

Citation: *R. v. J.M.P.*, 2016 YKTC 24

Date: 20160609  
Docket: 15-03522  
Registry: Whitehorse

**YOUTH JUSTICE COURT OF YUKON**  
Before His Honour Judge Cozens

REGINA

v.

J.M.P.

**Publication of information identifying the young person charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that *Act*.**

**Publication of information that could identify the complainant or a witness is prohibited by section 111(1) of the *Youth Criminal Justice Act*.**

Appearances:  
Keith Parkkari  
Norah Mooney

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCE**

[1] J.M.P. was convicted after trial of having sexually assaulted S.P., contrary to s. 271 of the *Criminal Code*. In addition, he has entered a guilty plea to having committed an offence contrary to s. 137 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”).

[2] In brief, I found that, on May 30 and 31, 2015 there was a party going on at the residence J.M.P. shared with his grandmother in a Yukon community. Alcohol was being consumed to excess by many of the individuals there, including J.M.P. and S.P.

[3] J.M.P. accompanied S.P. to his bedroom where she wanted to sleep. Without her consent, and while she was lying on the bed, he removed all her clothing from the waist down except her socks. He then climbed on top of her, put his hand over her mouth and penetrated her vagina with his penis. In doing so he overcame her repeated attempts to resist him. He continued the sexual assault for one to two minutes before there was a knock on the closed and locked or barred bedroom door. J.M.P. released S.P. and the sexual assault stopped at this time.

### **Positions of Counsel**

[4] Crown counsel submits that an appropriate sentence is a two-year custody and supervision order followed by the maximum period of probation of one year (three years total sentence). This should be served consecutive to the sentence J.M.P. is currently serving for offences committed as an adult.

[5] Counsel notes the following aggravating factors:

- Elements of force and confinement in the commission of the offence;
- Age of the victim (16);
- Breach of trust in that the victim was J.M.P.'s cousin and she had been at the residence on occasions previously;
- Criminal record of prior convictions, including a sexual interference conviction.

[6] Counsel notes that there are few mitigating factors, and observes in particular the absence of any expression of remorse. J.M.P. continues to deny having committed the offence.

[7] Counsel does, however, note J.M.P.'s young age, difficult life circumstances, and the potential for J.M.P. to lead a productive life as providing some mitigation.

[8] Counsel filed a document entitled *Crimes, by type of violation, and by province and territory (Yukon, Northwest territories, Nunavut)* that provided statistics for 2014.

[9] Counsel highlighted that while the national average of sexual assault was 58.35 per 100,000 in 2014, the rate in the Yukon, while less than that in the NWT and Nunavut, is still almost four times higher than the national average, being at 221.86 per 100,000.

[10] Defence counsel submits that a custody and supervision order of between six to twelve months, followed by a lengthy period of probation, is the appropriate disposition. Counsel suggests that the sentence could commence immediately and be served concurrent to the time J.M.P. has remaining in custody on charges for which he was sentenced as an adult.

### **Victim Impact Statement**

[11] S.P. provided a Victim Impact Statement ("VIS"). She says that her life has changed since the incident. She has distanced herself from others, including her friends and family, and has lost friends. She finds it hard to trust people, particularly males. She suffers from anxiety attacks, restlessness, stress and fear. She struggles to understand how J.M.P., as a trusted friend, could hurt and betray her. She is scared to be in a public place where she believes J.M.P. might show up and, as such, avoids events she would previously have been interested in attending. She has lost her

motivation to participate in school, work, and her First Nations Dancing Group. S.P. feels victimized by J.M.P., his family members and his friends, including through social media.

[12] S.P. says that she “pretty much stopped caring for my life”.

[13] M.P., S.P.’s mother, provided a VIS. She states that there has been a severe and negative change in S.P.’s demeanour and behaviour towards school, social activities and her participation as a developing leader in her community’s First Nations dancing group. S.P. has nightmares and, besides sleep deprivation, suffers from anxiety, hypersensitivity and mistrust of others. On a number of occasions she has found S.P. curled up on her bed in a fetal position depressed and crying. M.P. states that S.P. has encountered severe victimization and bullying behaviour. M.P. also feels betrayed by J.M.P. in that she chose to treat him with kindness and assistance when he moved to the community and he in turn sexually assaulted her daughter. This has impacted her ability to trust people.

[14] A Community Impact Statement (“CIS”) was filed. Neither Crown nor defence counsel objected to the filing of the CIS or my considering it for the purposes of sentencing.

[15] The provision allowing for the filing of a CIS is s. 722.2 of the *Criminal Code*. Section 50 of the *YCJA* states that s. 722.2 of the *Code* applies to proceedings under the *YCJA*. This said, however, s. 50 refers to s. 722.2 (inquiry by court). Section 722.2 (inquiry by court) was replaced in its entirety by 2015, c. 13, s. 26 which came into force July 22, 2015. Section 722.2 is now under the heading “Community Impact Statement”,

not “Inquiry By Court”. The former provisions of s. 722.2 regarding the inquiry by the court are now captured in s. 722(2) and (3) of the *Code*.

[16] In my opinion, in the absence of an express provision in the *YCJA* incorporating the now s. 722.2 (community impact statements) to proceedings under the *YCJA*, there is no jurisdiction for me to consider the CIS in these proceedings. There is a substantial and significant difference between s. 722.2 (inquiry by court) and s. 722.2 (community impact statement), and I cannot presume that the intent of s. 50 as it applied to the power of the court to make inquiries into whether the victim had been offered the opportunity to provide a VIS, has now been transferred to allow for the filing of a CIS.

[17] Further, and upon consideration, it would seem that allowing the filing of a CIS in proceedings under the *YCJA* would be contrary to the objectives, purposes and principles of the *YCJA*, noting, for example, the publication ban in regard to any information that would reveal the identity of a young offender.

[18] This said, having read the CIS prior to noting the jurisdictional issue, certainly the content is consistent with the expected impact that the withdrawal of S.P. from her involvement and leadership in the First Nations Dancing Group could be expected to have.

### **Circumstances of J.M.P.**

[19] The circumstances of J.M.P. are set out in a ***Gladue*** Report (the “Report”) as well as in a Pre-Sentence Report (“PSR”). The author of the PSR indicates that he has had very little contact with J.M.P. for the purpose of the PSR and relied primarily on

records contained in J.M.P.'s Youth Probation and Offender Supervision Services files. Also relied on were a pre-sentence report and update that originated in Alberta.

[20] J.M.P. is an 18-year-old member of the Champagne and Aishihik First Nation ("CAFN").

[21] The author of the Report stated at the outset that: "To say [J.M.P.] has had a dysfunctional upbringing would be an understatement". The author of the PSR stated that J.M.P.'s family life "...can be defined as having been lacking in structure, consistency, and predictability... [and] has been chaotic and inconsistent".

[22] J.M.P.'s mother, A.P., was 16 when J.M.P. was born. She separated from J.M.P.'s biological father, J.D., shortly afterwards. She entered into a relationship with B.N. when J.M.P. was three. This was a positive environment for J.M.P. but B.N. was tragically killed in a car accident when J.M.P. was five. J.M.P. and his mother witnessed the death of B.N. His mother spiralled downwards into a drinking and drug spree after B.N.'s death, leaving J.M.P. in the care of his grandmother and his biological father. J.M.P. stated that his biological father sexually abused him when he was in his care, although he has no recollection of this occurring and says he was told so by his mother. I note that in the August 20, 2012 pre-sentence report from Alberta, A.P advised the police that she had been sexually assaulted as a child.

[23] J.M.P. states that he was picked on and bullied as a child, in part because he was overweight.

[24] J.M.P. ended up primarily residing with his mother, punctuated with periods of time when he lived with his grandmother. He was kicked out of the home he shared with his mother in Edmonton when he was a young teenager and ended up living on the streets. There he entered into a life of crime and violence connected to his involvement in gang criminality.

[25] It is noted in the Report that "...the dysfunction and broken relationships within his family have made it next to impossible for him to receive the level of love and support he needs". In this regard, the animosity between J.M.P.'s mother and grandmother is noted. His grandmother states that whenever J.M.P.'s mother entered into his life, his life "goes crazy". She states that A.P. used to get J.M.P. to break into cars and steal money for her. She alleges that A.P. also had J.M.P. get marijuana from his friends for her.

[26] There is clearly a problematic and manipulative relationship between J.M.P.'s grandmother and his mother that has resulted in an ongoing pattern of dysfunction in J.M.P.'s life.

[27] J.M.P.'s school attendance was noted to have been sporadic at best. He states, however, that he has completed Grade 11 and is only a few credits short of completing Grade 12. He is described as being able to perform at an average level academically but his performance has been hindered by a lack of attendance, a refusal to follow rules and his tendency to be disrespectful and aggressive towards others.

[28] On one occasion when attending school, due to his disrespectful, defiant and rude behaviour towards teachers, J.M.P. had to be put on a bus back to his community, with RCMP assistance, in the middle of a school field trip.

[29] J.M.P. attended only three of six sessions for sex-offender treatment after he had been convicted of the offence of sexual interference in respect of his five-year-old sister. As a result of his non-completion of the counselling sessions, J.M.P. was assessed as being at a moderate risk for re-offending sexually. Subsequently, J.M.P. was interviewed in June 2015 by a forensic psychologist who concluded that he was at a high risk to reoffend and should undergo a multidisciplinary psychological assessment.

[30] J.M.P. has 35 convictions as a youth and nine as an adult, only three of which were for offences of violence. These were the s. 151 offence as a youth and ss. 266 and 264.1(1) offences for which he was sentenced as an adult on March 11, 2016 to 183 days custody. His earliest possible release date from Whitehorse Correctional Centre (“WCC”) is July 13, 2016.

[31] The Report comments on J.M.P. presenting as a confident and intelligent young man with a number of achievable life goals. In particular he wishes to pursue an apprenticeship in welding, starting with a 20-week pre-apprenticeship program at Yukon College beginning in September. Counsel provided me information on the date of this decision that J.M.P. has now been accepted into this program at Yukon College commencing September 2016.

[32] Residency will, however, be a problem for J.M.P. once he is released from custody. His grandmother and great-grandmother are both intending to move out of the



Territory, thus leaving him without any support in Whitehorse. J.M.P. has considered moving to Alberta with his grandmother in order to attend an apprenticeship program there.

[33] J.M.P.'s First Nation is prepared to make educational funding available to him in the event he is accepted into the pre-apprenticeship program at Yukon College.

[34] While in custody J.M.P. has engaged in programming. He has completed a Peer Relationships program and attended a carving workshop, church services and a men's healing group. He has been doing physical fitness activities.

[35] In addition, counsel advises that J.M.P. has completed the Substance Abuse Management program and has been seeing a psychologist in the month prior to the sentencing hearing.

[36] However, his employment on the gym cleaning and laundry crews was terminated after a month due to poor performance. He has also been written up on multiple occasions for minor institutional infractions.

[37] It is noted that due to the polarizing effect this offence has had upon the community, it is unlikely J.M.P. will be able to return and successfully re-integrate into the community.

[38] J.M.P. recognizes that he has a significant drug and alcohol addiction and that he needs help to deal with his addictions and to deal with the trauma he has encountered in his life. He states that he often had parties in his basement suite, despite his grandmother's objections, in which he drank a lot and got into trouble. He tried alcohol

for the first time when he was 10 years old and drank heavily between 13 and 17.

J.M.P. acknowledges that he becomes “stupid” when he is drunk and that his anger comes out. He acknowledges having anger issues. He states that at first he feels good after beating someone up because he has vented his anger but then feels badly afterwards because someone was hurt. He acknowledges that he “can be an asshole sometimes”.

[39] J.M.P. started smoking cigarettes at the age of eight or nine.

[40] J.M.P. stated that he has trouble sleeping and suffers from depression.

[41] J.M.P. was taking one-on-one counselling until the retirement of the psychologist he was seeing. He indicates that he may attend at Many Rivers to seek further counselling. He also indicates that he is prepared to attend at a treatment centre. J.M.P. states that he values being on the land in the bush and sees this as being a very therapeutic environment. He has been encouraged to spend time at a healing camp outside his community run by a former CAFN Chief with whom he has made a positive connection.

[42] J.M.P.’s stated intentions in regard to accessing counselling should be considered in the context of his historical resistance towards receiving sex-offender treatment.

[43] J.M.P. admits to having difficulty complying with the terms of the probation order he was bound by when he returned to the Yukon from Edmonton. This is consistent with the information in the various pre-sentence reports that indicate J.M.P. is able to

comply with the community supervision portions of custody and supervision orders but then demonstrates consistent non-compliance with probation orders. The author of the PSR concludes that:

This implies that [J.M.P.] does not simply struggle to abide by conditions of Orders in general, but rather that he makes a calculated choice to only abide by conditions that he perceives would result in a Provincial Director (PD) remand if he were to breach. It also implies that he does not make efforts to comply with conditions that he perceives will not likely result in him being placed in custody.

[44] In the pre-sentence report from Alberta dated August 20, 2012, a Family Coach working with J.M.P.'s family considered J.M.P. as lacking "...comprehension of long term consequences for his actions and disrespect for the law shown by not abiding by his current Court order."

[45] In the June 10, 2013 pre-sentence report out of Alberta it was noted that J.M.P.'s behaviour "...worsened significantly at the time the Community Supervision Order expired...".

[46] J.M.P. states that most of his friends use alcohol and drugs. When together, they usually sit around and smoke marijuana. He acknowledges that in order to stop committing crimes he needs to change his peer group. He also needs to take advantage of the supports he has been offered by CAFN and get further assistance from mental health professionals.

[47] J.M.P. states that he is now motivated to do well so that he can concentrate on his goal of becoming a welder. He states that, while he grew up in an environment

where criminal activity became “normal” for him, he is done with being involved in criminal activity.

[48] I place this in the context of his comments to the author of the June 10, 2013 pre-sentence report out of Alberta where it was noted that J.M.P. stated he wanted to make a positive change in his life and in his behaviours, and that he had learned his lesson while in custody. Obviously, he still had some work to do and lessons to learn.

[49] J.M.P. denies having sexually assaulted S.P. He told the author of the PSR that S.P. was harmed but only because she has lost many friends because “everyone knows it [the sexual assault] is bullshit”. He states that S.P. has “betrayed his trust”. The author of the PSR states that J.M.P. “regards himself as having been victimised by his accuser”.

[50] I note that in the police reports attached to the August 20, 2012 pre-sentence report from Alberta, that in that case J.M.P. fully acknowledged his responsibility for the sexual offence committed against his sister and, in the opinion of the police officer interviewing him “...seemed genuinely remorseful for what had happened and also seemed to grasp how serious the incident was”.

[51] This is to be contrasted to the information stated in the June 10, 2013 pre-sentence report out of Alberta in respect of property-related, firearms and breach charges contrary to ss. 430(1)(a), 335, 88(1), and 137 (YCJA) where J.M.P. was noted as not expressing any remorse or taking any responsibility for his actions. He was noted to project blame on others.

[52] Counsel for J.M.P. points out that, had J.M.P. been sentenced for this offence prior to being sentenced as an adult for offences which were committed subsequently, he would have served any custodial disposition that would be imposed in the Young Offender's Facility, rather than at WCC.

[53] Given that J.M.P. is currently serving time at WCC, he will now serve any sentence imposed for this offence at WCC. In a sense that could be viewed as "harder time".

### Case Law

[54] The leading case in regard to the generally appropriate range of sentence for sexual assaults involving non-consensual intercourse with a sleeping or passed-out victim is established in **R. v. White**, 2008 YKSC 34 at paras. 85-87, as being between 12 to 30 months. This is a very broad range and there will be cases where an appropriate sentence will be either less or more than this general range.

[55] The **White** case involved an adult offender and the authorities referred to in **White** also involved adult offenders. While of some value in considering an appropriate disposition for J.M.P., the purposes, objectives and principles of sentencing in regard to young offenders differ from those in regard to adult offenders.

[56] In **R. v. J.P.W.**, 2010 BCPC 36, the 17-year-old Aboriginal offender had non-consensual sexual intercourse with a passed-out victim, who was also a youth. The offender and the victim were known to each other and had been together and "sharing a beer" prior to the sexual assault occurring. The offender was convicted after a trial.

[57] A VIS was filed that made it clear that this sexual assault had caused the victim considerable emotional and physical pain.

[58] The offender was 20 years old at the time of sentencing. He had a limited and unrelated youth and adult criminal record. He was noted to have an “I do what I want” attitude and as being unresponsive to the idea that he would have to take directions from his adult probation officer.

[59] The aggravating and mitigating factors are not substantially different in any meaningful way from those before me in the case of J.M.P.

[60] J.P.W. was sentenced to a 12-month custody and supervision order, followed by a period of probation. The length of the probation order is not specified in the decision, however, I note that Crown counsel’s submission was for a total period of two years for both the custody and supervision portion and the probation order (para. 22). I note that at the time of this decision denunciation and specific deterrence were not available as considerations in the sentencing process, whereas they are now applicable for the purposes of sentencing J.M.P.

[61] In *R. v. N.E.*, 2015 ONCJ 767, three youth were sentenced on one count of sexual assault and one count of sexual touching of the victim, who was also a youth, on approximately 20 occasions over a 15-month period of time. Most of the sexual assaults involved the offenders acting in concert, although there were separate sexual assaults perpetrated by one offender acting on his own or two offenders together.

[62] The offenders and the victim were all Crown wards who were residing in a foster home together. The victim was as young as 11 years old at the time of the sexual assaults and the offenders ranged from 13 to 17 years old. (There is some discrepancy in age with respect to one offender, R.S. who at one point is stated to be 18 to 19 years of age (para. 69) whereas at another point all the individuals involved, including the victim, were stated to be between 11 to 17 years of age (para. 5)).

[63] The sexual assaults included intercourse and oral sex, done while the victim was being physically restrained and held down by the others. The offenders would at times take turns. The victim would at times vigorously resist the sexual assaults.

[64] Substantial harm was suffered by the victim. She described herself as being “broken inside” and said she felt worthless.

[65] The offenders plead guilty although one, N.E. proceeded to a **Gardiner** hearing in which the victim was required to testify.

[66] C.S., who was determined to have committed the majority of the sexual assaults, was sentenced to a custody and supervision order of 21 months to be followed by three months of probation. The custody imposed was open custody. C.S. had a generally positive pre-sentence report, was on a good rehabilitation track and was considered to be the most remorseful of the offenders. He was considered to be at a moderate risk for reoffending, with a good chance that some counselling would reduce this risk to low.

[67] I note the comment in para. 82, made in relation to C.S. and his past history, that “...being the victim of abuse does not excuse an individual from degrading and abusing another more vulnerable person”.

[68] R.S. was sentenced to a custody and supervision order of 18 months followed by six months of probation. The custody imposed appears to have been open custody.

[69] While R.S. was the oldest of the offenders, he cooperated with the police, implicating both himself and the others. He was involved in fewer of the sexual assaults. He also suffered from cognitive limitations.

[70] This said, R.S. had a less favourable pre-sentence report. He was noted to be somewhat “rudderless”. He was struggling with substance abuse and poor peer group association. He was noted as being at a low to moderate risk to re-offend, although his risk factors could also be reduced with further treatment.

[71] N.E. was the youngest of the offenders. He was involved in fewer assaults than the other two offenders. He was sentenced to a 15 month custody and supervision order. This was to be closed custody. He was also placed on probation for a period of nine months.

[72] N.E. had less mitigation than the others in his guilty plea in that he did not accept responsibility for the commission of the offences to the extent that the others did. He had a less favourable pre-sentence report, had not shown any willingness to address his substance abuse issues and struggled to comply with rules and regulations. His



behaviour exacerbated his mental health issues. He was assessed as being at a moderate risk to reoffend.

[73] All three offenders were noted to possess a high degree of moral blameworthiness (para. 91).

[74] The Court noted in para. 37 that sexual assault is one of the most serious offences in the *Code*. In para. 38 the Court said that if the offenders had been adults there is no doubt they would have been facing penitentiary sentences.

### **Legislative Framework for Sentencing Youth under the YCJA**

[75] Section 3 of the YCJA, under the Heading DECLARATION OF PRINCIPLE, sets out the Policy for Canada with Respect to Young Persons. It reads, in part:

**3. (1) The following principles apply in this Act:**

- (a) the youth criminal justice system is intended to protect the public by
  - (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
  - (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
  - (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
- (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

- (i) rehabilitation and reintegration,
  - (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
  - (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
  - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
  - (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;
- (c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
- (i) reinforce respect for societal values,
  - (ii) encourage the repair of harm done to victims and the community,
  - (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
  - (iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements;

[76] Subsection (2) requires that the *YCJA* be liberally construed in order ensure that youth are dealt with in accordance with these principles.

[77] The Purpose and Principles of youth sentencing under the *YCJA* are set out in s. 38:

### **Purpose**

**38.** (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

### **Sentencing principles**

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
- (e) subject to paragraph (c), the sentence must
  - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

- (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
  - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and
- (f) subject to paragraph (c), the sentence may have the following objectives:
- (i) to denounce unlawful conduct, and
  - (ii) to deter the young person from committing offences.

### **Factors to be considered**

(3) In determining a youth sentence, the youth justice court shall take into account

- (a) the degree of participation by the young person in the commission of the offence;
- (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
- (c) any reparation made by the young person to the victim or the community;
- (d) the time spent in detention by the young person as a result of the offence;
- (e) the previous findings of guilt of the young person; and
- (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

[78] To the extent that aspects of the purpose and principles of sentencing youth under the *YCJA* are similar to those in the *Criminal Code* in respect of adults, the sentencing of youth nonetheless remains a separate regime.

[79] While denunciation of J.M.P.'s actions and specific deterrence are relevant in this case, they are still to be considered and applied so as not to offend the principle of proportionality.

[80] This was a serious offence and J.M.P. needs to know that his actions in sexually assaulting S.P. are an offence not only against her but against society. He also needs to receive a sentence that sends a message to him that he has to take steps towards addressing his risk factors in order to not commit further offences in the future. This is particularly true in his case given his prior criminal history and failure to follow through on his previously stated desires to lead a better life and avoid a criminal one.

[81] The principle of accountability under the *YCJA* has been found to be the equivalent of the principle of retribution under the adult sentencing regime. In **R. v. A.O.**, 2007 ONCA 144. the Court, in considering the concept of accountability in youth sentencing, stated at para. 47:

In our view, for a sentence to hold a young offender accountable in the sense of being meaningful it must reflect, as does a retributive sentence, “the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender and the normative character of the offender’s conduct”. We see no other rational way for measuring accountability.

[82] While **A.O.** was decided before the principles of denunciation and specific deterrence were incorporated into the *YCJA*, courts have still referred favourably to the comments made in **A.O.** in this regard. (See **N.E.** at para. 34; **R. v. Joseph**, 2016 ONSC 3061 at paras. 54 and 55; **R. v. J.C.**, 2014 MBPC 40 at para. 9).

[83] I would agree. However, I view the concept of retribution in its application to youth in a manner similar to as how it has been implicitly expressed by C.S. Lewis in his

treatise *The Humanitarian Theory of Punishment* and not, as some may view it “an eye for an eye”. An offender is sentenced for an offence in a manner that is proportionate to the offence and to the moral culpability of the offender. Society exacts a price for the commission of the offence or, in other words, the offender receives his or her “just deserts”. The sentence, once served, means that the price has been paid and the offender is now able to move forward, having learned his or her lesson. In this way, the offender is not chained forever to the ball and chain of prior criminal activity but has the ability to put these acts in the past and make a change, free of any sense of not having paid what is due.

[84] In the sense that rehabilitation of the offender is structured in a manner that provides the necessary assistance to the offender to move forward from his or her criminal past positively in thought and action, it works hand in hand with the notion of paying the required price and putting one’s prior criminal actions behind.

[85] In respect of offenders sentenced under the *YCJA*, the end goal is to have them enter adulthood with the opportunity to make a break from any criminal acts they have committed in their youth. Youth, including 17-year-olds, such as J.M.P. was at the time of the offence, are presumed to have a lesser degree of moral blameworthiness for their actions than adults and, as such, are granted, through the *YCJA* regime, a greater understanding in respect of their actions and a greater opportunity to put these acts behind them than adults are.

[86] This is, of course, the underlying philosophy of the *YCJA*. Circumstances are not so obviously black and white in reality. Obviously there are some adults in age whose mental and emotional capacity are less than that of many youth. There are youth who

are much more aware of their actions and the consequences of those actions than other youth and some adults. There are frailties in the system that exist, but that is to be expected in any human-designed system that attempts to deal with human behaviour.

[87] I recognize in sentencing J.M.P. that he comes from a dysfunctional background. Certainly this is a case where **Gladue** factors come into play. The lack of stability, both emotional and physical, that have existed in J.M.P.'s life to date and that have contributed to his anti-social and criminal behaviour have their roots in the consequences of the systemic discrimination of Aboriginal peoples in Canada. As such, I must look to all sentencing options that minimize the use of custody in sentencing J.M.P.

[88] This is not a stand-alone principle within the *YCJA*, however, and must be balanced against its other objectives, purposes and principles.

[89] J.M.P. poses a significant risk to society for the commission of further offences and this risk must be recognized in order to provide protection to the public. He is in the preliminary stages of addressing his risk factors through counselling and, while I do not intend to undervalue his statements about making change, he has said the same previously and then not made the desired change.

[90] Through the sentence I impose J.M.P. must be encouraged to follow through on his stated commitment to change. In imposing such a sentence, it is to be hoped that society is not only provided further protection, but that J.M.P. will also be able to become a productive member of society free from the destructive and criminal lifestyle he has lived for years.

[91] As such, rehabilitation is of considerable significance in this case. I find that the goals J.M.P. has stated that he has are realistic, if he actually makes the day-to-day choices he needs to make to separate himself from his past lifestyle. If he does not make good choices then it is likely that he will spend much time before the courts. His current status as a serving prisoner for having committed adult offences is supportive of my concerns in this regard.

[92] The gateway to custody is open in this case as the sexual assault is a violent offence within s. 39(1)(a) of the YCJA. I am satisfied from the materials filed, in particular her and her mother's VIS, that S.P. has suffered bodily harm, in particular psychological harm, as a result of the commission of this offence.

[93] There is a wide range of sentence available for this offence. Each case is of course unique in its own way and I am required to impose a fit sentence, not one that is mathematically designed to fit into a pre-determined slot. The cases as set out in **White** are helpful for looking at what the generally imposed range of sentence is for adult offenders having committed similar acts.

[94] I also recognize that S.P. was not passed out or unconscious in this case. She was nonetheless somewhat similarly vulnerable. To the extent that S.P. was conscious and aware of what was happening and was resistant to what was being done to her, the application of force by J.M.P. to allow him to commit this offence increases the seriousness of this offence. This does not, in any way, take away from the fact that sexual assault of a passed out or unconscious victim is, at a minimum, an extremely serious offence.



[95] I also consider that the attitude of J.M.P. towards S.P. and the extent to which he engages in victim-blaming is aggravating. I recognize that he denies having committed this offence. I also am aware that there is nothing aggravating in his decision to take this matter to trial as is within his rights. This said, I find that his statements in the PSR certainly contribute to the ongoing victimization of S.P. I do not forget, however, that he is still a young man and has some maturing to do.

[96] The *N.E.* case simply shows how one court in one set of circumstances dealt with the sentencing of youthful offenders in circumstances that were much more aggravating than in the case before me. This does not mean I should therefore be required to impose a lesser sentence than was imposed in that case. The sentence imposed must be a fit one in the end taking into account the circumstances of this offence and the circumstances of J.M.P.

[97] I agree with counsel that a custodial disposition is necessary in this case. I disagree, however, that a sentence of two years is required. Taking into account all the aggravating and mitigating circumstances and considering the objectives, purposes and principles of the *YCJA* in sentencing J.M.P., I find that a custody and supervision order of 14 months' custody is appropriate, to be served two-thirds in custody and one-third in the community under supervision. Noting the positions of counsel and being in agreement, this is to be closed custody, as I do not see anything in the circumstances before me that would suggest that open custody is appropriate. The period of custody will commence upon the expiration of the adult custodial disposition he is presently serving.

[98] In addition there will be a period of probation of 22 months.

[99] The terms of the probation order will be as follows:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Youth Probation Officer immediately on release, and then be under the supervision of the Youth Probation Officer;
4. Remain within the Yukon unless you obtain written permission from your Youth Probation Officer;
5. Reside as directed by your Youth Probation Officer and not change that residence without the written permission of your Youth Probation Officer;
6. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;
7. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
8. Attend and actively participate in all assessment and counselling programs as directed by your Youth Probation Officer, and complete them to the satisfaction of your Youth Probation Officer, for the following issues:
  - sex offending,
  - substance abuse,
  - anger management,

- psychological issues,
- and any other issues identified by your Youth

Probation Officer,

and provide consents to release information to your Youth Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

9. Have no contact directly or indirectly or communication in any way with S.P., except with the prior written permission of your Youth Probation Officer and with the consent of S.P.;
10. Not attend within 50 metres of any known place of residence or employment of S.P. except with the prior written permission of your Youth Probation Officer and with the consent of S.P.;
11. Participate in such educational or life skills programming as directed by your Youth Probation Officer and provide your Youth Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition; and
12. Make reasonable efforts to find and maintain suitable employment and provide your Youth Probation Officer with all necessary details concerning your efforts.

[100] J.M.P. has spent 15 days in custody that can be credited to him which, if he were assigned 1.5:1 allows for 23 days credit. I recognize that this is a youth matter and time

in custody on remand is at times computed somewhat differently than for adult matters, noting the custody and supervision nature of youth custodial orders as compared to custody and statutory release for adults. Nevertheless I will credit J.M.P. for 23 days custody against the 14 month custody and supervision order, leaving him 13 months and one week to be served.

[101] For the s. 137 offence, which involved J.P. consuming alcohol on May 30, 2015 contrary to the terms of a youth probation order he was subject to at the time, he will be sentenced to a 30 day custody and supervision order, concurrent to the sentence for the s. 271 offence.

[102] There will be the mandatory firearms prohibition order for the minimum period of two years pursuant to s. 51 of the *YCJA*.

[103] As this is a primary designated offence for the purpose of the providing a DNA sample I make this order.

[104] Noting the consent of the parties, I also order that there be a s. 34 *YCJA* assessment. While counsel did not request that a s. 34 assessment be prepared for the purpose of sentencing, I am satisfied that such an assessment will be of assistance for any reviews of this sentence that are held in future.

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COZENS, T.C.J.