, 2004 CanLII 18520 (ON CA). While distinguishable in terms of the circumstances of those offenders, the Defence maintains they illustrate much lesser sentences imposed for threats of actual violence where the ability to effect the threats had significant adverse impacts on those subject to the threats.

E. THE PURPOSE, PRINCIPLES AND OBJECTIVES OF SENTENCING

[10] In determining a fit sentence for Mr. Avik, I am guided by the:

---

[1] Mr. Avik was a serving prisoner on previous offences and would not have been held in custody for any additional period as a result of any short adjournment in respect to this matter. From a natural justice and procedural fairness perspective extending such opportunities to any litigant should be exceptional where there was ample time for counsel to prepare.

- Purpose, principles and objectives of sentencing set out in the *Criminal Code*;
- Circumstances of the offences and of Mr. Avik, including his Indigenous status; and,
- Case law.

[11] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparation for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgement of harm done to victims and to the community.

[12] The principle of proportionality is a fundamental principle of sentencing. It requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[13] The principle of parity states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[14] Finally, all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention paid to the circumstances of Indigenous offenders.

F. VICTIM IMPACT

[15] As already noted, the offence appears to have little impact on the officers and no victim impact evidence was tendered. That is not to say that there was no impact and indeed such threats must not be minimized as society relies on police officers to enforce the law and maintain order. Being subject to any form of threat must not be regarded as a simple occupational fact of life for police officers.

[16] Like any threat to any person however, objective reasonability in terms of the impact of the threat in question must be considered. The conditions of transport of prisoners by the RCMP in this jurisdiction is within their sole control subject only to the Charter of Rights and Freedoms and an objective risk/threat evaluation. Had there been actual concern that Mr. Avik might act out on his threat or that he posed any other risk to the airplane or its operation, one must assume that Mr. Avik would have been secured, shackled or otherwise restrained so as to nullify whatever threat he might be assessed as posing.

[17] By way of contrast, in terms of threats where the impact on officers is inherently obvious, one need only look at the threats that Malakoe J. had to consider. Those threats involved violence, including Mr. Avik stating to a cell guard that, "I will take out as many people as I fucking can. You'll be the first one." Specific threats of violence against peace officers must be denounced, particularly given the heightened impact that they can have on officers working in remote northern communities. In these communities everyone knows where the police officers live, whether they are in or out of the community and the presence of firearms is widespread given reliance on subsistence hunting. Even though he was being sentenced for 2 such threats and a separate assault, Malakoe J. only imposed a sentence of 26 months imprisonment in respect of all three offences (the majority of which he had already served via the accumulation of remand credit). For a single offence of threatening property, that proceeded summarily, the Crown now seeks a sentence just 8 months less than that disposition. Mr. Avik also has 6 months left to serve on his previous sentence as I recently granted the Crown's application to collapse the conditional sentence order imposed by Malakoe J. in respect of the mischief and breach of probation offences.

G. AGGRAVATING AND MITIGATING CIRCUMSTANCES

[18] Mr. Avik's criminal record is extensive and largely uninterrupted since he started accumulating that record as a teenager. Any gaps are attributable to him being in prison. His propensity towards violence when impaired makes him a significant risk to the community given the lack of any effective interventions to address the trauma he has suffered and his related addictions/substance abuse issues. It is also aggravating that Mr. Avik did actually damage RCMP property during his show cause hearing.

[19] On the other hand, Mr. Avik did enter a guilty plea, saving the Court valuable time and resources and after hearing his section 726 allocution, I believe the sober Mr. Avik that appeared before me genuinely is sorry, recognizes that what he does while impaired is wrong and knows he needs help/treatment. In availing of his opportunity to address the Court directly Mr. Avik offered the following:

THE ACCUSED: I do apologize for -- for you having to basically put your -- put my life in your hands and what kind of jail sentence I should have.

And I do realize now that, you know, like when I do get frustrated that I can't just, you know, say certain words because it will get me in trouble, and knowing now that, you know, like sometimes when you say stuff, there are repercussions that go out, whether it's a positive or a negative.

And I do have -- I do have -- I don't -- I'm just sorry that you have to -- I'm just sorry that you have to figure out a sentence for me that is right when -- I don't know, it's -- I do apologize. I do apologize.

THE COURT: You have basically spent most of your life in and out of prison?

THE ACCUSED: Ever since I was younger, yeah, as a boy. I basically grew up in the system.

THE COURT: Yeah. But you will soon be 40 years old, right?

THE ACCUSED: Pardon me?

THE COURT: You will soon be 40 years old?

THE ACCUSED: In two years from now, yeah.

THE COURT: So do you want being in and out of prison to be for the rest of your life?

THE ACCUSED: No, not at all. Not at all.

THE COURT: So what can we change? What is going to change to break that pattern?

THE ACCUSED: I have to take things slow to be able to function, you know, like for me when something happens, it's like right away you have to do something. And when something so -- so hard that, you know, the only basically thing for me is to only make it better is to turn to alcohol.

I have to take things slow in order for me to be able to not -- I have to make a choice not fast, but slow, where I'm able to make the right choice instead of the wrong choice.

THE COURT: Yeah.

THE ACCUSED: It's just like -- I'm mostly like a little kid, you know, like when you can't get a candy, you know, like you get -- you get all hysterical and stuff like that, start crying about it. But I'm an adult, you know. I'm an adult and I know what's right from wrong.

It just -- my thinking has to slow down. It's where I have to slow my thinking down and think of how to not make the situation go right out of hand when it could be a small situation.

THE COURT: Yeah. All right. Anything else you wanted to tell me before we adjourn?

THE ACCUSED: I'm just sorry for you that you have to find a reasonable sentence for me. It probably is pretty hard, but not to --

THE COURT: Well, there are a lot of competing factors, Mr. Avik. You know, I do not arrive at these decisions easily, but I have to say to you, sir, there is no joy in watching somebody who has been through the trauma that you have been through, has addiction problems. There is no good result on my end, whatever the result is.

But the power to change, I believe we all have the power to change within us, and I appreciate that when you have been through a lot of trauma like you have, it is not easy. But it does not mean that there is not hope. There always has to be hope.

THE ACCUSED: Yeah, and I have to realize that. Have to realize that.

THE COURT: Okay, sir. Thank you very much. We will see you back here next Friday.

[20] By way of further demonstrations of his remorse and desire for help, Mr. Avik consented to the Court including a residential treatment condition in any probation order that the Court might choose to impose as part of his sentence. In *R. v. Taylor* (unreported, T-2-CR-2021-000008, May 7, 2021) I expressed my views on the significance of giving this consent:

... however many justice buildings or detachments, whatever you want to call it, there are in the North -- I do not just mean the territories, I mean the entire North -- there is nowhere near the corresponding levels of

> *treatment centres, of safe houses, of any of the things that might serve to ameliorate the pressures to give people a chance to -- I appreciate and I am putting it in the order that you go to treatment, but it is not lost on me that you would have to go south for that.*
>
> *It is not lost on me that the connection of Indigenous people, and yourself included, in the territories to their communities is extremely strong. And it is no small sacrifice to have to go to Edmonton or Vancouver or wherever it is, where you may not know a living soul, where you are in an environment that is completely foreign and hostile, and then in that environment under those conditions be told to go to a healing program and heal yourself.*

H. GLADUE FACTORS

[21] I must consider section 718.2(e) and the guidance offered by the Supreme Court of Canada in applying Parliament's directive aimed at addressing the circumstances of Indigenous offenders (*R. v. Gladue*, [1999] 1 SCR 688; *R. v. Ipeelee*, [2012] 1 SCR 433). There is an abundance of evidence that Mr. Avik is impacted by many *Gladue* factors that must be considered as lessening his moral blameworthiness.

[22] In this regard, I again cannot frame it any better than Malakoe J.:

> *The abuse and neglect that Mr. Avik experienced arise in the context of his aboriginal background. His grandparents (adoptive parents) were residential school survivors. His childhood was shaped directly by the systemic and background factors affecting aboriginal people generally, but more specifically by the abuse he received at the hands of his relatives. R. v. Gladue, [1999] 1 S.C.R. 688 and R. v. Ipeelee, [2012] 1 S.C.R. 433 require this Court to recognize the diminished blameworthiness of Mr. Avik and to consider alternatives to incarceration.*
>
> *The documentation before the Court indicates that if Mr. Avik does not change his behaviour, he will likely re-offend within a short time after his release from imprisonment.*
>
> *The connection between Mr. Avik's trauma and his criminal behaviour raises the potential futility of unduly emphasizing the objective of specific deterrence. Mr. Avik does not appear to be deterred from future crime by lengthy periods of incarceration. Similarly, the objectives of general deterrence, denunciation and reparation are of secondary importance since the length of the previous periods of incarceration have reached a*

point where the ordinary member of the public would consider their length to sufficiently denounce the offence and to provide deterrence.

I. SENTENCING AUTHORITIES

[23] The most relevant decision tendered by the Crown is that of Malakoe J. from January of 2021, in which he rejected the Crown's sentencing position in regards to Mr. Avik and described it as disproportionate. In addressing the Crown's arguments that in part the disproportionate sentence was necessary to separate Mr. Avik from society, Malakoe J. held as follows:

> *Edwin Avik has spent most of his adult life locked up in a Territorial or federal prison. When he is released, he drinks and he re-offends and is locked up again. Without a change in Mr. Avik's behaviour, this cycle will continue.*
>
> *When Mr. Avik is out of jail, he does not appear to be deterred by the length of the sentence associated with a potential offence. Increasing the length of these sentences will not deter future criminal behaviour. Even long sentences will eventually be served and Mr. Avik will be released. The exception to this, of course, is an indeterminate period of incarceration which recognizes that Mr. Avik will not change and the sole objective is to protect the public from his harm.*
>
> *The Crown has not asked the Court to declare Mr. Avik a dangerous offender nor a long term offender. Both of these designations are a recognition that other sentences will not adequately protect the public.*
>
> *In the absence of a dangerous offender or long term offender application, the Court cannot impose a period of incarceration which is determined solely on the need to separate Mr. Avik from the public.*
>
> *The starting point has to be the fundamental principle of sentencing, that is, the proportionality principle, as stated in section 718.1: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*

[24] On being provided the opportunity to summarize its sentencing position in this case, the Crown stated as follows:

> *CROWN: To summarize, sir, the principle is separation from society, protection of the public, and also taking into account Mr. Avik's*

> *personal circumstances, his rehabilitation and what has appeared to benefit him in the past.*
>
> *And on this particular point, I think my friend will talk about Mr. Avik's relationship with a particular healthcare provider that he does have a history with, and it's also been discussed in some detail in Judge Malakoe's decision quite recently. But those are the principles. Protection of the public, separation from society.*
>
> *THE COURT: So principally, it's protection of the public by separating him from society?*
>
> *CROWN: Yes, and also to facilitate his rehabilitation and reintegration once he's released.*
>
> *THE COURT: Sure. But principally it is to protect the public by separating him from society, correct?*
>
> *CROWN: Yes.*

[25] The Crown's response, on being referred to paragraph 72 of the decision by Malakoe J. was that it used the word *solely*. I appreciate the distinction between solely and principally, however not nearly to the degree that it would support a submission seeking a sentence grossly disproportionate to the gravity of the offence of threatening to damage property. Particularly so where there was no possibility that the threat could be carried out, no significant victim impact and where Mr. Avik is so profoundly impacted by *Gladue* factors that lessen his moral blameworthiness. In terms of any reliance by the Crown on rehabilitation to support such a lengthy sentence in a territorial correctional facility, I note that before Malakoe J. the Crown argued that the disproportionate sentence then being sought was necessary in large part because the rehabilitation Mr. Avik needed was best available to him in the federal correctional system.

J. SENTENCE

[26] Mr. Avik's criminal record contains 9 entries in regards to the offence of uttering threats. Of those convictions 5 are identified as threats to cause death or bodily harm to another person. As for the other 4 entries, the record tendered by the Crown does not indicate whether those offences involved threats to persons, property or otherwise.

[27] The longest sentence imposed in respect of any of the uttering threats offences is the 26 month[2] sentence imposed by Malakoe J. That sentence however was imposed concurrently to the 26 month sentence imposed on the assault conviction. The threats in that case also involved threats to cause death to peace officers and Mr. Avik had the capacity to carry out those threats on his release from prison.

[28] Prior to the 26 month sentence, the longest sentence ever imposed on Mr. Avik for the offence of uttering threats was a 12 month sentence of imprisonment. That offence was one of threatening violence towards persons and that sentence was imposed at the same time as he was being sentenced on assault and breach charges.

[29] Regardless of whatever potential the Crown believes that there is for Mr. Avik to be declared a dangerous or long-term offender in the future, it cannot in the interim obtain inordinately long sentences for Mr. Avik for minor summary conviction offences such as the one here.

[30] Taking into account the principles of sentencing, Mr. Avik's circumstances, the circumstances of this offence, the guilty plea, his remorse and his consent to a probationary condition requiring him to attend residential treatment, I conclude that a fit sentence here is a period of 4 months imprisonment. That sentence is much longer than would have been imposed if Mr. Avik did not have the related prior convictions.

[31] In addition to the period of imprisonment, Mr. Avik will be placed on probation for a period of 18 months. The conditions of that Order are as follows:

(a) Keep the peace and be of good behaviour;

(b) Appear before the court when required to do so by the court;

(c) Report to a probation officer within 2 business days of the expiry of your sentence of imprisonment and report thereafter as required by the probation officer;

(d) Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;

(e) Abstain from being under the influence of alcohol to any degree when outside of your primary residence;

[2] This may be an illegal sentence in the sense that it is in excess of what the law permits. As the Crown proceeded summarily in respect of all of those offences the maximum sentence appears to be 24 months imprisonment by virtue of the operation of sections 266(b), 264.1(2)(b) and 787(1) of the *Criminal Code*.

(f) Provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under subsection 732.1(9) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that you have breached a condition of this order that requires you to abstain from the consumption or being under the influence of alcohol;

(g) Attend any and all counselling, programming or other related activities as directed by the probation officer; and,

(h) Pursuant to your consent as expressed on October 15, 2021, and subject to the program director's acceptance of you, participate actively in a treatment program approved by the territorial government.

[32] In addition to the probation order the Court makes the following orders:

i. That Mr. Avik provide a sample of a bodily substance pursuant to section 487.051 (a DNA order); and,

ii. That Mr. Avik be prohibited from possessing firearms and other items as enumerated in section 110 for a period of 10 years, but allowing for the sustenance exemption as set out in section 113.

Donovan Molloy
T.C.J.

Dated at Yellowknife, Northwest Territories, this 22nd day of October, 2021.

R. v. Avik, 2021 NWTTC 18

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