Citation: *R.* v. *Quash*, 2009 YKTC 54

Date: 20090512
Docket: 07-00516
07-00518A
07-00671A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

BOBBY RONNY QUASH

Appearances:

Noel Sinclair	Counsel for Crown
Nils Clarke	Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Bobby Quash has entered guilty pleas to having committed three offences; sexual assault, contrary to s. 271 of the *Criminal Code of Canada*, failing to stop a motor vehicle for a peace officer, contrary to s. 249.1(1), and breach of recognizance, contrary to s. 145(3).

Circumstances of the Offences

Section 249.1(1)

[2] On November 14, 2007, RCMP in Whitehorse received a report that Mr. Quash

was not in his room at the Adult Resource Centre. A subsequent report was received the morning of November 15th, advising the RCMP that Mr. Quash was in a vehicle in the Logan area of Whitehorse. At 10:55 a.m. the vehicle associated with Mr. Quash was observed by an RCMP officer on Falcon Drive. The RCMP officer activated the police cruiser's emergency lights and four-way flashers and followed Mr. Quash down Hamilton Boulevard at a speed of 40 to 50 kilometres per hour. Mr. Quash turned his vehicle into the McIntyre subdivision and drove down a dead-end street, a distance of approximately 1.3 kilometres from the time the emergency equipment was activated on the police cruiser. Mr. Quash then got out of the vehicle and ran away.

[3] He was not located until RCMP officers responded to a complaint of a fight at Lizard's Bar on November 16th. Mr. Quash was located in the washroom of the Gold Rush Hotel. At that time he provided the police officer a false name but was identified by another police officer as Bobby Quash. Mr. Quash provided some resistance to his arrest and kicked the windows of the police cruiser en route to the police detachment.

Section 271

[4] The testimony of S.M. at trial was that in the mid-morning of January 20, 2008, Mr. Quash entered her bedroom where she was sleeping naked with her boyfriend. Ms. M. woke up to find that Mr. Quash was having sexual intercourse with her. When asked what he was doing, Mr. Quash replied that he was "Making babies." Ms. M. and her boyfriend pushed Mr. Quash onto the floor and he then fled from the house. Mr. Quash is Ms. M.'s nephew through marriage.

[5] Mr. Quash has no recollection of the events testified to but does not dispute the

evidence of Ms. M. as to what occurred. Although she had consumed alcohol before going to sleep Ms. M. did not “pass out” due to her consumption of alcohol; she simply went to sleep.

<u>Section 145(3)</u>

[6] At the time of the sexual assault Mr. Quash was required by the terms of a recognizance to reside at the ARC, otherwise known as the Adult Resource Centre. He was not in compliance with that term on January 20, 2008.

Criminal Record

[7] Mr. Quash is 22 years old. He has a criminal record that consists of 18 entries. These entries are: as a youth in 2002, a s. 334(b) for theft under for which he received 30 days and three months probation, and a s. 26 of the *Youth Criminal Justice Act*, failing to comply, for which he also received 30 days and three months probation. In 2003, as a youth, there were two s. 266 offences, for which he received 90 days, and two s. 334(b) theft under offences, for which he received 30 days and 90 days.

[8] His adult record starts in 2005. There is a s. 266 assault, for which he received a suspended sentence and one year probation, a s. 354 possession of property, for which he received one day, three s. 145(3) convictions, for which he received one day on each. I am not certain in looking at these one days whether the record simply reflects whether there was any time served and it was one day deemed, taking that into account. The record simply states one day.

[9] Section 249.1(1), flight while pursued, for which he received 90 days; a s. 354

possession over $5,000, for which he received 90 days; a s. 253(b) impaired, for which he received one day and 18 months driving prohibition.

[10] In 2006, there is a s. 733.1(1), failure to comply with a probation order, for which he received 15 days; a s. 334(b) theft under, for which he received 15 days, and a s. 145(3) for failing to comply with a recognizance, for which he received one day.

[11] And of most significance, in 2007 there is a s. 271 sexual assault, for which he received a 13-month conditional sentence order and three years probation. This conditional sentence was collapsed at the time of the arrest for the current offence and he served the remainder of that sentence in custody.

Victim Impact Statement

[12] A victim impact statement was filed. Ms. M. was very restrained in her comments. She spoke of having to undergo the rape kit procedure. She said that she felt “let down” due to the relationship she had to Mr. Quash. She felt “gross, embarrassed and dirty.” She found the experience to be degrading.

[13] She felt bad for her son, who had to leave work in British Columbia and come to court to testify. This incident made it more difficult for her to go out and look for work. She was already involved in counselling for historical sexual abuse issues and she feels that this has further impacted her ability to trust people.

[14] There can be no doubt that this sexual assault has had a significant negative impact on Ms. M. and her family.

Submissions of Counsel

Crown

[15] Crown counsel suggests that an appropriate sentence, after credit for time served, would be a further two years custody to be followed by three years probation. I note that an additional period of time has passed since the original sentencing submissions, and so the credit for time served may go up appropriately from the time the submission was made.

[16] The aggravating factors that were pointed out are that Mr. Quash was on a recognizance at the time of the commission of this offence, as well as being on a conditional sentence for sexual assault. Ms. M. was in her own bed in her own house. Mr. Quash was related to Ms. M., which, although not making it a true breach of trust, is nonetheless, to some extent, reflective of an element of trust.

[17] Other factors that Crown noted during submissions were that the nature of this assault was more in the nature of being opportunistic as compared to being predatorial. The submission was that the guilty plea should be given some mitigation, although less than often seen, because it was given after Ms. M. and her son testified at trial.

Defence

[18] In the case of ***R.* v. *Harper***, which I will refer to later, and which defence counsel relied on during these proceedings, was somewhat distinguishable in that Mr. Harper was considered to have a child-like view of sexual relationships, which was not a factor that was necessarily present in the information related to Mr. Quash.

[19] Defence counsel submits that Mr. Quash should receive an additional year after

being given credit for time served, followed by two years probation, noting that Mr. Quash is already on probation for a further two years and a few months as a result of his prior s. 271 conviction.

[20] Defence counsel submits that it is important to not lose sight of the diminished responsibility of Mr. Quash as an individual diagnosed with FASD in attempting to balance it against the significant public safety concerns that exist in this case and which were raised and addressed by Crown counsel in his submissions.

[21] Defence counsel further submitted that Mr. Quash has in fact, at the time of the hearing, been in custody for 15 months due to the collapsed conditional sentence order which has already had a fairly significant impact on him, particularly with respect to the sentencing principle of specific deterrence.

Personal Circumstances of Mr. Quash

[22] A pre-sentence report was prepared in November 2007 for Mr. Quash's sentencing on the earlier s. 271 offence. An updated pre-sentence report was filed at this sentence hearing for the current matters.

[23] Mr. Quash is a member of the Tahltan First Nation. Due to his parents' problems with drinking Mr. Quash was removed from the family home as a child and spent approximately two years at the receiving home. His older brother died from pneumonia in 1998 at the age of 15. When speaking at sentencing, Mr. Quash stated that his brother's death was hard on him.

[24] He has one other sibling, an older sister. He has a limited education. He has

limited employment history. To be noted, however, is a very positive report from his employer at the Westmark Hotel. For the period of May to November of 2007, she described him as an awesome employee, hard-working, dedicated, easy-going, always had a smile on his face, although noting that tardiness was one issue that she had to deal with.

[25] In the LSI-R risk assessment in 2007 he was considered to be a high risk to reoffend. In the STATIC-99 assessment, which deals with sexual and violent recidivism for sexual offenders, and which is a group risk assessment as opposed to an individual assessment with respect to recidivism risk, he was noted to be a high risk to reoffend.

[26] Mr. Quash did very well while he was on bail prior to sentencing for the s. 271 offence in 2007 while he was residing at the ARC, and he was noted to show little remorse for this s. 271 and to some extent blamed the victim and showed disrespect towards females.

[27] In the updated pre-sentence report prepared in April 2009, additionally noted was the ongoing struggle with alcohol and its role in most of Mr. Quash's criminal record and the fact that cocaine use may have been a factor in the present s. 271 offence. He remains under the STATIC-99 a high risk to reoffend.

[28] Quoting from page 4 of the report:

> …without a group home style residence, with a high staff to resident ratio, coupled with an extremely stringent community supervision order, Mr. Quash will continue to put the community at risk for further sexual violence.

[29] Also filed was a FAS Diagnostic Clinic report. Mr. Quash was the subject of an

FAS, or fetal alcohol syndrome, evaluation on May 8, 2008. He was diagnosed as having an alcohol-related brain dysfunction and his formal diagnosis was within the range of FASD. The report concludes that Mr. Quash has permanent alcohol-related brain dysfunction and lacks the ability to listen better, remember better or to think faster.

[30] Excerpts of the report note that Mr. Quash has significant underlying brain dysfunction, functions in the extremely low range due to severe deficits in memory and information processing, which greatly interfere with his ability to gain information through the verbal domain, operates in the extremely low range with respect to his ability to mentally manipulate information and respond appropriately, has a severe weakness in speed of information processing and thinking abilities, has not achieved a functional level of literacy or numeracy skills, operates at a pre-teen level with respect to executive functioning skills and understanding of abstract concepts. The report states that:

> Wherever Bobby moves to following his release, it will be critical that there is a high level of structure and support. Bobby needs an external brain to help direct his daily activities and re-direct him when he makes poor choices.
>
> [He] does not have the ability to live successfully in an independent living situation.
>
> Bobby has a severe disability and requires significant supports in all areas of personal functioning. The level of disability in memory, processing and executive functioning dictates a need for dramatically increased supports to keep Bobby safe and help him move towards a happier, more productive life.

[31] The report notes that, when compared to September 2007, Mr. Quash "appeared to be lost and confused in Whitehorse Correctional Centre," noting that he was less conversant, had a flatter effect and was less interactive. The FAS Diagnostic report

does, however, say that:

> Bobby has FASD, but this is not an excuse for his behaviours. Bobby should be held accountable for his behaviours and his choices.

Other Information

Ms. Bailey

[32] For approximately one year while in custody, Mr. Quash has been assisted by Andrea Bailey as part of a Yukon Learn literacy program. Literacy issues were identified as a significant problem for Mr. Quash in the FAS Diagnostic report. Ms. Bailey advised the Court that Mr. Quash was very polite and receptive to the variety of materials they covered. He was particularly interested in learning and reading poetry. He was also interested in reading related to his Tahltan heritage as well as to current events.

[33] She has noted some improvement to Mr. Quash's reading and comprehension level. A fairly detailed work resumé was prepared by Mr. Quash with the assistance of Ms. Bailey, and this was filed during the sentencing proceedings.

Parents

[34] Mr. Quash's father and mother spoke during the sentencing proceedings. They said little, but Mr. Quash's father stated that he suffers from cirrhosis of the liver and has only a couple of years to live. Both his parents want him to stay in Whitehorse and be released from Whitehorse Correctional Centre as soon as possible.

[35] The 2007 pre-sentence report indicates that Mr. Quash's father, though

consistently employed, has struggled with alcohol abuse and his serious drinking-related medical issues. It is noted that Mr. Quash is close to both his parents and his sister, and Mr. Quash worries about his father when his father is drinking alcohol.

Case Law

[36] In ***R.*** v. ***White***, 2008 YKSC 34, a sentencing decision after conviction at trial, Mr. Justice Gower considered in detail the prior Yukon case law with respect to sexual assaults against "passed out" victims, as well as the approach in other jurisdictions.

[37] The leading Yukon case providing guidance in this area for a number of years had been ***R.*** v. ***G.C.S***., 1998 YJ 77, Court of Appeal. ***G.C.S***. had provided a generally accepted range of sentence of between one to two years for such an offence. ***G.C.S***. involved a guilty plea by a young First Nations offender.

[38] The circumstances in ***White*** were that Mr. White, who was a Yukon College classmate of the victim, had spent portions of the evening drinking and dancing at a local lounge, although not exclusively with each other. They returned to Mr. White's dorm room at the college and, while sitting on Mr. White's bed, talked about college matters. At one point they were kissing. The victim went to sleep on her side of the bed. Both the victim and the offender were wearing pants. Some time later the victim awoke. Her pants and underwear had been removed and Mr. White was attempting to have sexual intercourse with her. She said "No," and "I don't want this," or "I don't want to," three or four times. After about ten minutes passed Mr. White ceased his attempts to have sexual intercourse with the victim.

[39] Mr. White was a 39-year-old First Nations male with a dysfunctional family

background. He had a somewhat dated and unrelated criminal record. At the time of sentencing he was not yet accepting responsibility for the sexual assault and expressed no remorse. This latter aspect was properly considered to be a neutral factor by Mr. Justice Gower.

[40] The pre-sentence report rated Mr. White as a high risk to reoffend on the Level of Service Case Management Inventory. The aggravating factors in the ***White*** case were the trust issues that arose from the prior knowledge the parties had of each other, Mr. White taking advantage of the victim while she was sleeping, failure by Mr. White to cease his attempts for ten minutes after being told by the victim to stop, minor injuries to the perineal area of the victim, the criminal record which, although not directly related, did include an aggravated assault, which was obviously an offence of violence, the high risk assessment and the drug and addiction problem for which Mr. White refused to engage in treatment.

[41] The mitigating factors were considered to be the aboriginal status of Mr. White, his attempts to upgrade his education and letters of support commenting positively on his helpfulness and volunteer work.

[42] Mr. Justice Gower, preferring the approach to sentencing such cases as being along a continuum within a range rather than using the starting approach, reconsidered ***G.C.S.*** and held that the generally accepted range of sentence for such offences is from one year to 30 months in paragraph 85. Mr. White was sentenced to 26 months, less credit for time served. There was no probation order to follow that I can see in the decision.

[43] In ***R.*** v. ***Blackjack***, 2008 YKTC 66, Judge Faulkner considered the ***White*** decision and stated that:

> The difference between *G.C.S.* and *White* may lie partly in Mr. Justice Gower's review of the relevant case law, but may also lie partly in the fact that in *White*, the victim awoke during the course of the assault, which actually continued violently for some 10 minutes thereafter. Thus it had elements which perhaps went beyond the usual sort of cases contemplated in *G.C.S.* (Paragraph 7)

[44] Judge Faulkner ultimately found that, regardless, the facts in ***Blackjack*** were more egregious than in ***White*** and imposed a sentence of three years custody.

[45] I agree with Judge Faulkner that ***White***, in extending the sentencing range for sexual assaults involving passed-out victims a further six months from that established in ***G.S.C.,*** is likely more related to circumstances where the sexual assault continued in the face of some level of resistance from the previously passed-out victim of the sexual assault, as contrasted to circumstances where the victim remained passed out.

[46] To be clear, the extension of the range is not premised on there being any differential impact on the victim but rather on the increased moral culpability of an offender who persists in sexually assaulting a resistant victim. The sexual assault is no less serious when the victim remains passed out than when the victim awakens and resists the offender.

[47] In the case before me, the sexual assault ended almost immediately after Ms. M. awoke, although it appears that Mr. Quash may have briefly continued with the act of intercourse until he was pushed off of Ms. M.. That said, although force was used by Ms. M. and her boyfriend to push Mr. Quash onto the floor, there is no evidence that Mr.

Quash attempted to overcome any resistance in order to continue the sexual assault. To that extent, this case differs from ***White***.

[48] Significantly aggravating in this case, however, is Mr. Quash's prior conviction for sexual assault in November 2007, the fact that he was serving the conditional sentence for this offence at the time he committed the sexual assault on January 20, 2008, and the fact that at the same time he was also in breach of the residency requirements of his conditional sentence order. He was also clearly in breach of the abstention clause of his conditional sentence order, although Crown counsel is not seeking a conviction on that charge.

[49] I note, however, that I have been advised that the circumstances of the prior sexual assault are considerably different than the present one. In that case, the sexual assault occurred in the context of a brief relationship between Mr. Quash and a 12-year-old girl, with whom the sexual intercourse could not be consensual. Mr. Quash did, however, supply the 12-year-old with alcohol, which was an aggravating factor.

[50] Although there was an approximately eight-year age gap at the time of the prior sexual assault, given the identified FASD issues that exist in this case, the practical age gap would not appear to be as great. All said, the aggravating impact of the prior sexual assault is not as significant as would be the case if the circumstances of that sexual assault were the same as in the present case.

First Nation Status

[51] Section 718.2(e) states that:

> (e) All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[52] The following quote from the Ontario Court of Appeal in ***R.*** v. ***Whiskeyjack***, 2008 93 O.R. (3d) 743, underscores the balancing act that needs to take place when considering an appropriate sentence for a First Nations offender in the context of a serious offence of violence:

> The task of the sentencing judge is to weigh the aboriginal offender's circumstances and his or her interest in rehabilitation or restorative justice with the community's interest in deterrence, denunciation and the need for social protection. In the case of serious and violent offences, even for aboriginal offenders, the balance will often tilt in favour of the latter interests. (Paragraph 31)

[53] Even in very serious offences, however, the analysis set out in ***R.*** v. ***Gladue***, (1999) 1 S.C.R. 688, applies in all cases where the offender is of First Nations ancestry, although the application of a different methodology for a First Nations offender will not necessarily end up with a different result than in the case of a non-First Nations offender. This is ***Whiskeyjack***, paragraphs 29 and 30, referring to the case of ***R.*** v. ***Kakekagamick*** (2006), 81 O.R. (3d) 664, C.A., at paragraphs 56 and 66.

[54] It is important to consider the context in which 718.2(e) is to be applied today in light of the apology offered by the Canadian government on June 11, 2008, to former students of residential schools in Canada for the government's role in the residential school system. In this apology, Prime Minister Harper recognized that the damage went

beyond the negative impact on the individual, stating that:

> …the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.
>
> The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.

[55] In accepting responsibility for their role in causing such a negative impact on First Nations individuals, their families and their communities, the Government of Canada implicitly should be seen as also accepting responsibility for ongoing participation in ameliorating the consequences of this impact on First Nations individuals, their families and their communities. All too often it is in the criminal justice system where these negative impacts are to be found, not just in the victims of criminal activity but in the offenders who commit the crimes.

[56] It is not enough to apologize for harm done without making reparation for the harm. This reparation must reach beyond the payment of monies to former students of the residential schools. It must extend to how we treat First Nations peoples involved in the criminal justice system, regardless of their role within it. Legislation designed to "get tough" on crime must not lose sight of the fact that the very individuals that suffered harm, either directly or indirectly, perhaps as children of students of residential schools, may be the same individuals who are committing the crimes and who are, under such legislation, the individuals that the justice system will now "get tough" on.

[57] True justice requires proportionality, and it is incumbent on the criminal justice system to strive to achieve this proportionality in each case for each offender. The

same can be said for the treatment of First Nations individuals within other systems, such as child protection proceedings.

Application to Mr. Quash

[58] The information I have before me concerning Mr. Quash is not presented in the form of what is often referred to in other jurisdictions as a Gladue Report. The information is in the standard form pre-sentence report. There is little information before me concerning Mr. Quash's father's or mother's history, such as their First Nations ancestry, or whether they were students at residential schools and what impact, if they were students, this may have had on either or both of them. I have very little information as to what impact, if any, other aspects of the First Nations heritage of his parents may have had on him.

[59] In order to properly assess the application of s. 718.2(e) on an offender, it would be helpful for the Court to have as much information as possible about the First Nations ancestry of the offender and the impact of this ancestry, not only as they directly relate to the offender but as they may relate more indirectly through the immediate family members whose lives have most impacted on the offender.

[60] That said, in this case I am prepared to approach Mr. Quash's personal circumstances as being consistent with him demonstrating that he has suffered some particular disadvantages related to his First Nations ancestry. In doing so, I consider the FAS Diagnostic report as being supportive of my decision.

FASD Assessment

[61] In applying s. 718.2(e) to this case I must take into account the findings of the FAS Diagnostic report. I recognize that FASD is a serious problem that extends beyond the First Nations community. In the Yukon, however, it is disproportionately an issue within the First Nations peoples.

[62] The problematic consumption of alcohol that has resulted in children being born suffering the permanent effects of FASD often finds its roots in the systemic discrimination of First Nations peoples and the resultant alienation they experience from their ancestry, their culture and their families.

[63] This issue must be approached within the criminal justice system, keeping in mind the sentencing principle for proportionality set out in s. 718.1 of the *Criminal Code* which states:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[64] This principle was recently considered in detail by Judge Lilles in the case of ***R.*** v. ***Harper***, 2009 YKTC 18. The facts in ***Harper***, which was a sexual touching case involving a young teenage girl, were considerably different than those before me. Mr. Harper, however, was also diagnosed as suffering from FASD. There were some differences between his diagnosis and that of Mr. Quash. Mr. Harper appeared to function at a slightly lower level than Mr. Quash. He was considered to have problems related to:

> …impulsiveness and the fact that he has an immature understanding of social distance, social awareness and personal space. At the same time, Jason struggles to filter

> his urges and tends to react to base urges. Couple this with a child-like view of boy-girl relationships, and inappropriate relationships are inevitable.

[65] Mr. Harper was not considered to be a sexual predator. I say this to provide context for the above comments, as Mr. Quash has not been labelled as being a sexual predator.

[66] The question raised by Judge Lilles in ***Harper*** in considering the meaning of the degree of responsibility of the offender in s. 718.1 was put as follows:

> What does this mean for an offender who, like Mr. Harper, suffers from an organic brain disorder that affects not only his ability to control his actions, but also his understanding of the consequences that flow from them?

[67] In balancing the principles of proportionality to address the sentencing principles most applicable to serious offences against the moral blameworthiness of the offender, Judge Lilles concluded:

> Where FASD is diagnosed, failing to take it into account during sentencing works an injustice to both the offender and society at large. The offender is failed because he is being held to a standard that he cannot possibly attain, given his impairments. As noted by Judge Barry Stuart in *R.* v. *Sam*, [1993] Y.J. No. 112 (T.C.), FASD takes away someone's "…ability to act within the norms expected by society," (para. 17) and it is manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a "normal" offender cannot serve the same ends when imposed on an offender with FASD; it will not contribute to respect for the law, and neither will it contribute to the maintenance of a just, peaceful and safe society.
>
> The calculus of sentencing the average offender simply does not apply to an offender with FASD. Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a

> substantially more severe effect on someone with the impairments associated with FASD. (Paragraphs 38 and 39)

[68] Also considered in ***Harper*** was the decision of Judge Ruddy in ***R.*** v. ***D.J.M.***, [2005] Y.J. No. 18 (T.C.), where she was sentencing an FASD offender. Judge Ruddy stated that:

> In my view, Mr. Malcolm's cognitive disabilities and their impact on the executive functions of his brain does affect the degree of his moral culpability and must be considered. (*Harper*, paragraphs 40 to 41)

[69] In conclusion in *Harper*, Judge Lilles stated that:

> …a just sentence should result in a substantial reduction in the sanction imposed by this court. (Paragraph 42)

[70] I concur with the comments in ***Harper*** that the role of specific deterrence in sentencing FASD offenders must be proportional to the individual offender's ability to understand the connection between the sanction imposed and the offence committed. The greater the cognitive deficits of the offender, the less role specific deterrence should play.

[71] I also agree that the application of the principles of denunciation and general deterrence, although being the sentencing principles which almost invariably lead the way in sentencing offenders who have committed the type of sexual assault such as occurred in the present case, must be carefully applied in sentencing an FASD offender. There is some truth to the notion that an unfairness occurs when an individual who is the "innocent victim of the FASD visited upon him by maternal alcohol consumption during pregnancy," (***Harper***, paragraph 47) and who then commits crimes, even abhorrent ones which are, to some extent, attributable to the cognitive difficulties

accompanying the FASD, is to be held up as a public example in order to deter others. Such an offender is not only held up for his or her own failings, but also as an example of the many others, be it individuals, communities and/or governments, who have also failed.

[72] That is not to say that the principles of general deterrence and denunciation have no place in sentencing FASD offenders. In certain cases there may be a role, depending on the nature of the offence and the degree of moral culpability of the offender, based upon the extent of his or her cognitive difficulties.

[73] This said, it will almost invariably be the case that the role will be significantly less than when dealing with a non-cognitively affected offender who has committed the same type of offence.

[74] I also agree with the notion that separation from society does not necessarily require incarceration of the FASD offender or, if incarceration is necessary in the circumstances, which may well be the case, perhaps not incarceration for as long a period. The problem, however, is that certain offenders affected by FASD commit offences of such a serious nature that they cannot simply be released into society without sufficient supports in place.

[75] The frank reality is that there are insufficient residential facilities in the Yukon of the type required to meet the needs of these FASD offenders. If there were, fewer of these offenders would be incarcerated in jail; those who were incarcerated would not be incarcerated for as long, and, in the end, there is a very real likelihood that the revolving door of offending, often with increasing severity, would slow or be closed altogether for

the individual FASD offender. In the end, society would be better protected and would also benefit from the knowledge that its youngest victims were now being assisted to find a meaningful life, despite the crime visited upon them in the womb.

[76] The problem of providing appropriate supportive residential care facilities for FASD victims is one that will require collaborative effort of all governments, from federal to territorial and/or provincial and municipal, as well as an understanding by us as Yukon and Canadian residents that this is a societal problem and a societal responsibility. If we would choose to put our collective efforts into addressing this immediate need, in the end all parties would benefit.

Appropriate Sentence in This Case

[77] I find that specific deterrence has some role to play in this case. Mr. Quash's cognitive deficits have not left him without some capacity to learn from his mistakes and the consequences of these mistakes. As stated earlier, the FASD Diagnostic report mentions that:

> Bobby has FASD, but this is not an excuse for his behaviours. Bobby should be held accountable for his behaviours and his choices.

[78] Implicit in this comment is the fact that by holding Mr. Quash accountable he will hopefully be able to learn to avoid making the same mistake. He is not without some capacity to appreciate the consequences of his actions, although clearly not to the same extent or as quickly as a non-cognitively affected offender.

[79] I find merit in the argument of defence counsel that Mr. Quash's considerable time served in custody since January 20, 2008, on the collapse of the conditional

sentence and on remand for the present offences, will have largely provided him the full benefit of any specific deterrence he is able to comprehend.

[80] I further find that general deterrence and denunciation have a limited role to play in the case of Mr. Quash. There are communities functioning within the larger community and, in the context of these smaller communities, the denunciatory and deterrent effect may well be of some value. First Nations individuals are also often the victims of the offences committed by FASD offenders. The pain and harm these victims suffer cannot be overlooked.

[81] That is not to say that Mr. Quash should be held up as a “whipping boy,” to use the words of Judge Lilles in ***Harper***, but a message can still be sent to others through this case that such conduct is not to be condoned or excused. This said, the message must be tempered by the diminished moral blameworthiness of Mr. Quash. In the end, to the extent that Mr. Quash’s offences are denounced, the failings of the greater society are denounced as well.

[82] The principle of rehabilitation must be considered in conjunction with that of separation from society. I accept that Mr. Quash wishes to change his life from what it has been. At present, there are insufficient resources available to allow Mr. Quash to serve any further time imposed as a custodial disposition in the community. Defence counsel has submitted that, hopefully in the near future, sufficient resources and supports can be gathered for Mr. Quash, including by his First Nations community. That remains to be seen.

[83] Mr. Quash will always be FASD. He cannot be cured. Rehabilitation in his case

depends on him being provided with sufficient supports and guidance to direct and encourage him to maximize the abilities and understanding he has and channel it towards positive and non-criminal behaviours. It is achievable. It also requires effort by Mr. Quash to take advantage of any opportunities that are provided to him.

[84] Mr. Quash must of necessity, in the circumstances of this case, be sentenced to a further period of incarceration. This period, however, must take into account the fact that he is FASD and the long period of time that he has already served in custody. Notwithstanding the prior sexual assault conviction, I find that the circumstances of this case are not more aggravating than in ***White***, for which a sentence of 26 months was imposed.

[85] I find that a fit sentence for the sexual assault, prior to the application of any reduction resulting from Mr. Quash's FASD status, to be 26 months. From this amount I will deduct 14 months for pre-trial custody as I understand he has been on remand for this offence since August 4, 2008. That reflects approximately one and a half to one credit.

[86] From the remanet of 12 months I will deduct a further two months in recognition of the diminished moral responsibility of Mr. Quash resulting from his FASD.

[87] For the s. 249.1(1) offence, the sentence will be 60 days. There were no high speeds or dangerous driving involved.

[88] For the s. 145(3) offence, there will be a sentence of 30 days.

[89] Taking into account the cumulative aspect of the time in custody on the collapse

of the conditional sentence for the 2007 s. 271 conviction, his time in custody in a remand status for the present offence and, without giving Mr. Quash any actual additional credit than 1.5 to 1 for his remand time in doing so, keeping in mind the principle of totality, and finally, in further recognition of the impact of Mr. Quash's FASD status on his moral blameworthiness, I will allow the sentences for the s. 249.1(1) and 145(3) offences to be served concurrently. In the normal course these sentences would be consecutive to the sentence imposed for the s. 271 offence.

[90] To be clear, I have not considered the time Mr. Quash spent in custody on the collapse of his conditional sentence as being a form of sanction which reduces the appropriate sanction for the present offences. The collapse of the conditional sentence was premised on the fact that Mr. Quash, as a result of his actions, could no longer serve his sentence in the community in accordance with the principles of s. 742.1. It was a separate and distinct sentence and the collapse was not a further sanction for the index offence.

[91] The significance of the custodial time, however, is a significance of the cumulative effect on an offender who suffers from FASD, as outlined in more detail by Judge Lilles in ***Harper***.

[92] Unlike the case in ***White***, Mr. Quash will also be sentenced to a period of probation. He is currently on a probation order that does not expire until August 2011. The probation order I am imposing will run for three years from the expiration of the current sentence. The terms of this order will duplicate the terms of the existing order, and I will hear from counsel with respect to any additional terms that may be considered

appropriate.

[93] I note at this time that the terms imposed in the ***Harper*** decision were done in more of a plain and simple language on the reasoning of Judge Lilles that, if at all possible, these terms should be stated in a manner best able to be understood by the offender. That said, he is currently on the present probation order and I am not proposing to have a different order that tries to say the same thing in different words. I think that that would simply add to the confusion, and I am sure that the probation officer that is dealing with Mr. Quash will be able to ensure that he understands what each and every one of these terms are.

[94] These terms will be:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. To notify the probation officer in advance of any change of name or address and promptly notify the probation officer of any change of employment or occupation;
4. To report to your probation officer immediately upon your completion of your sentence and thereafter when and in the manner directed by the probation officer;
5. To reside as directed by your probation officer, abide by the rules of that residence and not change that residence without the prior written permission of your probation officer;
6. To abstain absolutely from the possession or consumption of alcohol and

controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;

7. To not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

8. To take such alcohol and drug assessment, counselling or programming as directed by your probation officer;

9. To take such psychological assessment, counselling or programming as directed by your probation officer;

I think that was the psychological assessment clause. So the other clause is:

10. To take such other assessment, counselling or programming as directed by your probation officer;

11. To have no contact, directly or indirectly, or communication in any way with [redacted];

I also, subject to anything counsel may say, believe that S.M. should be added to this order, and what about her son, [redacted], any submissions on that? Is that necessary?

[95] MR. SINCLAIR: I'm not concerned about that.

[96] MR. CLARKE: Your Honour, should [redacted] be in the new order? Probably not.

[97] THE COURT: Actually, I will take that out of this order, thank you, because it is still covered in the other order for a sufficient period of time. So it will simply be:

12. To have no contact, directly or indirectly, or communication in any way with S.M.;

[98] MR. CLARKE: Thank you.

[99] THE COURT:

13. To make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;

14. To provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this probation order;

I note that this order does not contain a clause that you participate in such educational or life skills programs as directed by your probation officer. I will include that in this order.

15. To participate in such educational or life skills programs as directed by your probation officer;

16. To report to the Sex Offender Risk Management Program to attend, participate and complete one-on-one or group programming as directed by your probation officer;

17. To not drive a motor vehicle at any time.

[100] Are there any other clauses that counsel think would be appropriate in this case?

[101] MR. SINCLAIR: None from the Crown.

[102] MR. CLARKE: I am content, Your Honour.

[103] THE COURT: Okay. There will also be, under s. 259 of the *Criminal Code*, an 18 month driving prohibition arising from the s. 249.1(1) offence. As this is a primary designated offence, the s. 271, there will be a DNA order.

[104] There will be an order under the *Sex Offender Information Registration Act*.

[105] There will be the mandatory s. 109 firearms prohibition for ten years.

[106] The victim fine surcharge will be waived.

[107] With regard to the *Sex Offender Information Registration Act* condition, does counsel have submissions on how long that should be?

[108] MR. SINCLAIR: I understand it to be a 20-year order.

[109] THE COURT: Twenty years?

[110] MR. CLARKE: No submissions.

[111] THE COURT: It will be 20 years. Anything else from counsel?

[112] MR. CLARKE: Briefly, so the remaining -- just to be clear, then, for the paperwork, the remaining sentence is ten months going forward?

[113] THE COURT: That is correct.

[114] MR. CLARKE: Thank you. The driving prohibition, you've indicated a

s. 259 independent order for 18 months. Is it -- was there any reason why it was included in the probation order?

[115] THE COURT: Oh no, that was not. The probation order was over by then. I included a driving prohibition in the probation order that extends further because I have concerns that arise, based on the record and how Mr. Quash is doing about his driving. I simply include that there but I did wish to state, and thank you for bringing it up, I will clearly, depending on what progress he is making, consider whether that should continue beyond the *Criminal Code* driving prohibition upon a probation review. But it is there as a reminder. But if in fact his situation becomes such that driving is something that will be of value to him, I would certainly consider removing that from the probation order upon review. For the next 18 months it will not make any difference. It was the probation order driving prohibition that you were concerned about, right?

[116] MR. CLARKE: Yes.

[117] THE COURT: Yes. Certainly within 18 months of the time that he is released from custody, we will know whether that term could be revisited.

[118] MR. CLARKE: I understand Your Honour's position with respect to the reviewability of that matter. My only concern is that there's not really much of a nexus between the underlying offence and the driving unless there -- is the probation order to apply to all the offences or?

[119] THE COURT: Not to the s. 145, but --

[120] MR. CLARKE: I would ask Your Honour to perhaps reconsider that. I

mean, my submissions would be that my client will be in custody for some period of time, that he will have an 18-month mandatory, absolute order. So that will put him well over two years from today's date. It's foreseeable, given his personal circumstances, which Your Honour has outlined in some detail today, that any job that he may have in the future may require him -- or at least his ability to acquire jobs, perhaps in construction or trades or something, would certainly be ameliorated by having a licence. Now, I understand I can make these submissions in 18 months, I can make these submissions in 21 months; I get it, but it's just a little unusual to attach it both to the probation order and have a stand-alone s. 259 order.

[121] THE COURT: Any submissions, Mr. Sinclair?

[122] MR. SINCLAIR: I'm not inclined to appeal to Your Honour to vary the terms of the sentence that you've imposed at this moment. I do note for the record that Mr. Quash's criminal record includes a prior conviction for flight from a police officer while pursued and an impaired driving charge. So I think there's certainly a nexus between the order that you've made and the totality of the circumstances, and I don't see any difficulty with it.

[123] THE COURT: No, I appreciate -- I understand what you are saying. I am going to have the probation order attach to both the s. 249, because of the prior history, and obviously the circumstances of the 90-day sentence he received, and that would indicate that it is not on the lowest end. I consider this one to be, as the sentence I imposed on it, likely less significant. I do not perceive there to be any real prejudice, because your client certainly will be in a position that that can be removed if it is at all

reasonable in the circumstances. I fail to see how any judge would not change that if in fact Mr. Quash was doing well and had a need for a driver's licence. So I am going to leave that term on the probation order.

[124] MR. CLARKE: And just for the record, I suppose I would find myself likely, in this circumstance in any event, agreeing with Mr. Sinclair on that point, in that the Court has provided my client some flexibility by imposing the absolute sentence -- the absolute driving prohibition which was, in my respectful submission, on the lower end of what could have been imposed in the circumstances, and he has the opportunity, through his own personal performance, to acquire -- first of all, have the matter reviewed through a probation review, perhaps have the driving prohibition removed, and ultimately go through the process of attempting to acquire a driver's licence again. So, I mean, there are steps that he -- there are steps that my client can take. So to that extent, I agree with Mr. Sinclair.

[125] THE COURT: I like the flexible approach that allows your client to make efforts to try to achieve something and see the benefit from his efforts.

[126] MR. SINCLAIR: And then the remaining charges then were ultimately --

[127] THE COURT: I believe they were already stayed, correct?

[128] THE CLERK: Correct.

[129] MR. SINCLAIR: -- were stayed and the remaining charges to which he was sentenced today were 60 and 30 days respectively, concurrent?

[130] THE COURT: Yes, that is correct. The victim fine surcharge will be waived and all other charges, if I did not say that already.

[131] MR. SINCLAIR: Thank you.

____

COZENS T.C.J.