Citation: *R. v. J.N.N.*, 2022 YKTC 43

Date: 20221103
Docket: 20-00777
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REX

v.

J.N.N.

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*.

Appearances:
Noel Sinclair — Counsel for the Crown
Kevin McGillivray — Counsel for the Defence

REASONS FOR SENTENCE

[1] KILLEEN T.C.J. (Oral): After a trial, I convicted J.N.N. of sexually assaulting a woman. The oral decision is an exhibit on the sentencing. I do not intend to repeat the findings, except as required. At the conclusion of the decision on conviction, the Crown notified the Court that they would be bringing an application to have the accused found to be a dangerous offender. At a later date, an application was heard and an assessment was ordered. After the assessment was completed, the Crown gave notice that they were seeking a determination that the accused should be subject to a long-term supervision order ("LTSO"), to commence after a term of incarceration.

[2] In September, evidence and argument was heard over the course of five days. The evidence included the evidence of Dr. Philip Klassen, a psychiatrist who had

completed the assessment. His qualifications to give opinion evidence were admitted. There was also evidence about programming available in the territorial and federal correctional facilities. There was evidence about what the accused had been doing in custody since his detention. There was also a Pre-Sentence Report and a *Gladue* Report.

[3] In addition, the accused argued that certain questions asked at the trial should result in a mistrial. He had been represented by other counsel at trial. No objection had been raised to a couple of questions asked by Crown counsel at the trial. He also argued that the conviction reasons were so unclear that it was impossible to adequately address the appropriate sentence. At the conclusion of argument, I reserved my decision on the various issues. This is the decision.

The Mistrial Issue

[4] The evidence on the trial included DNA evidence. The complainant did not testify about what happened during the assault, as she had been knocked out and woke later to find that some of her clothing had been removed. The DNA evidence was material to the issue of identification. That meant that counsel for J.N.N. decided, properly in my view, to explore other ways in which his DNA could have been on an article of her clothing. An innocent explanation for the presence of DNA could have raised a reasonable doubt.

[5] The identity of the complainant is subject to a publication ban. However, she has the same last name as the accused. Not surprisingly, counsel sought to determine if they were related to each other. In fact, they were related, although not closely. This

lead to an exploration of time that they had spent together. The questions were addressing whether his DNA could have been transferred to her underwear by an innocent means, such as the items coming into contact through laundry or some other contact.

[6] The complainant testified she met J.N.N. in Whitehorse in 2019. She thought he was staying in a shelter. She was living on the street. She was homeless and living out of a backpack.

[7] She was asked:

> Q. All right. And where would you spend the night?
>
> A. On the streets on a bench, under a tree or if the shelter wasn't full, I would spend the night there.
>
> Q. Okay. Did—
>
> A. And if that wasn't an option, I would go to friend's houses on the couch.
>
> Q. During that period of time, from the time you met [J.N.N.], did you ever overnight with him anywhere?
>
> A. No.
>
> Q. how would you describe your relationship with [J.N.N.] from the time you met him in June 2019?
>
> A. we were friends. Like I considered him family. That's how I considered our relationship. Other than that, there was no relationship. Just a friendship.

[8] At the end of her examination the Crown asked:

> Q. Did you ever knowingly have sexual contact with [J.N.N.]?
>
> A. No.

> Q. Did you ever knowingly consent to having any sexual contact with [J.N.N.]?
>
> A. No, I did not.

[9] Counsel for J.N.N. now argues that those questions dealt with prior sexual activity and accordingly, an application under s. 276 of the *Criminal Code* (the *"Code")* was required. He argues that an application is required no matter who raises the issue. See *R. v. Barton*, 2019 SCC 33.

[10] As it is too late to remedy the defect now, he says that a mistrial must be the result.

[11] Section 276 requires an application to determine if evidence of prior sexual activity is admissible. The fact that someone has consented to sexual activity with an accused on some past occasion does not lead to a conclusion that there is consent on another occasion. A court has to consider whether the evidence is probative of an issue rather than simply admitting it to show the parties had consensual prior sexual activity.

[12] However, here the issue was not whether the parties had engaged in sexual activity in the past. Such an issue never arose. Instead, the issue was whether there was any possible explanation for his DNA and semen being on her underwear, other than him sexually assaulting her. It was in the context of addressing that issue that the question of staying together overnight arose. It was not prior sexual conduct. It was the absence of an explanation for the semen and DNA.

[13] The final questions were not about prior sexual activity, but about the substance of the offence. To refuse to allow the Crown to ask if the activity forming the charge was

consensual would lead to the argument that there was no evidence that consent was not present. That would lead to an absurd result. It is completely different from asking if there had been consensual sex at some other time.

[14] In any event, had the issue arisen at trial, the result would have been the same. The Crown would have been entitled to explore whether the two parties had slept in the same spot, for the purpose of determining if the DNA and semen transfer could have resulted from the clothing touching something. The evidence would have been the same, even if an application had arisen from an objection to the direct examination. No evidence that the parties had engaged in prior sexual conduct was before the Court. The application for a mistrial is dismissed.

The Imprecision of the Conviction

[15] A court is only entitled to reach conclusions on the evidence on a trial. Sometimes, the evidence is clear and compelling. Sometimes, it is less clear, but still compelling. It seems odd to ask a court to find that a decision is too unclear to be used even for sentencing. With respect, that is an issue for the Court of Appeal. However, it was raised now and therefore must be dealt with.

[16] The complainant was not able to give evidence touching directly on the event. However, when she awoke, items of her clothing had been removed and it felt like she had had sex while she was unconscious. The semen and DNA of the accused was on her underwear, in a location that meant that the transfer had occurred after the underwear had been moved or removed. Male DNA was located on a vaginal swab, although the evidence did not disclose the source of that DNA. The evidence was that

the presence of female cells on a vaginal swab could overwhelm the smaller amount of male cells present.

[17] That evidence established beyond a reasonable doubt that J.N.N. had sexually assaulted the complainant. Based on the presence of male DNA on the vaginal swab, there must have been some penetration by a male. Whether that was the accused or another person in his presence was not established. It does not change the fact that looking at the evidence as a whole, it leads me to conclude the accused's semen ended up on the complainant's underwear while she was unconscious as a result of him sexually assaulting her. While absolute certainty about the event is not possible, it is not required. The presence of another or others would not lessen his culpability. There is a sufficient basis to impose sentence.

The LTSO Application

[18] After the conviction, the prosecution gave notice as required under the *Code*.

> 752.01 If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).

[19] The accused was convicted of a serious personal injury offence and has at least twice served penitentiary terms for designated offences. An assessment was ordered under s. 752.1(1) of the *Code*. The assessment of Dr. Klassen was received pursuant to s. 752.1(2).

[20] Later, after the receipt of the assessment, the Crown gave notice that the proceeding would not be an application to find the accused to be a dangerous offender, but rather to have him subject to a LTSO under s. 753.1 of the *Code*.

> 753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.
>
> (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
>
> (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement — sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking — person under 18 years) or subsection 279.02(2) (material benefit — trafficking of person under 18 years), 279.03(2) (withholding or destroying documents — trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of

> another offence of which the offender has been convicted; and
>
> (b) the offender
>
> (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
>
> (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
>
> (3) If the court finds an offender to be a long-term offender, it shall
>
> (a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and
>
> (b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

The Case Law on Long-Term Offenders

[21] Both counsel filed material, including cases from trial and appellate level courts on the nature of this application. I have considered all of the cases and the issues that are to be decided. The facts of individual cases vary, but the principles are the same.

[22] In *R. v. S.W.P.*, 2020 BCCA 373, the Court considered such an application and stated:

> 14 I have reproduced s. 753.1 at para. 39 below. It sets out the three criteria for finding that an offender is a long-term offender. Where the criteria are met, the court must impose a sentence (which must be a minimum of two years' imprisonment) for the predicate offence *and* order

that the offender be subject to a period of supervision for up to ten years: s. 753.1(3). In *R .v L.M.* 2008 SCC 31, the Court expressed the view that in determining the length of sentence for the predicate offence, the sentencing judge should not take into consideration the subsequent period of community supervision to which the offender will be subject if found to be a long-term offender. (See para. 38.) Speaking for the Court, LeBel J. highlighted the distinction between the sentencing procedures for dangerous offenders and those for long-term offenders. In his analysis:

> Although they both contribute to assuring public safety, the dangerous offender and long-term offender designations have different objectives. Unlike a *dangerous* offender (s. 753 *Cr. C.*), who will continue to be deprived of liberty, since such offenders are kept in prison to separate them from society (s. 718.1), a *long-term* offender serves a sentence of imprisonment of two years or more and is then subject to an order of supervision in the community for a period not exceeding 10 years for the purpose of assisting in his or her rehabilitation (s. 753.1(3) *Cr. C.*). This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [TRANSLATION] "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (Dadour, at p. 228). [At para. 42; emphasis by underlining added.]

15 The Court in *L.M.* also rejected the proposition that the usual principles of sentencing at ss. 718–718.2 of the *Code* should be applied in the usual way to the "combined effect" of a custodial sentence and an LTSO to be served thereafter. Although agreeing that a period of long-term supervision "cannot be any longer than is necessary to obviate the risk that the offender will reoffend and thus to protect the public", the Court emphasized the different objectives of determinate sentences of imprisonment and LTSOs. Whereas a 'normal' prison sentence is determined on a consideration of several factors, including the gravity of the offence, the degree or responsibility of the offender, the parity principle and the possibility of imposing a less restrictive sanction, the length of an LTSO is based "on an offender's criminal past and on the likelihood that he or she will reoffend". (At para. 47.) In addition, LeBel J. stated:

> ... it is important to remain faithful to the distinction between sentencing and the imposition of a supervision period. A judge who confuses these two processes risks straying from the normative principles and the objectives of sentencing. A judge who does so would also neglect the specific objective of the procedure for finding an offender to be a long-term offender, which requires the application of different

> principles. Parliament intended that the judge determine the appropriate sentence first. After doing so, the judge is to ask, in light of Parliament's objective of protecting the public, whether a period of supervision is warranted. The period of community supervision cannot therefore be equated with a new period of deprivation of liberty consecutive to the one resulting from the sentence. [At para. 49; emphasis added.]

The Criminal Record

[23] J.N.N.'s criminal record includes about 70 convictions, starting when he was a youth. The record includes 26 violent offences (including uttering a threat), 16 property offences and many offences of failing to comply with court orders. He has been convicted of sexual assault offences on two other occasions, both resulting in penitentiary terms of incarceration.

[24] Given the nature of this proceeding, the violent offences require some comment. I do not intend to review each one, but rather note some of the more significant ones. The details concerning the convictions was before the Court as part of the affidavit material. The information includes transcripts of decisions, where available, as well as police reports of some of the events. There was no contest as to the contents of the reports. I have not considered factors that do not appear consistent with the actual conviction registered.

[25] This background information provides a significant level of detail into the earlier offences. It is troubling to see that intoxication has been present throughout most of the offences, over more than four decades.

[26] In 1984, he received five months' incarceration for assault cause bodily harm. Shortly after the completion of that sentence, he received 18 months for aggravated assault. In 1988, he was convicted of robbery and assault, receiving 15 months' incarceration. In 1990, he was convicted of aggravated assault, receiving six months' incarceration. In 1990, he was convicted of two charges of assault with a weapon and a charge of assault, receiving seven months' incarceration. In 1993, he was convicted of sexual assault and received three years' incarceration. The circumstances of the event are before the Court in an affidavit that includes the sentencing transcript. He was intoxicated and assaulted his 17-year-old cousin, who was asleep on a couch. She fled and he pursued her, catching her and pulling her between some trailers. He removed her pants and his pants and tried, unsuccessfully, to have intercourse.

[27] In 2003, he was convicted of assault cause bodily harm and incarcerated for one year.

[28] In 2008, he received four and one-half years for another conviction for sexual assault. The complainant had been drinking and had passed out at the home of her brother. The accused was present for a party earlier and had been drinking, but had passed out. Hours later, the complainant awoke to find the accused was having intercourse with her, while she was asleep. It took several minutes to fight him off.

[29] Since then, he has several convictions for breaching a recognizance or probation order, in addition to several convictions for uttering a threat.

[30] He has had periods of time when he has not been involved in trouble, but it is impossible to glean much from those periods. His more recent record includes

significant terms of incarceration for breaching court orders imposed upon him. The imposition of probation orders or recognizances demonstrate efforts by sentencing courts to provide him with resources upon release, but also to limit his actions. His record demonstrates that those efforts have been unsuccessful.

[31] A recognizance to keep the peace is limited to a duration of one year. Sadly, his record shows that he has often been unable to comply with conditions even for that relatively short period of time.

The *Gladue* Report and the Pre-Sentence Report

[32] Each of the reports set out important information about the background of J.N.N. He was born in July 1964 and is now 58 years of age. His very early life appears to have been positive. His grandparents provided a loving home. He was raised in a traditional way. Sadly, that did not last. He was taken by his mother and her boyfriend. He endured over a decade of abuse; beatings were frequent. He was demeaned by his mother's partner, who called him a "bastard". His experiences at school were not positive.

[33] His education includes some training, but he dropped out after one year of a four-year educational program. He has had employment, once for about three years from 1998 to 2001. He had not been employed in the recent past before his incarceration for this offence.

[34] He has children with whom he maintains some contact. He was also involved in a domestic relationship prior to his arrest and detention. His partner is reported to also

have substance abuse issues. He reported that he maintained sobriety for a period from 2001 to 2003, while living in Aklavik. He was in a relationship at the time. That woman passed away about five years ago. In addition to her loss, his background is marked by loss and tragedy.

[35] Courts must take into account the circumstances of Indigenous offenders. J.N.N.'s life as a child explains why he is as he is. It is not surprising that he has an alcohol problem. It is also not surprising that he has so often resorted to violence. The problem on a sentencing is to balance his background with the danger he presents to others.

The Position of the Parties

[36] The Crown position was that five years was an appropriate sentence for the offence. The accused had been in custody as of the hearing date, September 21, 2022, for 457 days. Accordingly, a sentence of more than two years, plus ancillary orders, is still required. That should be followed by a LTSO.

[37] The accused submitted that the uncertainty of the actual offence made it impossible to conclude that a penitentiary sentence was appropriate. There was considerable discussion about sentencing precedents in Yukon Territory. His argument was that absent evidence of penetration, a sentence in a territorial jail was the longest sentence that the Court could impose. That would mean that a penitentiary sentence was not possible. With time served, a short term of incarceration followed by probation is appropriate.

[38] I have reviewed the precedents, but do not find that a territorial sentence, that is a sentence of less than two years, would be appropriate in this case. Section 718 sets out the principles to be followed in imposing any sentence. The gravity of the offence and the responsibility of the offender are paramount considerations. Other sentences imposed in other cases may establish an appropriate range of sentence, but cannot displace consideration of s. 718 of the *Code*. I will turn to his background and prospects for rehabilitation later in this decision. However, denunciation and the need for deterrence both to the accused and others requires a comment at this stage.

[39] The accused assaulted an unconscious woman. She was present in the apartment because she was trying to earn some money by doing housework. She had been drinking, but was cleaning at the time of the attack. Her clothing was removed. The semen of the accused ended up on the inside of her underwear. Male DNA was present on a vaginal swab. There is no other explanation other than an assault for that presence. It is possible, given all the evidence, that the accused was not the only one present when she was attacked. However, I do not intend to sentence him on that basis. I would view the presence of others as an aggravating factor in the attack and am not satisfied that the presence of another or others has been proven. In any event, this is a serious assault.

[40] Moreover, the assault was committed by an accused with prior convictions for the same offence. It is similar to what he had done on prior occasions. The other convictions demonstrate a complete disregard for others. During the earlier event, he assaulted his cousin while she was asleep, then pursued her in an attempt to force himself on her. On the second conviction, he was having intercourse with a woman

asleep or passed out. His record demonstrates that, at least on three occasions, he has viewed a woman as an object to be used for his gratification, asleep or not.

[41] Despite any precedents for non-penetrative sexual assaults, this crime calls for a significant term of incarceration. His record is only one factor to consider, but it is an important factor in looking at what must be done to deter him personally, as well as to determine the weight to be given to rehabilitation.

The Evidence of Dr. Philip Klassen

[42] Dr. Klassen is a forensic psychiatrist and vice-president of medical affairs at the Ontario Shores Centre for Mental Health Sciences. He is also an assistant professor at the University of Toronto. His extensive qualifications were admitted by the accused. He was qualified to give opinion evidence about the assessment of the accused. His assessment, dated March 1, 2022 was filed as an exhibit for this hearing. Dr. Klassen has conducted approximately 240 assessments and has testified approximately 200 times. I found his evidence to be clear, well considered, based upon extensive examination and background materials, and very helpful.

[43] Dr. Klassen travelled to Whitehorse to interview J.N.N. He also sought information from others who knew him. His interview with J.N.N. was comprehensive. He also had a considerable amount of information from earlier assessments or treatment attempts.

[44] J.N.N.’s background is described in detail. It is hard to imagine growing up like he did and not ending up with profound troubles. He had no contact with his father. A step

father abused him. He was beaten as a child. His life has been marked by loss and tragedy.

[45] He began to use alcohol at the age of 12 or 13. He described it as a trigger to anger. He also said that he always keeps his anger in check, although others get aggressive towards him. In that context, he will stand firm and not be bullied. He claimed that he will de-escalate situations. He also admitted to other drug use.

[46] Dr. Klassen reviewed the material available from the Correctional Service of Canada, produced during earlier periods of incarceration in the penitentiary. The reports prepared during the term in the early 1990s indicated that he did little to accept responsibility for the offence. He did not participate, meaningfully at least, in the alcohol programs available to him. Boredom, a need for stimulation and revenge were all found to be factors in his offending behavior. He was detained until the completion of his sentence.

[47] His second penitentiary sentence was from 2008 until 2012. He was described as having a difficult relationship with several staff, including his case management team. He was suspended from his moderate intensity substance abuse program on a couple of occasions. It appears that he would leave the program, blaming others for his problems. He later left the program completely after having been denied parole. The extensive history from the Correctional Service of Canada demonstrates that the accused was generally unreceptive to treatment, and occasionally displayed difficult behavior or a loss of temper.

[48] Dr. Klassen indicated that from a diagnostic perspective, the accused suffers from antisocial personality disorder. He provided an overview of the disorder.

> Personality traits are characteristic ways of interacting with one's environment. When personality traits are maladaptive and inflexible, and give rise to difficulties with social or occupational function, as a result of problems with affectivity, interpersonal relations, cognitive style or impulse control, then personality disorders are said to exist. Personality disorders tend to become evident by late adolescence or early adulthood, and are generally sustained thereafter, with attenuation of more drastic personality traits towards middle or late age. The course of the symptoms of a personality disorder may be exacerbated by psychosocial stress, an unstructured living situation, alcohol or other substance misuse, and non-adherence with psychiatric or psychological treatment. The mainstay of psychiatric treatment for individuals suffering from a personality disorder, where this is possible, tends to fall within the psychological, rather than the pharmacological, domain.
>
> An individual may be diagnosed as suffering from antisocial personality disorder where there is a pervasive pattern of disregard for, and violation, of the rights of others as indicated by three or more of:
>
> - failure to conform to social norms with respect to lawful behaviours [criterion met]
> - deceitfulness, as indicated by repeated lying, use of aliases, or conning others for profit or pleasure [criterion likely met]
> - impulsivity or a failure to plan ahead [criterion met]
> - irritability or aggressiveness [criterion met]
> - reckless disregard for the safety of self or others [criterion possibly met]
> - consistent irresponsibility as indicated by repeated failure to sustain consistent work behaviour or honour financial obligations [criterion met]
> - lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another [criterion met]

[49] It is noted that antisocial personality may remit as individuals age. The likelihood of further offending behaviour drops, with a significant drop at around the age of 70. J.N.N. is now in his late fifties.

[50] There were additional diagnoses. J.N.N. suffers from an alcohol use disorder. Alcohol interfered with his education and work history. It has been a significant contributor to his criminal record.

[51] Dr. Klassen also stated:

> While this gentleman has been a recidivistic sexual offender, on the basis of evaluation of his offending, it is not my opinion that this gentleman suffers from an underlying sexual behaviour disorder, specifically a paraphilic disorder. The two principal drivers of aggressive sexual offending against adult females are antisociality/psychopathy, and a paraphilic disorder. If one is present to a significant degree, the other need not be present. In my opinion, J.N.N. presents with significant antisociality/psychopathy. It appears to the undersigned that the motivation for this gentleman's sexual offending is similar to the motivation seen as regards other, non-sexual, offending; this gentleman engages in self-serving behaviour, often while disinhibited by alcohol intoxication.

[52] Dr. Klassen's diagnosis is consistent with the criminal record, the underlying reports and the information available from others. I found his evidence to be credible and compelling.

[53] Dr. Klassen went on to complete a risk assessment. He is trained in using the actuarial methods of risk assessment. He was aware of the need to use methods that have been demonstrated to be reliable for those of Indigenous background. Different assessment tools were used, although the results show consistency. His scores show J.N.N. to be at significant risk of aggressive behaviour and also to pose significant

difficulties with community supervision and treatment responsiveness. He has an above average risk of sexual recidivism, although this risk will fall as he ages. He also presents with a high risk of non-sexual recidivism and for intimate partner violence.

[54] He also determined that J.N.N. presents a substantial risk of future aggressive behaviour. As noted, the likelihood of sexual recidivism drops significantly with age. It is also noted that while J.N.N. claims to be open to treatment, his history in earlier programs has been unsuccessful. Except for the current period of incarceration while awaiting the outcome of this case, treatment had not been attempted for over a decade.

[55] Dr. Klassen made suggestions for treatment. J.N.N. should be offered treatment regarding aggressogenic or pro-criminal values and attitudes, a sexual offender treatment program, alcohol use treatment, and his behaviour should be monitored for peer association, domestic relationships, and employment. He also suggested that release should initially be to communities where he does not have prior peer relationships. His finances should be monitored to assess substance abuse.

Programming in the Territorial Correctional System

[56] There was evidence concerning the nature of programming available within the territorial correctional system. Affidavits set out what programming is available and the affiants were subject to cross-examination.

[57] Teneil Caron is the manager of programs at the Whitehorse Correctional Centre. Her prior experience is as a case manager. I am satisfied that her knowledge of the programming within the territorial correctional system was extensive. She outlined the

types of programming available, as well as the limitations. An issue is that the inmate is required to fit the program, rather than having the program modified to fit the inmate. Modifications to core programming result in higher levels of recidivism. Accordingly, some inmates with limitations of mental health issues may have difficulty with the programming available.

[58] Most of the programming was described as journal based. The inmate works through either individual or group delivery models. The programs focus on risk factors and assist the inmate in identifying the risks and learning alternatives to criminal behavior. The programs are extensively described in her evidence and affidavit. I have no doubt that the programs are valuable for many offenders. Those who are motivated to change can identify their problems and risks and learn to consider other options. However, the programs are not particularly intensive. That is not meant as a criticism. It reflects the fact that most territorial inmates are either on remand or serving relatively short sentences. It would not make sense to design programs to deal with inmates who require long-term programs and control and display psychological, psychiatric, or personality disorder issues.

[59] Substance abuse issues are dealt with by giving the inmate basic information about substance-abuse disorders. The accused has been struggling with substance abuse disorders for decades. The programming is simply not of sufficient length to bring his problem under reasonable control.

[60] There is also programming to deal with trauma and other issues in conjunction with the Forensic Complex care team. Additionally, referrals or other programs are

available to deal with issues for inmates of an Indigenous background. The facility maintains a roster of knowledge keepers from First Nations. It was agreed that J.N.N. is now meeting with one of those people, Reg McGuinty. Those programs are sensitive to cultural, spiritual, and other issues that may exist for the inmate.

[61] It was also agreed that J.N.N. has participated in some counselling during his time in the correctional facility. The programming is available for remand, as well as sentenced prisoners. The value of that counselling is difficult to assess at this point, but it shows at least an effort on his part. Whether that is because of a desire to resolve his issues, or whether it is to provide a benefit on this application is not known.

[62] The treatment available in the institution is also largely available for those who have been released and are on probation. There are facilities within Whitehorse offering counselling, particularly to deal with substance abuse issues.

[63] Dr. Michael Healey is the clinical manager of the Forensic Complex Care team. He described the team as providing interdisciplinary care to those with mental health issues or other issues requiring more complex care. The team relies on forensic assessments and uses forensic based methods and procedures. After assessment, the team will develop an appropriate treatment plan for each participant. The treatment may be individual, or group treatment. If individual counselling is required, one hour a week counselling is provided. This can continue after the inmate is out of custody. I note that with a probation order, the counselling could continue for the length of the custody and an additional three years.

[64] The team provides four types of group counselling: values based living, group therapy for violent offenders, substance abuse, and a sexual offender treatment program. That program is 42 sessions in length, it is typically offered over 21 weeks, with two one-hour sessions per week. It is a version of the Rockwood Program, designed to accommodate low to moderate risk offenders.

[65] Dr. Healey also confirmed that programming is available in the community. There are substance abuse programs that provide residential care. There are programs that allow counselling on a relatively intensive basis.

[66] The forensic complex care team approach can also be designed to include psychiatric or other needs of an inmate, including after their release. As with the information on programming generally, I was impressed with the territorial rehabilitation programs. I expect that they are helpful for a significant number of inmates. However, they do not appear to be designed for, or capable of, treating those offenders who have significant personality disorders, long term substance abuse disorders and decades of involvement with the criminal justice system.

The Correctional Service of Canada Programs

[67] If incarcerated for two years or longer, J.N.N. would serve his sentence in the federal system. There is no penitentiary in Yukon, so he would be transferred to a facility in the Pacific region, in British Columbia. An affidavit from Courtney Fletcher was filed and she was presented as a witness. She is the regional program manager.

[68] There are five areas addressed by programming; general criminality, violence, family violence, substance abuse, and sexual violence. The programming is aimed at those who have a moderate or higher risk of recidivism. Priority is given to inmates based upon their projected date of release, so an inmate serving a shorter sentence is going to start programming sooner. The level of programming is designed to deal with all risk factors. Actuarial tools are used, but the programming will also be based on all of the assessments or psychological assessments.

[69] Of particular note is the intensity of the programming offered. While the territorial programming might involve sessions once per week, the federal programming can involve sessions of about two and one-half hours, five times per week. There are additional motivational models. Compliance with treatment is bound to be a factor considered by a parole board. J.N.N. has already been held to warrant expiry on earlier occasions. If he is now actually motivated to accept treatment, it could be to his benefit in more than just preventing recidivism.

[70] Counsel for J.N.N. pointed out all of the limitations of a federal sentence, in addition to pointing to the possibility of treatment while on probation. One potential issue would be release to a supervised facility in the lower mainland of British Columbia, or somewhere else far from his home and family. With respect, there is a facility for those of an Indigenous heritage. I would not expect him to be completely isolated and without resources. As well, separation from his current peer group would be healthy. A return to Whitehorse, or one of his earlier homes, would be too likely to put him back into contact with friends or family who may themselves have alcohol or drug problems. The

temptation to return to his old ways in the company of his peers may be irresistible. I do not conclude that an enforced relocation would be a negative factor for J.N.N..

The Sentence to be Imposed

[71] Section s. 718 of the *Code* sets out the factors for courts to consider. Balancing the weight given to each factor is the responsibility of the court. The offence was a serious assault upon a woman while she was unconscious. The issue of whether or not intercourse took place is not the factor that determines the sentence. By any measure, there was a significant assault, including removal of the victim's clothing while she was unable to resist, including the accused transferring his semen to the inside of her underwear. His responsibility his high. There is no evidence as to his level of intoxication, if any, when this occurred. The crime is similar to his two earlier convictions for sexual assault, in which a woman who was asleep or passed out awoke to find him assaulting her. It is clear that J.N.N. viewed the victims as objects to be used for his sexual gratification.

[72] Courts need to denounce such attacks. Although deterrence to J.N.N. personally has been demonstrated to have little impact, the rest of society needs to clearly understand that courts will not tolerate this crime.

[73] J.N.N.'s prospects for rehabilitation have to be assessed in light of his actions over the last 40 years. His record of offending demonstrates that he is unwilling to comply with offers of treatment or efforts at control. He has consistently refused to do what is required of him, even when it had to have been clear that breaches would result in incarceration. The evidence of Dr. Klassen demonstrates the personality issues that

have caused such disregard for societal norms. However, there are two factors that may give some hope. He has started to accept some treatment or counselling of late. The motivation is unclear, but at least it has started. As well, he is reaching an age where his likelihood of recidivism is going to drop. By the age of 70, his risk will decrease substantially. That is still a decade in the future, but at some point J.N.N. may be safe around others.

[74] His background is an important factor. Reading the Pre-Sentence Report and *Gladue* Report, it becomes more clear how a happy child turned into the man he is now. After a short period of living in a happy, loving environment, he was thrust into over a decade of abuse. Daily beatings, combined with demeaning conduct, an absence of affection and an absence of positive mentoring left him with an alcohol abuse disorder and the antisocial personality that plays such a part in his criminal activity.

[75] Section 718(2)(e) of the *Code* has been interpreted to mean more than simply looking at alternatives to incarceration. It does not mean that there is some automatic discount in the appropriate sentence. Rather, it must be considered together with other relevant factors in reaching a fit sentence. Unfortunately, the nature of this crime, in light of his record and refusal for decades to meaningfully accept assistance make it impossible to place great weight on this factor.

[76] Rehabilitation must also include consideration of what programs or resources are available, together with the likelihood that they may be successful for J.N.N.

[77] If a sentence of no longer than two years is imposed, J.N.N. could be subject to a probation order for three years. In my view, that would not adequately address the risks

that he would commit further crimes. He has never demonstrated a commitment to rehabilitating himself. His efforts now may be well intentioned, but do not give confidence that he would continue once out of custody. In my view, J.N.N. requires a far more intensive course of therapy, followed by a highly structured set of controls when he is in the community.

[78] The appropriate sentence for this crime in these circumstances is five years. He will be given credit for the time in custody at a rate of one and one-half to one. As of today, J.N.N. has served 500 days; that means he is credited with 750 days and must serve a further 1,076 days.

[79] He is required to provide a sample of his DNA to the correctional service of Canada by January 31, 2023. By then, his placement will have been determined. He is bound by a weapons prohibition pursuant to s. 109 of the *Code*. In light of his record and earlier orders, that will be for his lifetime. I will consider any application for an exception for hunting for sustenance. He is prohibited from having contact with the complainant pursuant to s. 743.21(1) of the *Code*. Pursuant to s. 490.012, J.N.N. is bound to comply with the provisions of the sexual offenders' information registry for the rest of his lifetime.

The LTSO

[80] An order may be made where the Court finds the following:

> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

(b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

[81] A sentence of imprisonment for more than two years has been imposed. The evidence of Dr. Klassen establishes that the substantial risk to reoffend is present. Indeed, J.N.N.'s criminal record demonstrates an almost unbroken string of convictions over more than four decades. Many convictions involve violence or harm to others. This crime was one of sexual violence. Considering s. 753.01 of the *Code*, J.N.N. has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons. Absent substantial control, J.N.N. presents a substantial risk of becoming intoxicated and doing something violent again.

[82] I also see a reasonable possibility that he could be released into the community after treatment and with substantial control. I agree that the recommendations of Dr. Klassen, if part of a LTSO, could allow him to be released, but keep others safe. J.N.N. needs to decide that refusal to work with others will only lead to further incarceration. I am satisfied that his risk is reduced if he is in a highly structured environment. I do not suggest that a comprehensive list of controls, as that would need to be established later, as part of his release. However, it is clear than he must abstain from the consumption of intoxicants and be monitored to establish that he is complying with such a condition. He needs to accept treatment for his violence and sexual violence. His place of residence should be controlled. He needs to seek and maintain

employment or have structured education or programming to occupy his time. He should not be in the company of peers who are using intoxicants.

[83] A LTSO for up to 10 years may be imposed. I am satisfied that such an order is called for. It will be for a period of eight years from his release from incarceration. That duration is based largely upon his age, plus the sentence that he will now serve. His risk of recidivism will drop substantially as he ages. If J.N.N. does not follow restrictions placed upon him over that time, it is unlikely that an extra two years would solve the problem. More likely, his refusal to follow any order in the future would only result in re-incarceration.

[84] J.N.N. is designated as subject to a LTSO for eight years after his release from custody. Pursuant to s. 760, the evidence on his trial and sentencing shall be provided to the Correctional Service of Canada.

[85] Costs and any surcharge are waived.

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KILLEEN T.C.J.