SUPREME COURT OF YUKON

Citation: *R v T.J.H.*, 2022 YKSC 45

Date: 20220926
S.C. No. 22-AP001
Registry: Whitehorse

BETWEEN:

REX

RESPONDENT

AND

T.J.H.

APPELLANT

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

Before Chief Justice S.M. Duncan

Counsel for the Respondent — William McDiarmid

Counsel for the Appellant — David C. Tarnow

REASONS FOR DECISION

Introduction

[1] The appellant appeals the sentence of 18 months' imprisonment and three years' probation after guilty pleas to two counts of sexual interference under s. 151 of the *Criminal Code,* R.S.C., 1985, c. C-46 ("*Criminal Code*").

Facts

[2] The convictions resulted from two separate incidents with two different victims. In the spring of 2018, a ten-year-old Indigenous girl was sleeping over at a friend's house where the appellant was visiting the friend's older brother. The victim was woken in the

night by the appellant, who was intoxicated, getting into bed with her and her friend. The appellant groped the victim under her clothes and underwear, touching her chest, legs, vaginal area, and buttocks. The appellant left the room when the victim sat up.

[3] In the summer of 2018, a seven-year-old Indigenous girl was visiting a friend's house when the appellant asked her to come into the laundry room. He was intoxicated. He pulled down the victim's pants and underwear, lifted and bent her over on a chest freezer, and rubbed his clothed body against the victim's buttocks and vaginal area with his hips while he masturbated inside his pants with one of his hands.

[4] The Crown proceeded summarily with the charges under s. 151. An agreed statement of fact was filed and the appellant pleaded guilty to the two counts at the earliest opportunity, before any trial dates were scheduled. The court adjourned the matters to obtain sentencing documents, including a *Gladue* report and pre-sentence report.

[5] The sentencing hearing occurred on March 30, 2022. Crown counsel submitted the appropriate sentence was in the range of 18-22 months' custody and probation. Appellant's counsel submitted a four-month conditional sentence and probation was appropriate.

[6] Documents submitted at the sentencing hearing included: a pre-sentence report; a *Gladue* report; a report from an intake meeting the appellant had with a psychologist; a treatment program summary report; a letter from the appellant's sister; a letter from a mental wellness and substance use services counsellor; a letter from the appellant's girlfriend; and two victim impact statements from the mothers of the victims. The judge had not seen the *Gladue* report before the sentencing hearing.

[7] The judge sentenced the appellant to 8 months' custody on the first count and 10 months' custody on the second count, to be served consecutively, for a total of 18 months' custody. In addition, the judge sentenced the appellant to three years' probation at the conclusion of his custodial sentence.

Issues on Appeal

1) Did the sentencing judge err in principle in a manner that impacted the sentence by failing to consider thoroughly the *Gladue* report and the appellant's *Gladue* factors?

2) Did the sentencing judge err in principle in a manner that impacted the sentence by failing to consider properly or at all certain mitigating factors such as the appellant's age, the absence of a criminal record, and his early guilty plea?

3) Did the sentencing judge err in failing to consider Yukon precedent cases in similar situations?

Standard of Review

[8] Sentencing judges are entitled to significant discretion by appellate courts. The standard of review on a sentence appeal has recently been restated in *R v Friesen*, 2020 SCC 9 ("*Friesen*"):

> 25 Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*Lacasse*, at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own

> decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
>
> 26 As this Court confirmed in *Lacasse*, **an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44).** Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit. [emphasis added]

[9] In either circumstance justifying intervention, "the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances" (*R v Suter*, 2018 SCC 34 at para. 24).

Issue #1 – Failure to consider *Gladue* report and factors

[10] The appellant argues the sentencing judge gave insufficient weight to the significant *Gladue* factors set out in the 20-page *Gladue* report. The appellant notes the judge did not have the *Gladue* report before the hearing and did not recess or adjourn the hearing or reserve his decision in order to review the report thoroughly. The appellant says the sentencing judge made only a passing comment about the appellant's background and did not "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before

the courts" (*R v Gladue*, [1999] 1 SCR 688 at para. 69). The appellant says the sentencing judge did not undertake the appropriate analysis in determining the sentence.

[11] The respondent argues the record shows the judge did consider the *Gladue* factors. Many of the most salient features of the *Gladue* report were read into the record by the appellant's counsel during the hearing. The trial judge made specific reference to the appellant's background twice in his reasons and acknowledged he had the benefit of a very thorough *Gladue* report. This was sufficient to show he was familiar with its contents and he considered it in his decision.

[12] *Gladue* factors or principles arise from s. 718.2(e) of the *Criminal Code*, which has been described as a remedial section. It mandates that a sentencing judge take into consideration: "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." The purpose of the section is to respond to the problem of disproportionate incarceration of Aboriginal people and to encourage the sentencing judge to apply the principles of restorative justice alongside or in place of other more traditional sentencing principles.

[13] A fundamental principle of sentencing is proportionality, meaning the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Courts have stated "[t]here can be no sound proportionality analysis in the case of an Aboriginal offender without considering the impact of the offender's Aboriginal heritage on his moral culpability" (*R v Swampy*, 2017 ABCA 134 at para. 36).

[14] The *Gladue* factors provide a necessary context for understanding and evaluating case-specific information provided by counsel. The Court in *R v Ipeelee*, 2012 SCC 13 ("*Ipeelee*") at para. 60, said that a judge must take judicial notice of matters such as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational achievement, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of imprisonment. These matters do not impose a particular result – in other words, the intent of considering *Gladue* factors is not automatically to justify a reduced sentence or a different sentence. The need to consider these factors does however impose a particular process and is indispensable to a judge in fulfilling their duties under s. 718.2(e): *R v Elliott*, 2015 BCCA 295 at para. 17; *Ipeelee* at para. 60.

[15] Section 718.2(e) "calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders" (*Ipeelee* at para. 59). This analysis involves considering the "unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts" (*Ipeelee* at para. 72). These factors "may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (*Ipeelee* at para. 73).

[16] Here, the sentencing judge made reference to the *Gladue* factors in two places in his reasons. The first was:

> 14 I have the benefit of a very thorough *Gladue* Report which details many of the circumstances of the background of T.J.H. and how his heredity and upbringing have been impacted by the residential school system and details how it has very specifically impacted the living conditions that T.J.H. was raised in and in which he, to some extent, still resides.

[17] The second reference was when he set out the appellant's probation conditions, that is, after he had issued the custodial sentence. The reference was made in the context of encouragement to the appellant to seek help to address the issues in his background:

> [28] …the abuse you suffered is not your fault, just like what has happened to these poor girls is not their fault. What happened to you is not your fault, sir, but it is part of your background. If you are going to have a productive, happy life, you are going to have to deal with these issues and deal with them in a way that finally puts them behind you. You can only do that with help.

[18] There are two questions that arise in the determination of this first issue. The first question is whether the failure of the sentencing judge to recess, adjourn, or reserve before rendering his decision due to his inability to review the *Gladue* report before the hearing creates or contributes to a reviewable error. The second question is whether the judge engaged in the analysis mandated under s. 718.2(e) in determining a fit sentence for an Aboriginal offender.

[19] In considering the first question, I note appellant's counsel referred extensively to the *Gladue* report in his submissions at the sentencing hearing, including quoting directly from it (pp. 6, 7, 8, 9, 10, 11, 12, 13, 14 and 17). The judge may have read the full report during those submissions. The judge paused twice before rendering his decision; it is not clear from the transcript how long those pauses were or what he was doing during those pauses.

[20] A trial judge is not required in their reasons "to itemize every conceivable issue, argument or thought process" (*R v O'Brien*, 2011 SCC 29 at para. 17). It is necessary to assess whether the reasons, read in context and as a whole, explain what the judge

decided and why they decided in a way that permits effective appellate review. Did the reasons respond to the case's live issues? It is also necessary to look at the full record before the judge to determine if the what and why questions are answered there (*R v GF*, 2021 SCC 20 at paras. 69-71).

[21] Here, while the sentencing judge's reference to the *Gladue* factors was minimal (paras. 14 and 28 of the reasons), he heard many of the salient points during the hearing from defence counsel and stated in his decision that he had "the benefit of a very thorough *Gladue* Report". Judges are entitled to be taken at their word (*O'Brien* at para. 18). I do not give any weight to the appellant's argument that the judge did not take the time to review the entire *Gladue* report.

[22] What is important though is the second question: the assessment of how the judge considered and applied the *Gladue* factors in determining the sentence. Here, there is no evidence of any consideration by the judge of the systemic, background and personal factors and their potential effect on the appellant's moral blameworthiness. For example, the judge did not refer to:

a. the specific history of Mr. H.'s family: in particular the attendance of his father, grandparents and great-grandparents at residential schools; and growing up in a home full of drinking and violence, with the father often beating the mother and the children;

b. Mr. H.'s parents' alcoholism when he was a child resulting in child protection concerns of physical and emotional abuse and neglect, and including such things as the community members finding him and his siblings wandering the streets;

c. his being placed in temporary care and foster care, and the negative experiences he had there, including being picked on and beaten;

d. his difficulties in school, including not learning to read until Grade 6 and at age 14 reading at a Grade 3 level, resulting from low cognitive functioning (bottom end of the borderline range) behaviour problems (inattention, hyperactivity, oversensitivity, anxious-passive, a-social) and significant absences;

e. his sexual molestation by two uncles while he was a child;

f. his frequent witness to abuse of his mother and sister by his father; and

g. his difficulty in finding employment.

[23] The sentencing judge's reasons note specifically the significance of the following factors in the determination of the sentence – the age of the victims; the victim impact statements and the concern expressed by one victim's mother that the "system" protects the appellant's rights but not the victim's rights; and the concern in the community about the appellant.

[24] The judge rejected the imposition of a conditional sentence. He wrote:

> … I am not satisfied that imposing a conditional sentence is either practical, in your living circumstances, or that it would send the right message of deterrence and denunciation for these types of offences (*R v* TJH, 2022 YKTC 15 at para. 21).

[25] The appellant lives at home with his parents in a community of approximately 400 people. The victims live in the same community.

[26] The judge does not explain what he means by a conditional sentence being impractical in the appellant's living circumstances. It would be improperly speculative to

suggest a meaning here. I note that the judge is not a resident Yukon judge and that he indicated during the sentencing hearing that he was not familiar with the appellant's community, having only driven through it once in 1960.

[27] In the recent Yukon decision of *R v GK*, 2021 YKTC 17 ("*GK*") at para. 57, the judge, a Yukon resident judge, stated:

> I take judicial notice of the fact that serving a conditional sentence in the Yukon attracts a substantial level of supervision and intervention, **especially in the smaller communities**. [emphasis added]

[28] In *R v Pye*, 2019 YKTC 21 ("*Pye*"), the judge, another Yukon resident judge, wrote at para. 46 when considering whether a jail sentence was the only way to send a clear denunciatory and deterrent message:

> In my view, it is not. Deterrence can take many forms, including the imposition of criminal charges, a criminal record, and the stigma that flows from the very public nature of criminal justice proceedings, **particularly in the smaller communities one finds in the Yukon**, where such offences rarely go unnoticed by the media and are regularly debated in the court of public opinion. [emphasis added]

[29] As required by s. 718.01 of the *Criminal Code*, in this case the sentencing judge gave primary consideration to the objectives of denunciation and deterrence because the offences involved the abuse of victims under the age of 18. Section 718.2(a)(ii.1) was also considered by the sentencing judge – it provides that abuse of a victim under the age of 18 is an aggravating circumstance. The sentencing judge found a further aggravating circumstance under s. 718.2(a)(iii) that the appellant abused a position of trust with respect to the seven-year-old victim because he invited her into the laundry room, away from her friends.

[30] However, the sentencing judge did not engage in the necessary analysis required by *Gladue*. As the court in *R v RS*, 2021 ONSC 2263, stated at para. 183: "Even in grave cases of sexual violence, the *Gladue* principles must be applied [*Friesen*, at para. 92]". The *RS* decision is an example of how the *Gladue* factors, both specific to the accused and general in the sense of inter-generational effects of the collective experiences of Indigenous peoples, are considered as part of the context underlying the offences before the court. The court in *RS* said at paras. 183-184:

> … bringing these strands of analysis together, I find that they significantly reduce your moral blameworthiness for these offences. Basically, you are a decent person with good prospects of rehabilitation whose crimes are partially a product of a combination of factors connected to the injustices committed against Indigenous people, some of which is beyond your control.
>
> …The reality is that your unique personal circumstances, viewed contextually, diminishes your moral culpability.

[31] I refer to this passage as an example of the application of the *Gladue* factors analysis or process, not for its outcome. It is possible that a judge could consider *Gladue* factors, as was done in detail in *RS*, and conclude as provided for in *Gladue* (para. 79) and *R v Wells*, 2000 SCC 10, that the more violent and serious the offence, the more likely the appropriate sentence will be similar between Aboriginal and non-Aboriginal offenders. This is a result of the increase in significance of the sentencing goals of denunciation and deterrence in these circumstances. The point is that the analysis needs to occur. In this case, even with the caveat that judges are presumed to know the objectives of sentencing and are not required to state every thought process in their reasons, the sentencing judge did not engage in that analysis. His stated reason for rejecting the conditional sentence as impractical and not sufficient to address

denunciation and deterrence, without specifically referring to any *Gladue* factors is insufficient to demonstrate that the proper analysis was done.

[32] There was no evidence from his reasons that the sentencing judge assessed the impact of the *Gladue* factors on the appellant's moral culpability. In *R v Neepin*, 2020 MBCA 55, the Manitoba Court of Appeal concluded at para 69:

> As for the accused's personal circumstances, the trial judge correctly stated that the *Gladue* factors were mitigating, however, I see no evidence in his reasoning that he addressed these factors in the context of their impact on the accused's moral culpability. Tellingly, he stated they were mitigating after he found the accused's level of moral culpability was high.

[33] In *R v Martin*, 2018 ONCA 1029, the Ontario Court of Appeal wrote at para. 13:

> The failure to give adequate weight to *Gladue* factors is an error of law: *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664 (C.A.), at para. 31, leave to appeal refused, [2007] S.C.C.A. No. 34. In this case the error had an impact on the sentence imposed and appellate intervention is required.

[34] Here, the judge's failure to engage in a proper analysis of the *Gladue* factors had an impact on the sentence. The significant *Gladue* factors existing in this case, if considered contextually, should have led to an analysis of an option other than a custodial sentence.

[35] There was no attempt by the judge to explain why the objectives of deterrence and denunciation could not be achieved other than through a significant custodial sentence. For example, in the case of *R v Proulx*, 2000 SCC 5 ("*Proulx*") the Supreme Court of Canada stated at para. 100:

> Thus, a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than

> incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[36] The Supreme Court of Canada also held in *Proulx* (paras. 80-82) that it would be "unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences." Presumptions do not accord with the principle of proportionality and the value of individualization in sentencing. Thus, although a sexual offence against a child is serious matter, it does not result in a presumption that a conditional sentence is inappropriate, or incapable of addressing deterrence and denunciation.

[37] Further, the sentencing judge's failure to consider the effect of *Gladue* factors on the appellant's moral culpability affected the sentence.

[38] As a result, I find that the sentencing judge erred in principle and this error had a material impact on the sentence imposed.

Issue #2 – Failure to consider mitigating circumstances

[39] The appellant says the judge failed to consider several mitigating factors such as the appellant's age of 20 at the time of the offences, the absence of any criminal record, and his early guilty plea.

[40] The respondent acknowledges the judge did not specifically refer to these factors but states they were clear on the record from the pre-sentence report and the

submissions of counsel. Indication that the judge took the factors into account came from the probation order through which he acknowledged the appellant's rehabilitative potential.

[41] The judge's failure to refer to the absence of the appellant's criminal record, youth, and early guilty plea constituted an error in principle with an impact on sentence. Once again, it is the judge's analysis that is problematic. While the weight to be given to mitigating factors is within the discretion of the trial judge, the failure to consider certain factors is a different matter. This is not a situation where the finding is the sentencing judge gave too much weight to one relevant factor or not enough weight to another, as that would be an improper abandonment of deference (see *R v Lacasse*, 2015 SCC 64 ("*Lacasse*") at para. 49, quoting from *R v McKnight* (1999), 119 OAC 364). This is instead a case where by emphasizing certain factors and not giving enough weight to others, the sentencing judge exercised his discretion unreasonably.

[42] The sentencing judge referred specifically to the aggravating factors (required to be considered by statute) but made no reference to any mitigating factors. Section 718.2(a) specifically states that a court shall take into consideration the principle that "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender". Here, the imposition by the judge of a significant custodial sentence of 18 months plus three years' probation on a young appellant without a criminal record who provided an early guilty plea, even in a case with statutory aggravating factors and where deterrence and denunciation are the primary considerations, was not balanced by an assessment of the above mitigating factors. The failure to consider those mitigating factors led to an

unreasonable exercise of discretion and was an error in principle that affected the sentence.

Issue #3 – Failure to consider Yukon precedent cases

[43] The appellant argues the law in the Yukon is clear and has provided for conditional sentences in similar circumstances. The appellant specifically referenced *GK*, *Pye*, and *R v DAD*, 2021 YKTC 20 ("*DAD*"*)*. In *Pye*, the judge imposed a 12-month conditional sentence and 18 months' probation on Mr. Pye, a 23-year-old Yukon First Nations man, who pled guilty to sexual intercourse with a 14-year-old girl on two occasions. Mr. Pye had no criminal record and a difficult upbringing. In *GK*, the judge imposed a six-month conditional sentence on GK, a 59-year-old Yukon First Nations man, who kissed and sexually touched a 17-year-old girl. In *DAD,* the only one of the three Yukon decisions that the sentencing judge referenced in this case, the judge, following *Pye*, imposed a six-month conditional sentence on DAD, a 28-year-old Yukon First Nations man, who pled guilty to sexually touching a 15-year-old girl. The judge referred to his age and lack of criminal record, among other things, as mitigating factors.

[44] The respondent notes the codification of the parity principle in s. 718.2(b), stating that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The respondent further notes the Supreme Court of Canada has held in *R v M (CA)*, [1996] 1 SCR 500 at 566, that the appeal court should intervene only where the sentence imposed by the trial judge is a marked and substantial departure from the sentences customarily imposed for similar offenders committing similar crimes.

[45] The respondent says the facts of this case are substantially different from the three Yukon cases referred to by defence counsel. The age of the victims was the most significant difference (14, 15, and 17 in the other Yukon cases, and 10 and 7 in this case) but there were other differences as well, including the pre-meditated and predatory nature of the offences occurring on two separate occasions with two different victims. The judge was not required to find a conditional sentence was a fit sentence on that basis that judges in other recent Yukon cases have done so, especially where there are substantial fact differences among the cases.

[46] Here, the sentencing judge began the sentencing hearing by stating he was prepared to consider the imposition of a conditional sentence, without hearing argument from counsel on the issue, based on the three Yukon cases he had reviewed in which the mandatory minimum of 90 days was found to be unconstitutional. The sentencing judge accepted this was the law in the Yukon. Further, the sentencing judge itemized several factors which in his view distinguished this case from the other Yukon cases, as noted by the Crown in his submissions: that is, the young ages of the victims and the circumstances surrounding the offences. Thus, his failure to refer specifically to *GK* and *Pye* did not constitute a reviewable error.

Conclusion on Sentence

[47] In *GK*, *Pye*, and *DAD*, each court reviewed cases to determine the appropriate sentencing range, absent a conditional sentence. In *GK*, that was found to be three to four months custody; in *Pye*, nine to 10 months; and in *DAD*, four months.

[48] In each of those cases, the judges found the mandatory minimum of 90 days custody in s. 151(b) to be unconstitutional, making a conditional sentence available for

them to consider. The unconstitutionality of this section was not argued at the sentencing hearing, based on the sentencing judge's stated acceptance that the law in the Yukon made a conditional sentence available for his consideration. As a result, I will not proceed through that analysis here, but agree with the analysis of the Territorial Court in *GK*, *Pye*, and *DAD* that the mandatory minimum is unconstitutional for the purpose of this sentence.

[49] The appropriateness of a conditional sentence requires a balancing of the often-conflicting principles of denunciation and deterrence on the one hand, and rehabilitation and the application of s. 718.2(e) on the other (*Pye* at para. 42).

[50] The sentencing judge in this case did not engage in any risk assessment or assessment of rehabilitative potential of the appellant before imposing the custodial sentence. One of the statutory requirements before a conditional sentence is imposed (s. 742.1(a)) is that the Court 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."

[51] The appellant has been living in the community since his first appearance after being charged on December 22, 2020 under conditions. Since April 22, 2022, he has been released on bail pending appeal and his conditions have been equivalent to house arrest. He has not breached any of his conditions at any time.

[52] He has the support of a girlfriend. They have been together for almost two years and they spend as much time as possible doing activities out on the land. They plan to marry.

[53] He has worked seasonally in the past for a First Nation government collecting sonar data for Fisheries and landscaping.

[54] He has self-referred for counselling with Yukon Health and Social Services. He is currently working with a counsellor at Mental Wellness and Substance Use Services.

[55] As evidenced by the letters submitted for the sentencing hearing and the comments of the sentencing judge, the appellant has completed a treatment program for alcohol use. He had reduced his drinking to one six-pack of beer a month. As noted by the sentencing judge, this is a significant achievement. He stated to the *Gladue* report writer that he plans to quit drinking altogether.

[56] Given this high level of compliance with strict conditions, evidence of motivation to seek and complete treatment, his lack of criminal record, and his sincere remorse, serving his sentence in the community would not endanger the safety of the community in my view. He appears to be at low risk to reoffend.

[57] I have already referred to the judge's observation in *Pye* that deterrence and denunciation can take many forms, including community sentences. As well, the Supreme Court of Canada in *Proulx* noted a conditional sentence can achieve both punitive and restorative objectives. At para. 41, the Court wrote:

> … A conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.

[58] I have considered the circumstances of the offences and of the appellant. There are significant aggravating factors and the offences are serious, for the reasons set out by the sentencing judge. However, the circumstances of the appellant must be balanced

against these factors and the *Gladue* analysis must be undertaken. The purposes and principles of the sentencing can be achieved by a strict conditional sentence.

[59] The court in G.K., where there was a conviction on one count after trial, imposed a six-month conditional sentence; the court in Pye, where there was a guilty plea to one count imposed a 12-month conditional sentence; and the court in DAD where there was a guilty plea on one count, imposed a six-month conditional sentence.

[60] In this case, there are guilty pleas to two counts, two victims of a younger age, and some evidence of premeditation and predatory behaviour. The penalty for the two convictions must be consecutive because they do not arise from the same event, and there are two victims (s. 718.3(4) and s. 718.3(7)(b)).

[61] As in *Pye*, the serious nature of these offences warrants the continuation of strict conditions in the nature of house arrest for the appellant.

[62] The custodial sentence of 18 months' plus three years' probation is overturned. In its place, the appropriate sentence shall be 18 months' term of imprisonment (8 months on Information 20-00705 and 10 months on Information 20-00706 to be served consecutively) to be served conditionally plus two years' probation. The terms of that sentence will be:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so by the court.
3. Report to a Supervisor within two working days after the making of this conditional sentence order and thereafter, when and in the manner directed by the Supervisor.

4. Remain within the Yukon unless you have written permission from the Supervisor.
5. Notify the Supervisor in advance of any change of name or address, and promptly of any change of employment or occupation.
6. Not communicate directly or indirectly, with H.M., O.B. or S.J.
7. Not attend within 50 metres of H.M., O.B. or S.J.'s place of residence, school, employment or education or any other place they may reasonably be expected to be, except with the prior written permission of the Supervisor.
8. Not enter within 50 metres of any school, playground or place that reasonably might have people under the age of 16, except with the prior written permission of the Supervisor.
9. Not be in contact or communication with any minor under the age of 16, except with the prior written permission of the Supervisor in consultation with Family and Children's Services.
10. Reside at [redacted], Yukon, and abide by the rules of the residence, and as long as you are not in the same room as E.J. unless there is direct line of sight supervision of you and E.J. by M.H. or another adult. The supervisor must not be under the influence of alcohol or non-prescription drugs or except as otherwise directed by the Supervisor.
11. For the first 12 months of this order you must remain inside the residence at all times, except with the prior written permission of the Supervisor and except for the purpose of employment, which can include work at Victoria

Gold Mine, including travel directly to and directly from the place of employment. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition.

12. For the last 6 months of this order, abide by a curfew by being inside your residence or on your property between 10:00 p.m. and 6:00 a.m. daily except with the prior written permission of your Supervisor. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition.
13. Do not change that residence without the prior written permission of your Supervisor.
14. Attend and actively participate in all assessment counselling, and treatment programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, for the following issues: substance abuse, alcohol abuse, psychological issues, and any other issues identified by your Supervisor, and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition.
15. Abstain from the use of alcohol and non-prescription drugs.
16. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub, or any premise whose primary purpose is the sale of cannabis.

[63] The statutory terms of a probation order apply. All other conditions will be the same as outlined in the conditional sentence order, except that there will be no house arrest condition and no curfew condition. As this is a primary designated offence there will be an order pursuant to s. 487.051 authorizing the taking of samples for the purpose of DNA analysis.

[64] There will be an order pursuant to s. 490.012 requiring T.J.H to comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 10 years.

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DUNCAN C.J.