Citation: *R. v. Charlie*, 2021 YKTC 56

Date: 20211208
Docket: 19-00819
21-00617
Registry: Whitehorse

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

REGINA

v.

CARL RUFUS CHARLIE

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Mina Connelly — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

REASONS FOR SENTENCE

[1] COZENS C.J.T.C. (Oral): Carl Charlie was convicted after trial of having committed the offence of sexual assault. The Crown has proceeded by way of summary election.

[2] The sentencing hearing took place on September 28, 2021, and my decision was reserved until November 29, 2021. However, on that day and just prior to the court appearance where I was to render my decision, I learned from the Court Registry that Mr. Charlie had been in custody on the weekend as a result of new ss. 267(b) and

145(3) charges, arising from an incident alleged to have occurred on November 28, 2021.

[3] I addressed this issue with counsel, as I felt that these new charges were relevant to my decision as to the appropriate sentence for Mr. Charlie for the s. 271 offence, in particular as they potentially were relevant to assessing the element of risk of harm to the community presented by Mr. Charlie, moving forward, based upon the positions of counsel regarding sentence. I then adjourned the matter to December 6, 2021, for counsel to make further submissions, based upon this new information.

[4] On December 6, 2021, Mr. Charlie entered a guilty plea to the s. 267(b) offence. Counsel made further submissions, firstly, on the appropriateness or not of a conditional sentence for the s. 271 offence, as well as to what would constitute an appropriate sentence for the s. 267(b) offence.

Circumstances of the Section 271 Offence

[5] The circumstances of the offence and my findings are set out in ***R.*** v. ***Charlie***, 2021 YKTC 13. In brief, Mr. Charlie went into the bedroom of his brother's house where a visitor, S.S., was sleeping. S.S. was 17 years old. Mr. Charlie placed his hand under her clothing, and his finger penetrated her vagina. S.S. thought it was her boyfriend and told him to stop. Mr. Charlie said it was not her boyfriend. Mr. Charlie removed his hand and the sexual assault ceased.

Positions of Counsel at the Initial Sentencing Hearing Date

[6] Crown counsel sought the maximum sentence of 18 months' imprisonment, to be followed by two years of probation. Counsel opposed the sentence being served conditionally in the community, as counsel submitted the safety of the community would be jeopardized. This concern was premised on Mr. Charlie's alcohol abuse issues and his lack of acceptance of responsibility for his actions, thus increasing his risk of reoffending.

[7] Counsel noted the following aggravating factors:

- the statutory ones set out in sections:

718.01

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct;

…

718.04

> When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence;

…

718.2

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the

> offender, and, without limiting the generality of the foregoing
>
> …
>
> (ii.i) evidence that the offender, in committing the offence, abused a person under the age of eighteen years;
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, [counsel noted Mr. Charlie's role as an elder in the community]; and
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation
>
> …

- Circumstances of the offence

  S.S. was asleep at the time of the sexual assault, and therefore vulnerable;

  The intrusiveness of the sexual assault involving digital penetration of her vagina; and

  The criminal record of Mr. Charlie, in particular the relatively recent sexual assault conviction.

[8] In mitigation, counsel recognized Mr. Charlie's Indigenous status and, as such, the applicable ***Gladue*** factors (***R.*** v. ***Gladue***, [1999] I S.C.R. 699).

[9] Counsel stressed that denunciation and deterrence were the primary sentencing principles to be considered when imposing sentence.

[10] Counsel for Mr. Charlie agreed that an 18-month custodial sentence was appropriate, but submitted that Mr. Charlie should be allowed to serve his sentence conditionally in the community. His risk factors could be managed through appropriate conditions. Mr. Charlie's ability to participate in rehabilitative programming, in particular residential treatment, would be jeopardized if he were to be incarcerated. The proposed residency for Mr. Charlie would be either at his family camp cabin outside of the community of Old Crow, or with his spouse, Ms. Cheryl Itsi-Charlie.

Victim Impact

[11] S.S. provided a Victim Impact Statement ("VIS"). It is clear that this sexual assault has had a significant negative impact on her, not only emotionally and psychologically, but in her relationship with others within her own community, including her employment opportunities.

[12] Not surprisingly, when an offense of sexual violence occurs between community members, it is not unusual for sides to be taken, in particular when there is a denial of the offence having occurred. If either the accused or the alleged victim has stronger support within the community, the impact on the other can be considerably exacerbated. In cases where a person has been the victim of sexual violence, and then has to deal with being to some degree ostracized within his or her own community, the victimization and resultant negative impacts are significantly greater.

[13] I note in the Pre-Sentence Report ("PSR"), that the Crown Witness Coordinator relayed information that S.S. feels she is a target for Mr. Charlie's family in Old Crow, and that she no longer feels safe there.

[14] Although not present at the initial sentencing hearing, S.S.' mother was present and provided an oral VIS at the December 6 sentencing hearing continuation. She stated that her daughter feels like she is unable to return to the community of Old Crow because of being the victim of this offence, although Old Crow is where S.S. feels she needs to be, and where she wishes to be.

[15] It is important to recognize that S.S. is also of Indigenous ancestry, and that she and her family experience the victimization caused by Mr. Charlie's sexual assault against S.S. as persons also impacted by the negative impacts Indigenous Peoples have suffered in Canada.

Circumstances of the s. 267(b) Offence

[16] An Agreed Statement of Facts ("ASF") was filed. It reads:

> 1. On November 29, 2021. At approximately 10 p.m., Carl Charlie ("Accused") and Cheryl Itsi-Charlie got together at the Accused's residence in Old Crow, Yukon Territory. They were sitting and talking. The Accused had drinks.
>
> 2. The Accused and Ms. Itsi-Charlie are married. They had been separated for about a year at the time but had maintained a friendly relationship. Ms. Itsi-Charlie had been providing support to the Accused, as he was going through a difficult time.
>
> 3. At approximately midnight, Ms. Itsi-Charlie indicated that she was getting tired. She went to lay down in a bedroom and fell asleep.

4. Between approximately 3:30 a.m. and 4 a.m., Ms. Itsi-Charlie was woken up by the Accused sitting on the bed, slapping her on the left side of her face. The Accused slapped her and hit her about 4 times.

5. The Accused told Ms. Itsi-Charlie that he wanted to know who was the man she was talking to on her phone. Ms. Itsi-Charlie's phone was password-protected and she had not given him access to her text messages.

6. The Accused then grabbed Ms. Itsi-Charlie and threw her on the ground. Her back hit the wooden frame of the bed and she fell on the floor.

7. The Accused proceeded to put his right knee on Ms. Itsi-Charlie's chest and his right hand around her throat, squeezing. Ms. Itsi-Charlie had difficulty breathing but did not lose consciousness.

8. The Accused eventually got up and left the bedroom while Ms. Its-Charlie was still laying on the floor. He laid on the couch and fell asleep.

9. Ms. Itsi-Charlie got up, stayed in the bedroom for about 5 minutes and, after confirming that the Accused was sleeping, left the residence without her shoes and her phone.

10. Ms. Itsi-Charlie ran to a neighboring residence, RCMP were called.

11. Ms. Itsi-Charlie was brought to the nursing station. She suffered a sore back, chest, throat and neck, and bruises on her body and face. She had difficulty taking deep breaths, so the nurse gave her oxygen. She was also given morphine for the pain.

12. RCMP took photographs of Ms. Itsi-Charlie's injuries. They are attached to this Agreed Statement of Facts as Appendix "A".

[17] Added to the ASF was information that at the time of this offence, Mr. Charlie was required to abstain from the possession and consumption of alcohol as per the terms of the release order he was subject to. These facts were read in pursuant to s. 725 of the *Code*.

[18] The photographs that were provided show significant bruising to Ms. Itsi-Charlie's face, neck, shoulder, chest, arm and back.

Victim Impact

[19] Ms. Itsi-Charlie provided a VIS. As a result of the extensive bruising she incurred, Ms. Itsi-Charlie is ashamed to go out in public. She feels betrayed by Mr. Charlie after all the support that she has provided to him, and realizes that she cannot trust him to move forward with her in a positive way.

Positions of Counsel at the December 6 Sentencing Hearing

[20] Crown counsel submits that a sentence of 45 days' custody should be imposed for the s. 267(b) offence, consecutive to the 18 months' custody for the s. 271 offence.

[21] Counsel notes as aggravating for the s. 267(b) offence the statutory factors, being ss. 718.04, 718.2(ii) "evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family", and 718.2(iii.1). Counsel also notes that, as it was in the case of S.S., and the victim of Mr. Charlie's prior sexual assault conviction, Ms. Itsi-Charlie was sleeping, and therefore more vulnerable to his act of violence. Mr. Charlie had also been consuming alcohol, which he was aware was contrary to the terms of his release order, and was also a known significant risk factor for him.

[22] In mitigation, counsel notes the early guilty plea. Counsel also considered the principle of totality in seeking 45 days' consecutive custody.

[23] Counsel opposes the sentence being served conditionally in the community. Counsel reiterates her initial opposition to a conditional sentence for the s. 271 offence,

noting the now-realized risk of Mr. Charlie committing a further offence, which at the time of the sentencing hearing in September was a potential risk only.

[24] Counsel for Mr. Charlie again submits that Mr. Charlie should be allowed to serve his 18-month custodial sentence for the s. 271 offence conditionally in the community. This would be followed by a period of 60 to 90 days' custody for the s. 267(b) offence, also to be served conditionally in the community. Counsel's submission is premised on Mr. Charlie's virtually immediate acceptance of responsibility for having committed the s. 267(b) offence, his remorse for having done so, and his commitment to quit drinking alcohol for good, based in large part as a result of his regret for the assault upon his spouse and his children's reaction to it. Counsel proposed that Mr. Charlie be allowed to reside at the residence of his brother, Darryl Charlie, in the community of Old Crow, with the family camp cabin as an alternative residence.

Issue for the Court

[25] Both counsel have agreed that a custodial disposition is warranted for each of these offences, and have also agreed on the length of the custodial disposition for the s. 271 offence. Should I concur with the submissions and positions of counsel on this point, what I am then required to consider is whether Mr. Charlie should be allowed to serve his custodial disposition for the s. 271 offence in the community as a conditional sentence order. My decision on this point will inform my decision with respect to Mr. Charlie's sentence for the s. 267(b) offence.

[26] I am required to consider, when deciding whether to allow Mr. Charlie to serve a custodial disposition by way of a conditional sentence order, whether allowing him to do so would:

> …not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2,

as per s. 742.1(a).

Circumstances of Mr. Charlie as of the Date of the Initial Sentencing Hearing

[27] A PSR, Risk for Sexual Violence Protocol Assessment ("RSVP"), and a ***Gladue*** Report were provided.

[28] Mr. Charlie is 60 years of age. He is a citizen of the Vuntut Gwitchin First Nation.

[29] He has a criminal record consisting of the following convictions:

- 1997: s. 266 (Spousal Assault)
- 2010: s. 266 (Spousal Assault)
- 2016: s. 349(1) (Unlawfully in a Dwelling House)
- 2016: s. 271 (Sexual Assault)

[30] An Agreed Statement of Facts was filed with respect to the 2016 offence (committed in 2014). Mr. Charlie knocked on the victim's door. She let him in and went back to sleep on the couch. She was awakened by Mr. Charlie with his hands down her pants fondling her vagina hard enough that it was painful. On a different date, Mr.

Charlie had entered the residence of the same victim without invitation, and stood in her bedroom calling her name. That incident went no further.

[31] Mr. Charlie is the oldest of seven children. In his early years, he was raised in a stable home in Old Crow, and participated in traditional cultural activities. His mother began drinking when Mr. Charlie was 10 years old, and, at the same time, his father increased his own drinking. This continued through Mr. Charlie's teenage years. Mr. Charlie stated that, as a result, he and his siblings were neglected and witnessed arguing and physical violence between his parents.

[32] The community of Old Crow underwent a significant change from the Vuntut Gwitchin way of life with the introduction of alcohol to the community in the early 1960's, and residential school attendance. Children sent off to residential schools often returned to a community in which alcohol abuse and violence were rampant in their own homes. One former residential school student recounted: "When we came back, we were like strangers, (our families and community) didn't know us. They saw us differently. We lost our language…They called us 'white ladies', 'dumb', don't know how to do traditional things".

[33] The community has struggled for decades to deal with the trauma resulting from the introduction of alcohol to the community, and residential school attendance. In the past year a significant number of community members have died from issues related to these struggles.

[34] This said, there have been considerable efforts made by the leadership in the community to provide positive educational and employment opportunities for the

community members. This is not a community that has simply succumbed to the trauma and issues that they have had to deal with, but one determined to try to make things better.

[35] Mr. Charlie's parents passed away in 2011 and 2012. An older sister died in infancy, and his younger adopted sister passed away in her 30's from cancer. Her death was particularly hard on Mr. Charlie who was close to her.

[36] Mr. Charlie states that he was a victim of physical and sexual abuse committed by a community member. He states that he was also physically and sexually abused by staff at Yukon Hall in Whitehorse when he attended residential school there between 1976 and 1980.

[37] During his time at Yukon Hall, Mr. Charlie states that he saw his parents on visits to Whitehorse only one or two times a year.

[38] Mr. Charlie feels that the issues that have resulted from his attendance at residential school are largely unresolved. There is concern that he may be suffering from post-traumatic stress disorder connected to his past trauma.

[39] He states that he suffers from depression. He has bottled up many of his issues and emotions, but has been working on these over the years through various treatment programs. Since January 2020, he has been engaged in therapy at Creative Works Psychological Services Inc. He has participated in 13 sessions to date.

[40] Despite Mr. Charlie's positive participation in this counseling, his therapist notes that he has: "…distressing symptoms that suggest a consistent need for therapeutic

support", and that any programming for Mr. Charlie should include: "specific trauma therapy to help treat traumatic memories, address avoidant behaviour, and reduce elevated symptoms" like alcohol abuse. Some specific therapeutic programs are noted as being available for Mr. Charlie, including Prolonged Exposure Therapy and Accelerated Resolution Therapy, which involve 10 to 12 weekly sessions.

[41] When addressing the Court, Mr. Charlie stated that he has finally found the courage to open up and talk to counsellors about his past trauma, instead of just shutting down and keeping it inside like he used to. He stated that when he feels like he needs help, he will call his counsellor.

[42] Mr. Charlie's plan is to attend at out-of-territory treatment for his alcohol abuse issues, as well as to help him deal with past trauma. He is noted as being on a wait list for the Wilp Si'Satxw Community Healing Centre. Mr. Charlie completed spousal abuse programming following his 1997 conviction for spousal assault. He also completed life skills training courses in 1997 and 2000.

[43] Mr. Charlie scores on the Problems Related to Drinking assessment as having a moderate level of problems related to alcohol use. His counsel notes that Mr. Charlie has some insight into his problem with alcohol use. He scores on the Drug Abuse Screening Test as having no drug-related problems.

[44] Mr. Charlie attended Poundmaker's Lodge Treatment Centre in Alberta in 1990. He credits his attendance at Poundmaker's for his lack of problems related to drinking from 1990 to 2007. Mr. Charlie again began to abuse alcohol in 2007, engaging in periods of binge drinking. Mr. Charlie states that his drinking was triggered by the

residential school issue being moved to the forefront of discussion, which triggered his memories of the negative experiences he had while at residential school.

[45] Mr. Charlie attended St. Paul Treatment Centre in 2009. He states that since then, his drinking has largely been limited to periods of binge drinking lasting one to three days approximately every three months or so. Mr. Charlie states that he drinks in order to forget his past trauma and troubles. Mr. Charlie states that his last period of binge drinking was at the time that the incident with S.S. occurred. Since then he has limited his drinking.

[46] The Level of Service/Case Management Inventory Risk Assessment tool scores Mr. Charlie as having a moderate level of risk/needs.

[47] The RSVP notes Mr. Charlie as having the following risk factors:

Chronicity of Sexual Violence

- Based upon his prior conviction and collateral information about other incidents of sexual violence which did not result in convictions;

Extreme Minimization or Denial of Sexual Violence

- Based upon his denial of having committed the offence against S.S.;

Problems with Stress or Coping

- Based upon his ongoing struggles to deal with past trauma;

Problems Resulting from Child Abuse

- Based upon his continuing difficulties in dealing with the trauma from his history of child abuse;

Problems with Substance Use

- Based upon his issues with alcohol and his pattern of offence behaviours in the two sexual offences being committed while under the influence of alcohol;

Problems with Intimate relationships

- Based upon his self-reported infidelities, two incidents of spousal assault, and separation from his wife;

Problems with Non-Intimate Relationships

- Based upon his failure to establish or maintain positive relationships, engagement in relationships with antisocial peers, and the inappropriate sexualisation of non-intimate relationships.

[48] The RSVP notes that: "Statistically, recidivism rates for individuals who have committed sexual offences are low relative to other offender groups". However, it is noted that: "…if Carl were to offend again in the future, he would do so while under the influence of alcohol. Carl has also established a pattern of using alcohol as a means to cope, and collateral reports suggest that he is still dealing with his trauma…alcohol is best conceptualized as a destabilizer for sexually violent behaviour rather than a motivator for sexually violent behaviour. That is to say that addressing his substance use behaviour is necessary but not sufficient to reduce his risk of reoffending". The RSVP concludes with the comment that Mr. Charlie should be referred for sex offense specific treatment.

[49] Mr. Charlie has withdrawn somewhat from involvement with others in the community resulting from the shame he felt from having committed the prior sexual assault in 2014. He has a close and small circle of friends, and spends most of his time with family.

[50] Mr. Charlie completed Grade 12 and has since completed various other courses in several areas.

[51] Mr. Charlie maintained employment in a variety of capacities, primarily as a truck driver for the past 14 years. His last job was as a fuel truck driver for the Vuntut Gwitchin First Nation ending in December 2019 due to his health and legal issues. He has been unemployed since then, other than for one month in the summer of 2021.

[52] Mr. Charlie has been in a relationship with his Ms. Itsi-Charlie since 1991. They have five children and four grandchildren. Mr. Charlie and his wife are commended in the RSVP for having done an "exemplary job raising their children in a sober household". Mr. Charlie and his wife were separated at the time that the PSR was prepared, but remain on good terms, and his wife is supportive of him. Mr. Charlie recognizes that his drinking has caused problems in his relationship, and expressed regret for this.

[53] During the preparation of the PSR and ***Gladue*** Report, Mr. Charlie continued to maintain his position that he did not sexually assault S.S. However, during her submissions, counsel stated that Mr. Charlie denied the sexual assault because he did not remember it. However, counsel submitted that in page 5 of the RSVP, Mr. Charlie's statement that he: "…did acknowledge that when he drinks he does 'bad things'", was a

reference to what he did to the victim in the 2014 sexual assault, and to what he did to S.S. Counsel stated that Mr. Charlie further feels badly about what S.S. has had to suffer, and he wishes to write her an apology letter.

[54] Mr. Charlie addressed the Court during his sentencing hearing, and said that he is sorry for what S.S. had to go through in this process. He stated that, although it took a long time, he has now accepted what he had done to S.S., and that he is very sorry. He recognizes what harm he has done to his own family because of his actions, but even more so to S.S.' family. Mr. Charlie apologized directly to S.S. and her family for his actions.

[55] Mr. Charlie is noted to have been on community supervision for approximately three years, with the only breach being the one he is charged with from March 26, 2021.

[56] Mr. Charlie stated during the preparation of the PSR that the only place he could fulfill a house arrest sentence would be at his cabin one hour outside of the community of Old Crow, and that he has no cell service there. It is noted in the PSR that the lack of stable housing for Mr. Charlie would be a factor in whether he would be an appropriate candidate for a community sentence.

[57] In her submissions, however, counsel for Mr. Charlie stated that he would also be able to serve a conditional sentence in the residence of Ms. Itsi-Charlie.

Circumstances of Mr. Charlie since the Date of the Initial Sentencing Hearing

[58] Mr. Charlie now proposes that he be allowed to reside at the residence of his brother, Darryl Charlie in the community of Old Crow, with the camp cabin as an

alternative. Due to the s. 267(b) offence, Mr. Charlie is no longer able to live with Ms. Itsi-Charlie, as he had earlier proposed.

[59] Mr. Charlie addressed the Court, and stated that he has given a commitment to his family that he will completely quit drinking alcohol. He acknowledged that when he drinks he gets into trouble, and that he needs intensive treatment to deal with his alcohol abuse issues and his history of trauma.

Analysis

[60] I am in agreement with the submission of both counsel that Mr. Charlie should serve an 18-month sentence for the sexual assault on S.S., the maximum allowable as the matter proceeded by way of summary election. The case law supports the maximum 18-month sentence for the circumstances of this offence and of Mr. Charlie. I will not therefore refer to the many cases filed which address the range of sentence for offences of sexual violence, noting that some of these considered were ***R.*** v. ***White***, 2008 YKSC 34; ***R.*** v. ***Rosenthal***, 2015 YKCA 1; and the recent decisions of ***R.*** v. ***Charlie***, 2021 YKTC 48; and ***R.*** v. ***Charlie***, 2021 YKTC 54.

[61] I will however, refer to some of the comments of the Court in ***R.*** v. ***Friesen***, 2020 SCC 9. The ***Friesen*** case involved a sentence following a guilty plea to a charge of sexual interference of a four year old child. The circumstances were egregious and not comparable to the case before me. Of note, however, are the following comments in paras. 1 and 5:

> 1 Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve

> to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.
> …
>
> 5 …we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

[62] The Court conducted an extensive analysis of offences of sexual violence against children in the case, in particular from para. 42 onward.

[63] The Court stated that sentences for sexual offences against children should be higher than cases where the victim is an adult (paras. 115 to 118).

[64] S.S., being 17 years of age at the time of this offence, falls within the definition of child as referred to in ***Friesen***, and the concerns of the Court in relation to offences of sexual violence against children apply to her as a victim.

[65] The question for me, therefore, is whether Mr. Charlie should be allowed to serve his sentence in the community.

[66] The ***R.*** v. ***Proulx***, 2000 SCC 5 case, and subsequent cases, have made it clear that even in circumstances where denunciation and deterrence are the primary sentencing purposes, a conditional sentence can still be imposed.

[67] A conditional sentence served in a small community is a daily reminder to members of the community of the consequences of criminal actions such as those of Mr. Charlie in this case. A conditional sentence with restrictions can at times be more difficult than one would perhaps think it to be.

[68] Mr. Charlie has previously completed a 12-month conditional sentence order with no apparent problem. On the one hand, this should provide me with confidence that Mr. Charlie is capable of serving a further conditional sentence order with no problem.

[69] On the other hand, it could be argued that Mr. Charlie was not sufficiently deterred by the conditional sentence that he served for the prior and very similar sexual assault that he committed, and therefore, in order to achieve specific deterrence, this time he should be required to serve his sentence in a custodial facility and not in the community.

[70] Crown counsel's concerns about the risk factors for the commission of a further offence of sexual violence by Mr. Charlie, on the basis of his alcohol use issues and his lack of acceptance of responsibility for his having committed the sexual assault are also valid concerns.

[71] Mr. Charlie's statements in court, on his own and through counsel were, in my view, an acceptance and admission by him of having sexually assaulted S.S., as she testified that he did. No one should doubt any longer that the sexual assault occurred as S.S. said it did. This reduces Mr. Charlie's risk factor in this regard.

[72] With respect to Mr. Charlie's alcohol abuse issues, this remains a very real concern and is a significant risk factor. His alcohol abuse issues are part of much more complex issues. I am aware that Mr. Charlie, as of the date of the initial sentencing hearing, had been noted as making positive inroads into dealing with the underlying issues that have contributed to his alcohol abuse, as well as his alcohol abuse itself.

[73] Mr. Charlie also is considered as needing more specialized and intense treatment in order to make significant progress in dealing with his past trauma, and with his present issues of concern, including alcohol abuse.

[74] This said, the circumstances of the offences committed on or about November 28, 2021 include that Mr. Charlie was consuming alcohol at the time he committed the s. 267(b) offence against his spouse, while he was under a court-ordered condition to abstain from the possession and consumption of alcohol.

[75] Section 718.2(e), which is of course only part of the sentencing scheme set out in ss. 718 to 718.2, requires that:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[76] In ***R.*** v. ***Quock***, 2015 YKTC 32, I canvassed at length issues regarding the sentencing of Indigenous offenders as discussed in ***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688 and ***R.*** v. ***Ipeelee***, 2012 SCC 13, and in the *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, as well as the apology offered to the

Indigenous Peoples of Canada by Prime Minister Stephen Harper on June 11, 2008.

With respect to the application of s. 718.2(e), I stated:

> 100 Section 718.2(e) is not a statement that Aboriginal offenders should receive lesser sentences simply on the basis of being Aboriginal and the acknowledged systemic discrimination Aboriginal peoples and communities have faced in Canada. A fit sentence that accords with all the purposes, objectives and principles of sentencing must still be imposed. It is, however, required that, in the case of every offender, Aboriginal or otherwise, all available sanctions other than imprisonment that are reasonable in the circumstances should be considered. It is simply that special consideration needs to be given to the circumstances of Aboriginal offenders. This is because no group of peoples in Canada has been subjected to the same type of destructive, structural and organized systemic discrimination at the hands of the federal government as Aboriginal peoples.
>
> 101 The special circumstances of Aboriginal offenders are not solely retrospective considerations, but ones that are forward-looking as well. The sentencing judge must look to and consider all reasonable options and sanctions that may eliminate the need for a sentence of imprisonment, reduce the length of a sentence of imprisonment or, where available, allow for the imposition of a sentence of imprisonment to be served conditionally in the community.
>
> …
>
> 104 In addition, s. 718 (d), (e) and (f) speak to the objectives of rehabilitation, the provision of reparations for the harm done to victims and to the community and to promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community. It would be of considerable assistance if ***Gladue*** Reports also provided information in regard to the harmful impact of the offender's crime upon the victim(s) and the community. Often, the victims are themselves members of the same Aboriginal community as the offender, and have been impacted along with the offender and the community by the destructive government policies associated with the residential school system.
>
> 105 A fit sentence must take into account the harm caused to victims. Truly effective rehabilitation of an offender requires that the offender understand the harm he or she has caused, accept responsibility for having caused this harm and take such steps as are reasonably possible to try to repair the damage. In addition, such an understanding and acknowledgment of the harmful consequences of one's offending actions

> is, or should be, a deterrent to the offender from committing further such offences.

[77] As stated in ***Ipeelee*** at para. 59:

> The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[78] The application of s. 718.2(e), to any particular case, must be properly balanced within the purpose and principles of sentencing set out in ss. 718 to 718.2.

[79] Denunciation and deterrence, both general and specific, are the primary sentencing considerations in this case. They are not, however, the only principles applicable, and they do not necessarily require that custodial sentences be imposed, or that, if imposed, must be served in a custodial facility.

[80] Section 718.2(e) clearly requires that the use of incarceration be a last resort when there are no other available sanctions available, particularly, but not exclusively,

in the case of Aboriginal offenders. Section 718.2(d) states that: “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”. Section 718(c) states, as a purpose of sentencing, that offenders will be separated from society, where necessary.

[81] Therefore, the *Criminal Code* makes it clear that, in considering whether to sentence an offender to custody, I must be satisfied that there is not a non-custodial disposition available that would be appropriate. In order to be appropriate, such a sentence must be based upon a full consideration of all the relevant factors set out in ss. 718 to 718.2 on a principled-approach basis, not unduly overemphasizing or underemphasizing any of the purpose and principles of sentencing.

[82] The risk of harm to the public, or to any victim or witness of an offence, that would arise if an offender were sentenced to serve a non-custodial sentence, is contemplated in s. 718(c). If the risk of harm cannot be safely mitigated, then an offender must of necessity be separated from the public.

[83] Although I have spoken above about custodial as opposed to non-custodial sentences, the same reasoning is somewhat germane when considering, once it has been determined that a custodial sentence is required, whether an offender should be allowed to serve his or her sentence in the community.

[84] As stated in s. 742.1(a), when allowing an offender to serve his or her sentence in the community, I must be:

> …satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the

> fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[85] The risk to the safety of the community is a necessary criterion for consideration when determining whether allowing an offender to serve his or her sentence in the community, as well as properly considering and applying the purpose and principles of sentencing, taking into account that s. 718(c) incorporates the notion of risk.

[86] There is a potential benefit to allowing Mr. Charlie to continue the progress he is making through his counsellors, and to be able to also have the ability to access out-of-territory residential treatment when available.

[87] There is also some merit to the argument that Mr. Charlie has made enough strides towards his dealing with past trauma that I could be satisfied that he is in a different place today, and that he recognizes the cost of not dealing with his underlying issues.

[88] However, one of Mr. Charlie's significant risk factors is his alcohol abuse issue.

[89] The fact that Mr. Charlie, while having consumed alcohol, assaulted his spouse, the person whose residence it had been proposed as one place for Mr. Charlie to reside during the term of his conditional sentence, and one day before he was to learn what his sentence for the s. 271 offence would be, is a risk factor that I would be irresponsible to ignore when considering whether Mr. Charlie should serve his 18-month custodial sentence conditionally in the community.

[90] I understand that Mr. Charlie, as he stated when addressing the Court, has been under stress and the pressure has been getting to him. That does not particularly help Mr. Charlie, however. If stress and pressure are able to contribute to Mr. Charlie's choice to consume alcohol and assault his spouse as he did, then I can not say that I have confidence in his ability to abstain from the consumption of alcohol and from the commission of further offences of violence.

[91] While the balancing of the provisions of ss. 718 to 718.2, and the consideration of s. 742.1 may have, at the time of the initial sentencing hearing, caused me to perhaps allow Mr. Charlie to serve his sentence in the community through a conditional sentence of imprisonment, the recent allegations have tipped the balance the other way. I am not satisfied that the safety of the community would not be endangered if Mr. Charlie were to serve his 18-month sentence in the community.

[92] I am also not satisfied that a conditional sentence of imprisonment would be in accord with the purpose and principles of sentencing. While the purposes of deterrence, both specific and general, can be met through the imposition of a conditional sentence, I find that in the circumstances of the offences for which Mr. Charlie has been convicted, including the commission of the s. 267(b) offence while he was awaiting a decision on the sentence to be imposed for the s. 271 offence, they cannot be. I am satisfied that it is necessary that Mr. Charlie be separated from society, in particular because of the risk of him committing further offences that would cause harm to others.

[93] Therefore, I sentence Mr. Charlie to serve a sentence of 18 months' custody for the s. 271 offence. I decline to order that he serve his sentence conditionally in the community.

[94] With respect to the s. 267(b) offence, noting the extent of the assault and the aggravating and mitigating factors, I am satisfied that a sentence of four months' custody is appropriate. This was a serious assault with significant consequences for Ms. Itsi-Charlie. I believe that the seriousness of this assault should be reflected through the imposition of a longer sentence than the 45 days sought by the Crown. This said, I understand the sentence proposed by Crown counsel in light of the principle of totality and I am not criticizing it. In considering the application of s. 718.2(e), and the principle of totality, however, I am satisfied that this sentence can be served concurrently to the 18-month sentence for the s. 271 offence.

[95] Following the period of custody, and for both offences, Mr. Charlie will be placed on a period of probation of two years. The terms of the probation order will be as follows:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with S.S. except for the sole purpose of providing an apology letter through

your Probation Officer and only upon the consent of S.S. to receive such an apology letter;

5. Have no contact directly or indirectly or communication in any way with Cheryl Itsi-Charlie, except with the prior written permission of your Probation Officer and with the consent of Cheryl Itsi-Charlie;

6. Do not attend any known place of residence, employment, or education of S.S.;

7. Do not attend any know place of residence, employment, or education of Cheryl Itsi-Charlie, except with the prior written permission of your Probation Officer and with the consent of Cheryl Itsi-Charlie;

8. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, for the following issues: alcohol abuse, spousal violence, anger management, psychological issues, sexual offender issues, and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to the condition;

9. Report to a Probation Officer immediately upon your release from custody, and thereafter, when and in the manner directed by your Probation Officer;

10. Perform 50 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. Any hours spent in programming may be applied to your community service at the discretion of your Probation Officer; and

11. Have no contact directly or indirectly, nor be alone in the presence of, any person you know to be under the age of 18 years except in the actual presence of a sober responsible adult or with the prior written permission of your Probation Officer.

[96] As this is a primary designated offence, Mr. Charlie will be required to provide a sample of his DNA.

[97] He will also be subjected to a *SOIRA* order for life, as he has a prior sexual assault conviction.

[98] I decline to impose a s. 110 discretionary firearms prohibition. I do not consider it to be necessary.

[99] As Mr. Charlie will be incarcerated for a substantial period of time, I will waive the victim surcharges.

_____

COZENS C.J.T.C.