# SUPREME COURT OF YUKON

Citation: *R. v. Mathieson,* 2018 YKSC 49

Date: 20181113
S.C. No. 18-AP003
Registry: Whitehorse

HER MAJESTY THE QUEEN

Appellant

DARYL MICHAEL JOHN MATHIESON

Respondent

**Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code.***

Before Madam Justice Campbell

Appearances:
Leo Lane — Counsel for the Crown
Amy Steele — Counsel for the respondent

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] The Crown appeals from a sentence of six months' imprisonment followed by 15 months' probation imposed on Mr. Mathieson, the respondent, following his guilty plea to an offence of sexual assault contrary to s. 271 of the *Criminal Code*.

### BACKGROUND

[2] On February 18, 2017, Mr. Mathieson, who was 27 years old, and S.B., who was 14 years old, shared a two-litre alcoholic cooler. Mr. Mathieson and the victim, S.B.,

were friends. Mr. Mathieson was a welcome visitor in S.B.'s family home. The arrangement that night was for Mr. Mathieson to sleep in S.B.'s room, on the top bunk of her bed.

[3] In the early morning hours, S.B's mother entered her daughter's room and found Mr. Mathieson having intercourse with S.B. The mother told him to leave the house, which he did. S.B. left too, saying she was leaving "to be with her boyfriend". S.B. stayed at Mr. Mathieson's house for a couple of days.

[4] The mother contacted the police. Mr. Mathieson was arrested on February 22, 2017. After his arrest, he gave a statement to police. At first, he denied any physical contact with S.B., but then admitted to, on one occasion, having intercourse twice as well as engaging in oral sex with her. He admitted he knew she was only 14 years old.

[5] On March 17, 2017, Mr. Mathieson was released on a recognizance including a condition that he report to a bail supervisor.

[6] The events took place in Prince Rupert, British Columbia. Mr. Mathieson waived his charges to Whitehorse, Yukon. He made his first court appearance in Whitehorse in October 2017.

[7] From November 2017 to January 2018, Mr. Mathieson failed to report to his bail supervisor on nine occasions.

[8] On November 23, 2017, Mr. Mathieson entered a guilty plea to a charge of sexual assault against S.B. The Crown elected to proceed by summary conviction.

[9] The sentencing hearing was held on May 7, 2018. The Crown and the defence agreed to the facts of the breach being read in and considered as an aggravating

circumstance on the sexual assault sentencing without a conviction being registered on the breach charge.

[10] On June 13, 2018, Mr. Mathieson was sentenced to the mandatory minimum sentence of six months' imprisonment, reduced to four and one-half months to account for pre-sentence custody, plus 15 months' probation.

**Issues on Appeal**

[11] The issues on appeal are:

(i) did the sentencing judge err by giving insufficient weight to the objectives of denunciation and deterrence;

(ii) did the sentencing judge err by refusing to consider the victim's age as an aggravating circumstance independent of the mandatory minimum sentence; and

(iii) does the sentence offend the parity principle and is demonstrably unfit.

**Standard of Review**

[12] Sentencing judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*R. v. Lacasse*, 2015 SCC 64, at para. 39).

[13] In *R. v. Ipeelee*, 2012 SCC 13, at para. 38, the Supreme Court of Canada stated that a sentencing judge must have "sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender" (see also *R. v. Suter*, 2018 SCC 34, at para. 46).

[14] Considerable deference must therefore be accorded to the decision of the sentencing judge (*R. v. Lacasse*, *supra*, at paras. 39 to 41; and *R. v. Ipeelee*, *supra*, at para. 38).

[15] An appellate court must also keep in mind that: "[a]s long as the sentence meets the sentencing principles and objectives codified in ss. 718 to 718.2 of the *Criminal Code*, and is proportionate to the gravity of the offence and the level of blameworthiness of the offender, it will be a fit sentence'' (*R. v. Suter*, *supra*, at para. 27).

[16] An appellate court will only be justified in intervening with a sentence if:

(i) the sentencing judge erred in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor, and that error had an impact on sentence (i.e. the error materially contributed to the sentence imposed *(R. v. Suter*, *supra*, at para*. 7*) or, in other words, the sentence would have been different absent the error (*R. v. Agin*, 2018 BCCA 133, at paras. 56 and 57); or

(ii) the sentencing judge imposed a sentence that is demonstrably unfit (*R. v. Lacasse*, *supra*, at paras. 41, 43 and 44; *R. v. Suter*, *supra*, at paras. 24 and 28; *R. v. Joe*, 2017 YKCA 13, at para. 36).

[17] In either case, "the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances" (*R. v. Suter*, *supra*, at para. 24).

**ANALYSIS**

**(i) Did the sentencing judge err by giving insufficient weight to the objectives of denunciation and deterrence?**

[18] Section 718.01 of the *Criminal Code* provides that:

> 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.

[19] The appellant submits that while the judge correctly stated that denunciation and deterrence are the primary objectives in cases where the victim is under the age of 18, he failed to give any meaningful weight to these objectives and erred in giving primary consideration to the objective of rehabilitation in sentencing the respondent.

[20] The appellant further submits that the judge's reasoning, which resulted in the imposition of the minimum sentence, does little to signal society's condemnation of sexual abuse against minors.

[21] The appellant relies on the three passages of the judge's reasons for sentence in which he refers to the principles of denunciation and deterrence as evidence that:

- the judge erred in considering that the primary objectives of denunciation and deterrence are subsumed in the mandatory minimum punishment for the offence;
- the judge erred in using rehabilitation as a substitute for deterrence; and
- the judge failed to explain how the minimum sentence he imposed meets the primary objectives of deterrence and denunciation, except to say it is the least amount of custody required by law;

[22] The passages of the sentencing judge's decision the appellant relies on are the following:

> [109] Section 718.01 prescribes that when the victim is under the age of 18, the objectives of denunciation and deterrence are to be given primary consideration. These objectives are reflected in the mandatory minimum

> punishment of six months' incarceration as prescribed in s. 271 when the victim is under 16 years of age.
>
> …
>
> [121] In this case, deterrence and denunciation are the primary sentencing objectives. Given the mandatory minimum sentence of six months, it should be accepted that, in certain circumstances, these objectives can be accomplished by the imposition of this minimum sentence.
>
> [122] Even in cases where denunciation and deterrence are the primary objectives, rehabilitation is still, where the prospects for rehabilitation are present, an important objective. In imposing a sentence that supports and encourages the rehabilitation of an offender, a court is also accomplishing the objective of specific deterrence and providing protection for the community from further offending in the future.

[23] The respondent submits that, read in the context of the entire decision, these passages show that the sentencing judge clearly articulated that denunciation and deterrence are to be given primary consideration.

[24] The respondent submits that the judge considered the sexual assault to be a serious offence involving a 14-year-old victim and a 27-year-old adult offender and his sentence gave effect to the principles of denunciation and deterrence. Counsel for the respondent also submits that imposing a sentence of incarceration, even if it is the minimum sentence, on someone who has never spent time in jail, has, in and of itself, a denunciatory and deterrent effect.

[25] The respondent further submits that the appellant's position on the minimum sentence simply creates an inflationary floor which, if accepted, would make the minimum sentence adopted by Parliament meaningless.

[26] Having considered the parties respective arguments, I do not find that, even read together, the passages relied upon by the appellant demonstrate that the sentencing judge concluded that the objectives of denunciation and deterrence are subsumed in the mandatory minimum punishment for the offence.

[27] First, the judge rightly stated, at paras. 109 and 121 of his decision, that denunciation and deterrence must be given primary consideration. The judge then observed that the objectives of denunciation and deterrence "are reflected in the mandatory minimum punishment of six months". I see nothing wrong with this statement. It simply recognizes that, by its very nature, incarceration serves to achieve the principles of denunciation and deterrence.

[28] I also find no error in the sentencing judge's assertion that, in certain circumstances, the objectives of denunciation and deterrence can be accomplished by the imposition of a minimum sentence. Saying so does not equate to concluding that denunciation and deterrence are automatically incorporated in a mandatory minimum sentence and need not be weighed or given further consideration. It simply recognizes that sentencing is a balancing exercise and that, in certain cases, depending on the offender as well as on the nature and circumstances of the offence, the objectives of denunciation and deterrence can be achieved through the imposition of the minimum sentence provided by law.

[29] Also, the appellant relies on para. 122 of the judge's reasons to contend that he erred in considering rehabilitation as a substitute for deterrence:

> [122] … In imposing a sentence that supports and encourages the rehabilitation of an offender, a court is also accomplishing the objective of specific deterrence and

> providing protection for the community from further offending in the future.

[30] First, I note that the sentencing judge refers to the concept of specific deterrence in that paragraph. Second, there is support in the case law for the proposition that, in certain circumstances, rehabilitation may serve the objective of specific deterrence.

[31] In *R. v. Walsh*, 2011 ONCA 325, at para. 13, the Court of Appeal of Ontario recognized that in certain circumstances successful rehabilitation may be responsive to the objective of specific deterrence.

[32] In *R. v. Mackrell*, [1997] Y.J. No. 21 (Y.K.S.C.), at para. 27, Justice Maddison also endorsed the concept in stating that:

> Specific deterrence of this accused will be accomplished by rehabilitation. If he continues while in prison to take the positive approach he has taken while awaiting sentence, he will accomplish his own rehabilitation. …

[33] The interconnection between the objectives of rehabilitation and specific deterrence was also acknowledged in *R. v. Blancard*, [1992] B.C.J. No. 762 (B.C.C.A.), and in *R. v. Davis*, 2012 ONSC 6486, at para. 36.

[34] These decisions recognize that, in certain circumstances, specific deterrence may be furthered through rehabilitation permitting offenders to address the issues, such as alcohol and drug abuse, that surrounded or triggered their criminal behaviour. In that sense, for these individuals, rehabilitation may serve as a deterrent to reoffend.

[35] Furthermore, rehabilitation remains an important objective to consider even when denunciation and deterrence are to be given primary consideration (*R. v. D.B.S.*, 2018 YKSC 16, at para.36; *R. v. Menicoche*, 2016 YKCA 7, at para. 45).

[36] This is even more evident in the case of Mr. Mathieson who is an Aboriginal offender with substantial *Gladue* factors. As such, the judge was required to consider s. 718.2 (e) of the *Criminal Code* which provides that:

> [A]ll 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.

[37] Overall, I find that the judge's reasons for sentence demonstrate that he not only stated that denunciation and deterrence are the primary sentencing objectives in this case but that he also considered and applied these objectives in sentencing the respondent.

[38] I am therefore unable to accede to the appellant's submission that the sentencing judge erred in giving insufficient weight to the objectives of denunciation and deterrence.

**(ii) Did the sentencing judge err by refusing to consider the victim's age as an aggravating circumstance independent of the mandatory minimum sentence?**

[39] At para. 117 of his reasons, the sentencing judge concluded that the aggravating factor associated to the victim's age is already recognized in s. 271(b) by the mandatory minimum sentence and need not be further considered in sentencing Mr. Mathieson.

[40] The judge articulated his reasoning as follows:

> [117] It is a statutorily aggravating factor that the victim was under the age of 18, as set out in s. 718.01. I am satisfied, however, that this aggravating factor is already recognized in s. 271(b) by the mandatory minimum punishment that is to be imposed on the basis of the victim's age. To further increase the sentence for sexually assaulting a person under the age of 16, on the basis that the victim is under the age of 16, would not be logical or appropriate.

[41] The appellant submits that the sentencing judge erred in declining to apply the statutorily aggravating factor set out in s. 718.2(a)(ii.1) of the *Criminal Code*.

[42] In relying on the decision of *R. v. Allen*, 2012 BCCA 377, the appellant submits that:

(i) s. 718.01 (denunciation and deterrence as the primary consideration in cases involving the abuse of a person under the age of 18); and

(ii) s. 718.2(a)(ii.1) (evidence that the offender, in committing the offence abused a person under the age of 18 is an aggravating factor)

are to be considered in addition to the mandatory minimum sentence provided by s. 271(b) of the *Criminal Code* in cases involving a victim under the age of 16.

[43] In *R. v. Allen*, *supra*, at para. 60, the Court of Appeal of British Columbia stated:

> Parliament has made it very clear that the protection of children is a basic value of Canadian society which the courts must defend. It has done this by creating a minimum sentence of imprisonment for the distribution of child pornography (s. 163.1(3)(a)) and by requiring that offences that involve the abuse of persons under 18 years of age be both an aggravating factor in sentencing and the subject of a sentence which primarily addresses denunciation and deterrence (ss. 718.2 and 718.01). …

[44] The appellant further relies on the decision of the Supreme Court of British Columbia in *R. v. Akumu,* 2017 BCSC 1051, in support of its position. In *Akumu*, the court rejected the argument that the age of the victim, who was 14 years old, should not be considered an aggravating factor in sentencing the accused because it is also an essential element of the offence of sexual interference:

> [44] Ms. Hartney submitted that A.W.'s age is not an aggravating circumstances despite s. 718.2(a)(ii.1) because her age is an element of the offence of sexual interference, citing *R. v. V.J.S*., 2016 SKPC 112. In that case, the court held at para. 34 that "[a]n element of the offence required to

> establish guilt cannot also serve to aggravate the seriousness of the offence or the degree of responsibility of the offender".
>
> [45] While there may be some logic to this line of thinking, it runs contrary to the express words of s. 718.2(a)(ii.1), especially when considered in the context of the sentencing principles generally and the clear direction in s. 718.01. It also runs contrary to many authorities that have considered abuse of a person under 18 as an aggravating circumstance in sentencing offenders for sexual interference and like charges. See, for example, *R. v. P.D.W.*, 2015 BCSC 660; *R. v. O.C.M*., [2012 B.C.J. No. 2924 (SC); and *R. v. Lowney*, 2015 BCSC 1721.

[45] In *Akumu*, the court went on to consider the age of the victim as an aggravating factor as prescribed by s. 718(2)(ii.1) of the *Criminal Code* even though the age of the victim is an essential element of the offence which also gives rise to a mandatory minimum sentence (para. 62).

[46] More recently, in *R v. D.B.S.*, *supra*, at para. 6, Justice Veale, as he then was, in sentencing an offender for sexual interference, considered the victim's young age as a statutorily aggravating circumstance pursuant to s. 718.2(a)(ii.1) despite the fact that the age of the victim is an essential element of the offence which also carries a minimum sentence of imprisonment.

[47] The respondent, on the other hand, submits that it was open to the sentencing judge to conclude that the aggravating factor in s. 718.2(a)(ii.1) is already recognized in the minimum sentence of imprisonment set out in s. 271(b) because s. 718.2(a)(ii.1) applies to all offences in the *Criminal Code*, including those that do not carry a mandatory minimum punishment. Counsel for the respondent did not provide any authorities in support of her position.

[48] The respondent further submits that, even if the sentencing judge had committed an error in principle, it did not, ultimately, affect the sentence, and therefore the sentence should not be overturned.

[49] I find that the case law and the sentencing framework provided by the *Criminal Code* support the position that s. 718(2)(a)(ii.1), which deems the abuse of a person under the age of 18 to be an aggravating factor, is to be considered in addition to s. 718.01 and to the minimum term of imprisonment mandated by s. 271(b) when the victim is under the age of 16.

[50] The only conclusion that can be drawn from the sentencing judge's stated reasons is that he declined to give effect to and did not consider the victim's young age as a statutorily aggravating factor independent of the mandatory minimum sentence. In doing so, the judge erred in failing to consider a relevant aggravating factor in sentencing the respondent.

[51] I also conclude that the sentencing judge's error had a material impact on the sentence he imposed based on his conclusion that "… this aggravating factor is already recognized in s. 271(b) by the mandatory minimum punishment that is to be imposed on the basis of the victim's age. To further increase the sentence for sexually assaulting a person under the age of 16, on the basis that the victim is under the age of 16, would not be logical or appropriate" (para. 117).

[52] Having concluded that the error materially affected the sentence, a fit sentence remains to be determined.

[53] The appellant submits that the sentence of six months' imprisonment the respondent received falls well below the range of sentences imposed in cases of sexual

assault involving sexual intercourse with a victim unable to consent. As the victim in this case was incapable of consenting due to her young age, the appellant submits that the sentencing range ought to be similar to, if not higher than, the sentencing range of 12 to 30 months' imprisonment identified by Justice Gower in *R. v. White*, 2008 YKSC 34, at para. 85, and accepted in *R. v. Rosenthal*, 2015 YKCA 1, for sexual intercourse committed against a sleeping or an unconscious victim. The appellant submits that a sentence of 12 months' imprisonment is fit in the circumstances. The appellant does not challenge the 15 months' probation order also imposed on the respondent in this matter.

[54] The appellant relies on the decision of the Court of Appeal of Saskatchewan in *R. v. Revet*, 2010 SKCA 71 (followed by *R. v. Whiting*, 2013 SKCA 101), in support of its position that this Court should adopt the sentencing range identified in *White*.

[55] In *Revet*, the majority upheld a sentence of three years' imprisonment imposed on a 39-year-old male who pleaded guilty to an offence of sexual assault on a 14-year-old girl contrary to s. 271(1)(a) of the *Criminal Code*. The majority concluded that the three years starting point identified for sexual assaults against victims who are incapable of consenting due to being under the influence of alcohol and/or drugs or being asleep was also applicable to cases where the victim is incapable of consenting due to his or her young age (para. 25). The majority also expressed the view that: "Sexual assaults upon children are at least as high in terms of gravity, if not higher, than sexual assaults upon adult persons" (para. 26). In that case, neither Crown nor defence was able to provide the Court of Appeal with precedents from Saskatchewan involving similar circumstances (para. 16).

[56] I recognize that there may be a certain logic in adopting the sentencing range for sexual assaults committed on sleeping or unconscious victims who are incapable of consenting when considering cases of sexual assaults against victims who are incapable of consenting because of their young age.

[57] However, I am not inclined to adopt this approach. Sentencing ranges are not "hard and fast" rules. They are only tools amongst others developed by the courts to provide guidance to sentencing judges in the exercise of their discretion. (*Lacasse*, *supra*, at para. 69).

[58] Justice Wagner, as he then was, described sentencing ranges as follows in *Lacasse*, *supra*, at para. 57*:*

> … Where sentencing ranges are concerned, although they are used mainly to ensure the parity of sentences, they reflect all the principles and objectives of sentencing. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case. …

[59] Simply transposing a sentencing range arising from one general set of circumstances to another general set of circumstances, albeit where similarities exist, would not achieve, in my view, what sentencing ranges were developed for, namely to provide a description or an overview of the minimum and maximum sentences imposed by the courts for similar offences committed in similar circumstances.

[60] Also, unlike the situation in *Revet*, this is not a case where sentencing precedents are unavailable.

[61] Furthermore, in my view, a review of the sentences involving cases where an adult had sexual intercourse with a person under the age of 16 would result in a very broad range. Sentences for sexual assaults involving children and/or teenagers vary widely depending on factors such as the age of the victim, the nature of the relationship between the victim and the accused, and the circumstances surrounding the commission of the offence.

[62] I do not find it necessary, for the purpose of this appeal, to engage in such a wide review. I will therefore limit my review of the case law to sentences imposed in cases comparable to the one before me.

[63] The appellant relies on a number of precedents from Alberta, Saskatchewan and the Northwest Territories where sentences from 14 months to three years' imprisonment were imposed for offences of sexual assault or sexual interference committed in somewhat similar circumstances to the case at bar. In these jurisdictions, sentencing is guided by the use of starting points and categories of offences, such as "major sexual assault". However, Yukon does not subscribe to the starting point approach (*R. v. D.B.S.*, *supra*, at para. 29) nor does it subscribe to the use of categories of sexual assault or sexual interference in sentencing. These decisions, while still informative with regard to factors and principles applicable to sentencing, are therefore of less relevance in determining a fit sentence for the respondent.

[64] The appellant also filed two decisions from Yukon and one decision from Ontario in support of its position in this appeal.

[65] In *R. v. Menicoche*, *supra*, the Court of Appeal for Yukon reduced a sentence of 23 months' imprisonment to 17 months for a 26-year-old male offender for the sexual

assault of a 15-year-old victim. The sexual assault consisted of one instance of unprotected anal intercourse with the victim while she was sleeping at the offender's home. The victim woke up while being assaulted. She elbowed the offender away and told him to stop, which he did. The Court of Appeal agreed that the 12 to 30 months' sentencing range established in *White* was applicable as the victim was asleep when the offender sexually assaulted her. The aggravating factors were the age difference between the offender and the victim, the fact that the offender had supplied alcohol to the victim, the negative impact on the victim, the serious and invasive nature of the sexual assault and the fact that it was unprotected, thus putting the victim at risk to contracting a sexually transmitted disease. The mitigating factors were the minor criminal record, the fact that the offender was an Aboriginal person with compelling *Gladue* factors, and his positive future prospects.

[66] In *R. v. Quintal*, 2016 YKTC 46, an 18-year-old offender was sentenced to 10 months' imprisonment less 11 days of pre-sentence custody followed by a two-year probation order. The offender and the victim were both attending the same school at the time of the offence. The victim was 13 years old. The sexual assault took place in the vehicle of the offender. The offender put his hand on the victim's leg who was too scared to say anything. The offender removed the victim's pants and had vaginal intercourse with her. The aggravating circumstances were the serious invasive nature of the offence and the negative impact on the victim. The mitigating factors were the early guilty plea, the offender's remorse, the fact that he was a young adult of prior good character who had been a productive member of society, and his low risk to reoffend. The offender was a young Aboriginal man and the judge took into consideration the

presence of *Gladue* factors. The sentencing judge noted that the range of sentence was arguably 12 months' imprisonment and upward (para. 30).

[67] In *R. v. Hussein*, 2017 ONSC 4202, the offender was found guilty after trial of sexual assault, sexual interference and sexual touching on a 13-year-old victim. The offender was 27 years old at the time of the offence. The charges of sexual assault and sexual touching were judicially stayed pursuant to the rule against multiple convictions stated in *R. v. Kienapple*, [1975] 1 S.C.R. 729. The sentencing judge imposed a sentence of 15 months' imprisonment followed by a two-year probation order. The offender and the victim became friends. They met three or four times and exchanged text messages of a sexual nature. The victim invited the offender to her home while her mother was away. He brought a bottle of beer that they drank together. The offence involved sexual touching as well as protected vaginal intercourse. The event was interrupted when the victim's mother came home early and discovered the two in the bedroom. The judge concluded that the offender and the victim were in some sort of a relationship. The aggravating factors were the nature of the sexual assault on a 13-year-old girl, and the fact that the offence took place after the offender had been made aware of the victim's age. The mitigating factors were the absence of criminal record, the fact that it was a single incident that occurred during a short period of time, and the offender's somewhat lesser degree of moral blameworthiness.

[68] In the case at bar, the respondent relies solely on the principles stated in *R. v. Lacasse, supra*, and on the decisions referred to by the sentencing judge in his decision to argue that six months imprisonment is a fit sentence in the circumstances.

[69] The sentencing judge referred to a number of cases in his reasons for sentence. In addition to the Yukon decisions of *R. v. Quintal* and *R. v. Menicoche*, which I have already referred to, the judge considered a number of decisions from British Columbia and Yukon, including the decisions of *R. v. William*, 2014 BCSC 1639 and *R. v. Ross*, unreported, (2017) December 14 of the Yukon Territorial Court.

[70] In *R. v. William*, *supra*, the offender was convicted of sexual interference. He was sentenced to one year of imprisonment followed by three years' probation. The victim was 15 years old. The offender and the victim had been drinking and consuming drugs with others. The offender digitally penetrated the victim and had sexual intercourse with her. The aggravating factors were the negative emotional impact on the victim, the circumstances surrounding the offence which involved full intercourse with a victim who was under the influence of drugs and alcohol, and the fact that the offender had asked a witness to lie in court. The mitigating factors included: the offender's acceptance of responsibility, remorse and his apology to the victim; the absence of a criminal record; the reduced likelihood of reoffending; and the offender's willingness to undertake substance abuse treatment and counselling. The court also took into consideration the fact that the accused was an aboriginal person with *Gladue* factors.

[71] The sentencing judge also considered the decision of *R. v. Ross*, *supra*. As the decision is unreported, I am relying solely on the summary of the decision as outlined by the sentencing judge. In *Ross*, a 25-year-old offender pleaded guilty to a charge of sexual interference on a 15-year-old girl. The victim invited the offender to her home where he performed oral sex on the victim and had sexual intercourse with her. The sentencing judge acceded to the joint submission of Crown and defence of a 90-day

intermittent sentence followed by a 90-day period of probation. In doing so, the sentencing judge noted that the joint submission was at the very lowest end of the sentencing range and that if the case was presented as a precedent, its unusual details and circumstances had to be considered. The offender had no criminal record. He was an Aboriginal person with significant *Gladue* factors. The offender became ill as a child, and although he recovered, his illness had a significant negative impact on his learning abilities. Both Crown and defence counsel agreed that although he was 25 years old, his diminished mental capacity effectively lowered his age. At the time of sentencing, the offender, who had abused alcohol in the past, had quit drinking and had obtained fulltime employment. There were also some challenges for the Crown in prosecuting the offence.

[72] In addition to the decisions provided by the appellant and those referred to by the sentencing judge in his reasons for sentence, I have identified a number of relevant sentencing decisions from Yukon and British Columbia. As this matter originated and was waived from British Columbia, precedents emanating from that province should be given consideration in the sentencing process (*R. v. Buy*, 2013 BCCA 168, paras. 14 and 15).

[73] My review includes sentencing precedents for the offence of sexual interference (s. 151 of the *Criminal Code*), as the offences of sexual interference and of sexual assault, when the victim is under the age of consent, carry similar punishments under the *Criminal Code*. This is despite the fact that their mandatory minimum sentence have changed over time and differ when proceeded summarily.

[74] In *R. v. Veinotte*, 2016 BCCA 21, the 29-year-old accused pleaded guilty to a charge of sexual assault against a 13-year-old girl. The accused had known the victim and her parents for several years. The girl went to the offender's home. They talked, smoked marihuana and cigarettes, listened to music and watched television together. They had sexual intercourse twice and he also performed oral sex on her. The victim indicated at first that she was feeling really good and that no one had treated her in that way before. She also told the police that she was not frightened by the accused but was scared of losing him as a friend. She did not feel angry but was disappointed. The accused expressed remorse to the victim's family shortly after the incident and gave a statement to the police in which he admitted the circumstances of the offence. The offender's parents were both of Mi'kmaq descent. *Gladue* factors were present. The offender had been molested by another male when he was 11 years old. The offender had a significant substance abuse problem. However, he ceased consuming drugs and alcohol after the offence and had been substance free for almost a year at the time of sentencing. He had a prior but unrelated criminal record. At sentencing, the judge expressed his frustration with the Crown for proceeding by indictment and imposed the minimum sentence of one year imprisonment followed by a one year probation order. In upholding the sentence, the Court of Appeal of British Columbia stated:

> [29] As the majority in *Lacasse* stated, the cardinal principal is proportionality. It is self-evident from the review of the record in this case that this offence is very serious in that it involved an intrusive but non-violent sexual assault of a 13-year-old girl. No one would suggest that it is not serious or that Parliament's intention in mandating a minimum sentence in a crime against a child should be minimized.
>
> [30] However, it is also self-evident that Mr. Veinotte had an exceedingly deprived childhood marred by his own alcohol

> addiction and drug use. He expressed his remorse at an early opportunity and pleaded guilty before trial. He has embarked on a rehabilitation with remarkable success given a history of addiction that appears to have span more than half his life.

[75] In *R. v. Butler*, 2014 YKTC 67, the accused pleaded guilty on the day of the trial to one count of sexual interference. The 23-year-old accused invited a 14-year-old girl and her 15-year-old cousin to his apartment where he offered them cocaine. The offender had sexual intercourse twice with the 14-year-old victim that night. The offender then had sexual intercourse with the victim on a few occasions over the next few months. The offender also had sexual intercourse with the victim after being arrested for sexual interference and while on a recognizance with a no contact provision. The aggravating factors included: a prior criminal record with a prior conviction for sexual interference; the offender was on a recognizance with a condition to have no contact with the victim when the last sexual encounter occurred; he had been given clear notice that the victim was underage; he had little real remorse and a tendency to blame the victim; his negative progress report from the sex offender treatment program; and his limited rehabilitative prospects. The mitigating factors were: the guilty plea, the fact that the offender had been the victim of a similar offence when he was 14; his full-time employment; and the support he had from his family and his spouse. The offender was sentenced to 15 months' imprisonment followed by two years of probation.

[76] In *R. v. Lamb,* 2013 BCCA 372*,* the accused pleaded guilty to one count of sexual interference and one count of sexual luring. The Court of Appeal of British Columbia upheld a sentence of 12 months' imprisonment for sexual interference and 12

months' consecutive for sexual luring (after taking into account six months of pre-sentence custody) followed by three years' probation. The accused was 24 years old and the complainant 15 when the events occurred. The accused met the victim on a bus and they soon began an intimate relationship. The victim told her parents that she was in love with the offender and planned to run away with him when she turned 16. Her father moved her to Mexico in an attempt to separate them. Despite her father moving the victim out of the country, the offender continued to pursue a relationship with her by email. Their exchange of sexual emails made it clear that their relationship had been sexual early on. The father of the victim discovered the emails and complained to the police. The offender had a drug addiction. The mitigating factors were the early guilty plea, the fact that the offender had the support of his family and the positive changes he had made since his arrest. The aggravating factors were the negative pre-sentence report, the offender's high risk to reoffend and the fact that the offence occurred within five or six weeks of his release from jail in respect to an offence of sexual interference against a 15 year old. The judge also considered the offender's lack of insight. Overall the Court of Appeal was not persuaded that the sentence was excessive and unfit.

[77] In *R. v. Craig,* 2013 BCSC 2098, the offender was convicted by a jury of sexual assault, sexual interference and communicating with a person under the age of 16 by means of computer for a sexual purpose. The charge of sexual assault was judicially stayed pursuant to the principle stated in *Kienapple*. The offender was 22 years old at the time of the offence and the victim was 13 years old. The offender was sentenced to 15 months' imprisonment followed by two years' probation. The offender initiated contact with the complainant through a social networking website, after which they met

on two occasions. On the second occasion the offender had sexual intercourse with the victim. The offender had a serious drinking problem at the time of the events. The aggravating factors included: the age of the victim; the negative impact on the victim; the nature of the offence involving sexual intercourse and the offender's attempt to reinitiate contact with the victim through an alias, after it was clear she no longer wanted to have contact with him. The mitigating factors were the accused relative youth, the absence of a related criminal record, and the steps the offender had already taken towards rehabilitation.

[78] In *R. v. L.P.J.*, 2015 BCPC 298, the offender was found guilty after trial of sexual assault and sexual interference. The charge of sexual assault was stayed pursuant to the *Kienapple* principle. The offender was sentenced to 16 months' imprisonment followed by a probation term of two years. The offender, who was 24 years old at the time, and the victim, who turned 15 around the time the events took place, were friends. The victim was intoxicated when she arrived at the offender's family home with other friends to play video games. After her arrival, she consumed more alcohol with the accused and their friends and became extremely intoxicated. The offender had sexual intercourse with the victim twice that night after the other friends had departed. He later admitted to police that he had had sexual intercourse with the victim on a prior occasion. The offender was a young Aboriginal male. Although both his parents had a drinking problem when he was a young child, they ceased drinking when he was approximately eight years old and their home had been sober, happy and healthy since then. The aggravating factors included: the age of the victim; the fact that the offender had sexual intercourse on two different occasions with her; the invasive nature of the

offence; the vulnerability of the victim due to her consumption of alcohol; and the offender's lack of insight. The mitigating factors were the absence of a criminal record and the fact that the offender was gainfully employed and was of previously good character.

[79] In *R. v. Lowney*, 2015 BCSC 1721, the offender pleaded guilty to two charges of sexual interference, one charge of possession of marihuana for the purpose of trafficking and one charge of failing to comply with a recognizance. The Crown proceeded by indictment. The offender who had 22 days of pre-sentence custody, was sentenced to 15 months' imprisonment and 14 months' concurrent on the two charges of sexual interference followed by a two years' probation order. The offender, who was 21 years old at the time, engaged in sexual activities with two 15-year-old girls. He had met the first complainant online and engaged in sexually explicit communications with her. They met on four occasions. On two of the occasions the accused paid the victim to perform fellatio on him and to video record their sexual activities. The offender also had vaginal intercourse with the victim on one occasion and anal intercourse on one occasion. The offender's girlfriend found the videos in question and posted some images on Facebook. The offender denied any knowledge or participation in the Facebook posts. The parents of the victim became aware of this and contacted the police who conducted a search of the accused's apartment. They found marihuana and another video recording of the offender having vaginal intercourse, on one occasion, with another 15-year-old girl. The video also showed her performing fellatio on him. The aggravating factors were: the number of victims; the fact that the offender provided money to one of the victim to engage in sexual activity; the nature of the sexual conduct

including vaginal and anal intercourse as well as fellatio; and the video recording of the sexual activities. The court also considered the age of the victims as a mandatory aggravating factor. The mitigating factors were the offender's young age, the absence of a criminal record and the guilty plea prior to trial. The sentencing judge also took into consideration that the accused was remorseful, had taken steps towards rehabilitation and had a supportive family.

[80] Finally, in *R. v. Louie*, 2014 BCSC 552, the offender pleaded guilty to one count of sexual interference after the victim had testified at the preliminary inquiry. The Crown proceeded by indictment. The accused, a 32-year-old male, was sentenced to 18 months' imprisonment followed by three years' probation for having sexual intercourse on at least three occasions, over a number of days with a 14-year-old girl. The acts of sexual intercourse took place after the offender and the victim had consumed a considerable quantity of alcohol supplied by the offender. The incidents had a significant negative impact on the victim who thought she was in a romantic relationship with the offender. At some point prior to the preliminary inquiry the offender asked the victim to recant. The aggravating factors were: the age difference, the fact that the sexual assaults occurred on more than one occasion and involved penile penetration with risk of pregnancy, the offender supplied alcohol to the victim, he attempted to convince the victim to recant, and the offender had a prior sexual assault conviction against a 17-year-old victim for which he was on probation when he committed the offence. The mitigating factors were the guilty plea, his acceptance of responsibility for his actions and his remorse. The sentencing judge also took into consideration the fact that the offender was an Aboriginal person with significant *Gladue* factors. The offender had a

longstanding problem with alcohol abuse but had engaged in counselling and had been sober for the two years prior to sentencing. The sentencing judge also noted that the offender had a strong and supportive relationship with his family.

[81] This review of reported sentencing decisions leads me to conclude that in the recent past, courts in Yukon and in British Columbia have generally imposed sentences from 12 to 18 months' imprisonment for offences of sexual assault and/or sexual interference committed in comparable circumstances to the case before me, with the exception of the two Yukon cases mentioned earlier in this decision in which sentences below 12 months were imposed (*R. v. Quintal* and *R. v. Ross* - the latter decision is distinguishable from the case at bar based on the particular circumstances of that case and the comments made by the sentencing judge).

[82] The offence of sexual assault is punishable by a minimum of six months and a maximum of two years less one day of imprisonment when the Crown elects to proceed by summary conviction (s. 271(b) of the *Criminal Code*).

[83] The objectives and principles of sentencing are stated in ss. 718 to 718.2 of the *Criminal Code*. As noted earlier, s. 718.01 provides that denunciation and deterrence are to be given primary consideration in cases such as this one involving the abuse of a person under the age of 18 years old.

[84] This objective, as well as the mandatory minimum sentence provided for sexual assault when the victim is under the age of consent, recognize the importance that our society attaches to the protection of children against abuse. This extends to teenagers who may in certain cases appear mature for their age but who are still in a crucial stage of their physical, emotional and intellectual development, and remain, in many ways,

vulnerable and in need of protection (See the majority's judgment in *R. v. Hajar*, 2016 ABCA 222, regarding the considerations underlying increasing the age of consent to sexual acts with adults not within the close-in-age exception).

[85] I concur with Judge Ruddy's statement in *R. v. Butler*, *supra*, at para. 6, with regard more specifically to matters involving adults engaging in sexual activities with teenagers:

> Ms. K's apparent belief that silence equals consent also underscores the very reason why someone under the age of 16 cannot in law consent to sexual activity with an adult. It is a law which recognizes the particular vulnerability of young persons who, from a developmental perspective, are ill-equipped to process and to understand the myriad of complex emotions and implications associated with engaging in sexual activity and who are consequently at a higher risk of sexual victimization.

[86] However, even in cases where denunciation and deterrence are of primary consideration, the principle of proportionality (s. 718.1), which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender", remains central to the determination of a fit sentence. (*Lacasse*, *supra*, at para.12)

[87] As stated by Justice Wagner, as he then was, in *Lacasse*, *supra*, at para. 53:

> … Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.

[88] Therefore, the principle of parity of sentences remains secondary to the fundamental principle of proportionality. (*R. v. Lacasse*, *supra*, at para. 54)

[89] Furthermore, while parity is an important consideration, each case presents its unique set of circumstances and factors that may call for a sentence outside of a particular range. Lesser or greater sentences may be appropriate where circumstances warrant. (*R. v. Suter*, *supra*, at para. 4; *R. v. White*, *supra*, at para. 87).

[90] The severity of a sentence depends not only on the seriousness of the offence but also on the moral blameworthiness of the offender and the specific circumstances of each case (*R. v. Lacasse*, *supra*, at para. 12, *R. v. Ipeelee*, *supra*, at para. 38).

[91] The Court must also pay attention to the unique circumstances of Mr. Mathieson as an Aboriginal person who comes before the Court with significant *Gladue* factors.

[92] As stated by the Court of Appeal for Yukon in *R. v. Joe*, *supra*, at para 78, a sentencing judge must take the offender's "Aboriginal heritage into account and give it tangible effect when crafting the sentence."

[93] In determining a fit sentence for Mr. Mathieson, the Court must also give effect to the principles of rehabilitation and restraint.

[94] Turning to the aggravating circumstances of this case, first, it is statutorily aggravating that the offence involved the abuse of a person under the age of 18 (s. 718.2(a)(ii.1)). Second, the respondent failed to report to his bail supervision on nine occasions contrary to his recognizance. As agreed by the parties at sentencing, the facts of the breach should be considered an aggravating circumstance. Third, although there is no evidence that Mr. Mathieson supplied alcohol to S.B., he did consume alcohol with the underage victim prior to the offence. Fourth, the nature of the sexual assault which involved full intercourse with the victim.

[95] I also take into consideration the likelihood of psychological harm to the victim in cases of sexual assaults even though the victim did not file a victim impact statement (*R. v. Rosenthal*, 2015 YKCA 1, at para. 6).

[96] There are, however, a fair number of mitigating circumstances in this matter. First, the fact that Mr. Mathieson waived his matter to the Yukon and entered an early guilty plea, sparing the victim and/or her mother from having to testify in court. Also, Mr. Mathieson is remorseful and possesses insight into how his actions may have impacted the victim and her family.

[97] I also take note of the fact that Mr. Mathieson is still relatively young and that he has a limited but unrelated criminal record.

[98] Further, Mr. Mathieson had a long-standing issue with alcohol and drug abuse going back to his troubled upbringing. However, he abstained from drinking and using drugs for a period of 15 months prior to his sentencing. He completed an intensive five-week residential treatment program after his arrest, attended Alcohol and Drug Services for follow up counselling and attended Alcoholics Anonymous regularly. There is also evidence that Mr. Mathieson has taken steps to deal with his mental health issues.

[99] The sexual assault of a 14 year-old-girl by the respondent is a serious offence. The fact that, in this case, the victim may have thought Mr. Mathieson was her boyfriend and was said to have *de facto* consented to the sexual acts do not reduce the seriousness of the offence (*R. v. Hajar*, *supra*, at paras. 82 to 103). Also, the fact that no violence beyond the violence inherently associated to the very nature of the offence of sexual assault is not a mitigating factor (*R. v. Hajar*, *supra*, at paras. 112 and 116).

[100] As indicated, denunciation and deterrence are the primary consideration in cases involving the abuse of a person under the age of 18 years old. There are also a number of aggravating factors in this case.

[101] However, I find that Mr. Mathieson's difficult circumstances and background as an Aboriginal person, his relatively young age, his early guilty plea, his insight and remorse, his sustained efforts prior to sentencing at dealing with his substance abuse and mental health issues and his path toward rehabilitation must also be recognized and should result in a sentence lower than that of 12 to 18 months' imprisonment.

**CONCLUSION**

[102] I find that a sentence of nine months' imprisonment is appropriate in the circumstances of this case followed by a period of 15 months' probation. However, I do recognize that the respondent has likely been released from prison, having already served the imprisonment portion of the sentence imposed by the Territorial Court of Yukon. Considering this and Mr. Mathieson's path towards rehabilitation, I elect not to impose the sentence of nine months of imprisonment and to leave in place the sentence of six months less time served and 15 months' probation imposed by the sentencing judge.

[103] Having determined that the appeal should be granted, there is therefore no need for this Court to turn to the analysis of the appellant's third ground of appeal.

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CAMPBELL J.