Citation: *R. v. K. and S.*, 2012 YKYC 3

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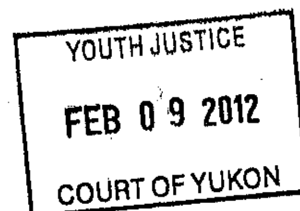
Docket: 11-03513
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before: His Honour Chief Judge Cozens



REGINA

v.

K. and S.

Publication of identifying information is prohibited by sections 110(1) and 111(1) of the *Youth Criminal Justice Act.*

Appearances:
Bonnie Macdonald — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCING

Overview

[1] In the evening of June 24, 2011, S., her co-accused, K., and an 11-year-old boy, were hanging out together in the Canada Games Centre (CGC). The ATCO arena area was being used for skateboarding and related activities. The three youth went to where the speedskating mats were located at the back of the ATCO arena and pulled down some of the mats to make forts. S. and K. took lighters which they had in their possession and together lit the handle of one of the mats on fire. The handle ignited and the 11-year-old boy put the fire out with his hands.

[2] S. and K. then used their lighters to light the handle of another mat. This mat caught on fire, and the three ran from the area. The mat was half on fire when they looked back while they were running.

[3] They ran past three fire alarms and numerous adults without pulling an alarm or telling anyone that there was a fire.

[4] While they were running away, S. told the 11-year-old boy that she would punch him if he told anyone what they had done. She also took a picture of the fire with her cell phone and exchanged text messages with friends and K. talking about the fire.

[5] When initially interviewed by the RCMP as a witness, S. told the officer that she had seen a Native girl come out of one of the change rooms around the time of the fire, implying that this unidentified person may have been responsible for starting it.

[6] After the RCMP obtained and viewed a copy of the surveillance video-tape, they re-interviewed S. as a suspect. She acknowledged her and K.'s role in starting the fire in a statement that night to the RCMP.

[7] In the end, the fire caused between five and seven million dollars of damage to the CGC and resulted in the significant disruption of numerous recreational activities and business operations, some for an extended period of time. The negative impact upon the Whitehorse and Yukon community has been substantial.

[8] K. and S. have entered guilty pleas to having committed the offence of arson, contrary to s. 434 of the *Criminal Code* (the *Code*). Only the sentencing hearing for S. has been conducted and this judgment deals with her sentence.

Positions of Counsel

[9] Crown counsel submits that S. should be sentenced to a period of deferred custody followed by a period of probation, for a total period of supervision of two years. Although S. has no prior criminal history, the Crown submits that custody is an option as the aggravating circumstances are such that this case is exceptional within the meaning of s. 39(1)(d) of the *Youth Criminal Justice Act* (the *YCJA*).

[10] Defence counsel submits, firstly, that s. 39(1)(d) does not apply in these circumstances, as the circumstances are not sufficiently aggravating, therefore custody is not an option. Further, even if the circumstances are considered to be sufficiently aggravating, this is not an exceptional case where a custodial disposition is required, and a sentence of probation is sufficient.

[11] As will be discussed further below, s. 39 of the *YCJA* generally stipulates that custody is unavailable in cases of non-violent first offences. However, s. 39(1)(d) provides that a custodial disposition can be made in "exceptional cases" where the "aggravating circumstances of the offence" are such that the imposition of a non-custodial sentence would not be in keeping with the purposes and principles of sentencing set out in the *YCJA*.

Victim Impact

[12] Two Victim Impact Statements ("VIS") were submitted. The VIS provided by Art Manhire, Manager of Indoor Facilities at the CGC, included the following comments:

> The fire at the Canada Games Center has had a significant impact on our community. The community's sense of safety has been compromised. The members of the community are still very angry and hurt.

. . .

> It has taken five months to repair the physical damage to the facility. But, it will take a lot longer to repair the emotional impact the fire has had on our community. The focus of the CGC is to rebuild the confidence and community trust. It will be a recovery process for the whole community and the (City) facility staff.
>
> The total damage to the facility was $7,000,000.00 It took 5 months of full time construction, cleaning and testing to ensure the facility was safe to open to the public. As a result of the closure the Games Center, youth and sporting groups had to be relocated. Some of the programs were moved up to 7 times as a result of facility availability. The starting dates for seasonal user groups were delayed by a month and a half. The stress of the rebuild had an effect on staffing. As you can appreciate, several staff chose to resign from the facility as a result of the stress the fire created. This has left behind an even larger burden on the remaining staff members. It has an impact on the moral(e) [sic] and safety of all staff who worked during and after the fire.

[13] Mr. Manhire cited specific examples of a mother who told staff that her children were having nightmares after the fire and adult facility users sitting with him and crying while talking about how the fire affected them. He noted that the facility provides services to over 300 user groups in addition to the 2000 individuals who attend daily.

[14] The second VIS was submitted by Clive Sparks on behalf of the City of Whitehorse Fire Department, who attended and extinguished the fire. After reviewing the VIS, Defence counsel objected to its admissibility on the basis that it did not conform to the requirements of s. 722 of the *Code*. Counsel asserted that the Fire Department was not a victim as defined in this section and, in fact, were doing the job they were paid to do in a manner akin to police officers investigating crimes and arresting individuals.

[15] Crown counsel took the position that the Fire Department's VIS was admissible. Counsel's submission was premised on the fact that this was an intentionally started fire

and constituted a criminal act. In addition, there was a risk of danger to the firefighters due to the nature of the fire and potential for explosion, and they were unavailable to attend at any other request for assistance while they were fighting this fire.

[16] Section 722 reads, in part, as follows:

> **722.** (1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.
>
> ...
>
> (4) For the purposes of this section and section 722.2, "victim", in relation to an offence,
>
> (*a*) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
>
> (*b*) where the person described in paragraph (*a*) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

[17] I note that there was no indication that any of the individual firefighters suffered harm or loss, whether physical or psychological, either in the course of attending at the CGC to extinguish the fire or in attending to related duties that flowed from this event. There is also no evidence or submission that there was, in fact, another call-out that the Fire Department was either unable to attend or had to attend in insufficient numbers, thus putting firefighters, community members, or property at greater risk of harm or loss.

[18] I concur with the submission of Defence counsel that the Fire Department, in these circumstances, does not constitute a victim per se as defined in s. 722(4) of the

Code and therefore find that this VIS is inadmissible. I do not believe that s. 722 is designed to allow for the introduction of Victim Impact Statements from individuals such as firefighters or police officers, regarding their efforts in carrying out the duties they are employed to do. Every police officer investigating a crime would be in a position to file a VIS on every charge were that the case. Exceptions can be made, however, where the circumstances are such that the individual suffered physical or emotional harm or loss. That is not, on the information before me, the case here.

Circumstances of S.

[19] A Pre-Sentence Report (PSR), prepared for the original sentencing date of December 9, 2011 with a subsequent update to January 24, 2012, was provided to the Court.

[20] S. turned 13 in April, 2011. She has resided with her parents in Whitehorse for her entire life. She has no prior involvement with the criminal justice system and, apart from her co-accused, only one of the individuals that she identified as a friend has had any such involvement.

[21] There has been some very limited involvement with the family by Family and Children's Services.

[22] S. attends secondary school and has part-time employment.

[23] S. has been supervised in the community on an Undertaking to a Judge or Justice since June 25, 2011. This Undertaking includes a curfew condition. S. has complied with all the terms of her Undertaking.

Actions of June 24

[24] S. indicated to the author of the PSR that she had no intention of committing any crime when she went to the CGC that evening. She indicated that it was "just another night and everything went wrong".

[25] S. stated that she did not attempt to put out the fire because she was unaware that it would become that big or burn that fast. She thought that the sprinkler system would put it out.

[26] She told the author of the PSR that when she threatened the 11-year-old, her world was spinning and she didn't think it through. It was a scare tactic, because she was scared herself and afraid that he would reveal her and K. right there as being the ones who started the fire.

[27] S. stated that she and K. decided to blame the fire on a Native girl because there were so many First Nations girls at the CGC for a Cadet program that they thought this story would be believable. S. states that she is not racist or prejudiced against First Nations people.

[28] When asked by the author of the PSR if she had gained anything from having committed this crime, S. stated that she had lost friends, is more anxious and jittery and is less calm and fun. However, S. further stated that she had gained popularity points and increased her reputation at school, as some people thought what she did was cool. She also stated that she has benefited from being able to meet regularly with a probation officer, from attending the Youth Achievement Centre and making new friends, and by learning how to better express what she is feeling.

[29] S. acknowledged having received and sent the following text messages after the fire started:

S.:	That was unbelievable
**1	Yeah. Do they know how it started?
S.:	Some numbnuts went by the mats n started it.
S.:	Ya...like the mats were destroyed, all the hocky crap, n almost the entire black wall is burned, n the top other floors to
**1	Hoooooolii! So who started it and what mats?
S.:	Some ignorant lil did. I dunno, i can deff tellit was lit. n ah hard to explain but there anout 100 mats n they allcought on fire
**1	Wow wtf! Was it lit from the inside? did u get to see it?
S.:	Ya. n ya i have a piic of the beggines of it on fb.
**1	Holy, so how long did it take for them to put it out?
S.	All those mats n the shiz on the wall is highly flamibal.. it took 2 hours or more 2 put it out.
**1	Holy! Crazy shit!
S.:	I know.

...

S.:	I canno3 believe a native persln started da fire!
**2	I know
S.:	Ya
**2	Crazy
S.:	Danm straight
**2	Lol
S.:	Im going up to seethe cgc
S.:	Its closed.. cops everywhere
**2	....
S.:	Sicurity cams burnt
**2	:)
S.:	Stick to the native story.
**2	Will do
**2	Lol
S.:	Dump ppl
**2	I know .when we get older we will party to celebrate
S.:	Hell yea
**2	Hehe

[30] When questioned by the author of the PSR about her actions that day, including these text messages, S. stated that she was not proud that she was part of the incident.

She acknowledged that her "Hell yea" response to the reference to "celebrating when they got older" was because she felt that "she had got away with a bad ass thing".

[31] S. told the author of the PSR that she can be either a leader or a follower and that she is not subject to peer pressure or, if she is, she can handle it. She feels that she does not get talked into things that she does not want to do. She states she has been stressed due to the incident and has suffered from headaches, stomach problems and lack of sleep. She also struggles with some self-awareness issues and says she gets teased about her acne, her weight and her involvement in the fire, something her peers at school are aware of. She states that she can talk to her parents or teachers about what she is feeling.

[32] S. acknowledges having consumed alcohol and smoked marijuana on occasion, although I do not understand that this was a factor the night of the fire. She thought that drinking alcohol and smoking marijuana would make her feel like she was a "bad ass" and give her an instant reputation. She states that she regrets and feels guilty about drinking and doing drugs so young. She states that she wants to feel accepted. She characterized herself as having been a "nice, sweet and innocent girl" while in elementary school, but states that she chose to change her attitude, swear and wear more make-up in secondary school as it made her feel like she had more power and seem less gullible or an easy target.

[33] S.'s interests include sports, drawing and painting. During her time at the Youth Achievement Center she engaged in the recreation and fitness program, lunch program, food/nutrition cooking program, job hunter program and breakfast program. She also

attended the Helping Hands program and has volunteered 3 hours time at the Food Bank.

[34] S. is currently voluntarily involved in the Youth High Risk Treatment Program and appears to be doing well. While she feels that she does not need to see a psychologist or mental health worker, she further states that at times "the anger in my head is out of control and sometimes [I] want to punch someone". However, she is afraid that if she sees a psychologist she will become labelled. She acknowledged intentionally attempting to cut herself once in the past, feeling that if she made a slit all the pain would release, an incident her parents were not aware of. She says that she has no thoughts at present about hurting herself.

[35] The author of the PSR noted that, at times, S. appears to have had some difficulty relating to, or empathizing with, the people affected by the fire, stating such things as "it's recreation, it's not going to affect your life if you can't go swimming. Not going to kill you." And that the "ice surface is never used anyway". This said, it is also noted that S. recognized that people may be offended or hurt by her actions, and that she became agitated and emotional in the interviews when discussing the victims of the arson. S. stated that she is afraid to meet victims of the fire as she feels they would be angry at her, although she says that she would agree to be involved in a victim-offender process. S. prepared an apology to the community for her actions which is attached as Appendix A to this decision.

[36] S. scores at a low risk on both the Personal Experience Screening Questionnaire (a drug and alcohol pre-screening test) and the Youth Level of Service Case

Management Inventory. The author of the PSR feels that S.'s low risk status can be maintained through education, community resources and parental support. The author of the PSR is of the opinion that, despite the sometimes contradictory statements S. makes, she accepts her involvement in the fire and has the ability to succeed in the community.

[37] S.'s parents are supportive of her. There is nothing apparent in the family background that points to any basis or likelihood that S. would have acted as she did in lighting the fire and would have responded as she did afterwards. Her parents agree that S. needs to be held accountable for her actions, to learn from this incident and to make positive choices in the future.

Youth Criminal Justice Act

[38] The following Declaration of Principle is set out in section 3 of the *YCJA*:

> **3.** (1) The following principles apply in this Act:
>
> (*a*) the youth criminal justice system is intended to
>
> (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
>
> (ii) rehabilitate young persons who commit offences and reintegrate them into society, and
>
> (iii) ensure that a young person is subject to meaningful consequences for his or her offence in order to promote the long-term protection of the public;
>
> (*b*) the criminal justice system for young persons must be separate from that of adults and 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; and

(*d*) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

[39] The following Purpose and Principles of Sentencing are set out in ss. 38 and 39 of the *YCJA*:

> **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.
>
> (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; and
>
> (*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.
>
> (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.

[40] Section 39 of the *YCJA* sets out the required criteria for when a young person can be committed to custody. The following excerpts from s. 39 stipulate as follows:

39. (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

(*a*) the young person has committed a violent offence;

(*b*) the young person has failed to comply with non-custodial sentences;

(*c*) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or

(*d*) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

(2) If any of paragraphs (1)(*a*) to (*c*) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

(3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

(*a*) the alternatives to custody that are available;

(*b*) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and

(*c*) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

...

(6) Before imposing a custodial sentence under section 42 (youth sentences), a youth justice court shall consider a pre-sentence report and any sentencing proposal made by the young person or his or her counsel.

...

(9) If a youth justice court imposes a youth sentence that includes a custodial portion, the court shall state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1), including, if applicable, the reasons why the case is an exceptional case under paragraph (1)(*d*).

[41] The regime for sentencing youth in Canada is a different one than the regime for sentencing adults. While the protection of the public is the primary objective of the *YCJA*, one of the specific goals of the *YCJA* is the restriction of the use of custody for young offenders (see ***R.*** v. ***C.D.***, 2005 SCC 78 at paras 35-38). Even if a custodial sentence is an option, it nonetheless remains a sentence of essentially last resort due to an absence of any reasonable alternative.

[42] It is clear from a consideration of the entirety of s. 39 of the *YCJA* that the specific exclusion of s. 39(1)(d) from s. 39(2) indicates that a youth justice court is not as limited in its ability to impose a custodial sentence in exceptional cases where there are aggravating circumstances. However, while s. 39(2) does not require a sentencing judge to "consider all reasonable alternatives to custody" for offences covered by s.

39(1)(d), as it does for offences covered by s. 39(1)(a-c), the *YCJA* still requires a youth justice court to abide by s. 38(2)(d) principle that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons” (see ***R.*** v. ***S.T.***, 2009 BCCA 274, at paras. 38-39).

[43] An important difference between s. 39(2) and s. 38(2)(d) is found in the choice of the word “shall” in s. 39(2) versus “should” in s. 38(2)(d). In this context, I find that “should” expresses a desire or request rather than imposing a mandatory duty (see ***R.*** v. ***S.S.***, [1990] 2 S.C.R. 254). Therefore I find that, in the case of offences that fall within s. 39(1)(d), the sentencing judge is provided with significantly more discretion regarding the use of custody as a disposition. However, despite this discretion, I nonetheless should not impose a custodial sentence if there is another reasonable alternative that accords with the purpose and principles of sentencing in the *YCJA*.

[44] Sentencing under the *YCJA* is guided by principles focused on holding youth accountable for their actions through meaningful consequences, while attempting to provide the guidance and support necessary to assist youth in re-directing their lives towards positive and socially acceptable behaviour.

[45] Sections 61 – 73 of the *YCJA* set out the criteria for crimes where the circumstances of the offence and the offender require a sentencing response more in accord with the purposes and principles of sentencing applicable in adult matters. This is not the situation before me in the present case.

Deferred Custody and Supervision Order

[46] Deferred custody is a sentencing option under s. 42(2)(p) of the *YCJA*. The maximum length of the deferred custody portion of the order is six months and the mandatory and discretionary conditions of such an order are set out in ss. 105(2) and (3). Section 42(5) states that a deferred custody and supervision order ("DFSO") can be made if:

> (a) the young person is found guilty of an offence that is not a serious violent offence; and
>
> (b) it is consistent with the purpose and principles set out in section 38 and the restrictions on custody set out in section 39.

[47] A DFSO is a step down from the Custody and Supervision Order available in s. 42(n) and is somewhat akin to the conditional sentence of imprisonment available for adult offenders. A DFSO is a less restrictive form of custody. As with a conditional sentence order ("CSO"), the sentencing judge must first be satisfied that the offence requires the imposition of a custodial sentence. Next the sentencing judge considers the purpose and principles of sentencing and the personal circumstances of the offender, in order to determine whether the sentence should be served in the community. Factors such as family support, employment, education and rehabilitative steps taken, or, available and not taken, by the offender since the commission of the offence, become relevant in this determination.

[48] A youth who is subject to a DFSO can, in the event of a breach of the terms of supervision, be required to serve some or all of the remainder of their sentence in

custody. Therefore, the offence committed must be one for which custody is permitted as per s. 39 of the *YCJA* before a DFSO can be imposed.

[49] One distinguishing factor between a DFSO and the CSO is that there is no punitive aspect to a DFSO. The CSO incorporates punitive provisions into the terms of the CSO whereas the DFSO does not. This is in large part because the purpose and principles underlying the *YCJA* are primarily rehabilitative. The DFSO has been referred to as offering "...youth courts one last sanction to spare the young person being committed to custody". (For a detailed commentary on the DFSO see P. Carrington, J. Roberts and S. Davis-Barron, "The 'Last Chance' Sanction in Youth Court: Exploring the Deferred Custody and Supervision Order", (2011) 15 Can. Crim. L.R. 299).

[50] Crown counsel submits that a DFSO is available for S. under s. 39(1)(d) of the *YCJA*, and is the appropriate disposition. Crown counsel agrees that ss. 39(1)(a-c) do not apply to these circumstances as arson, per se, is not considered to be a violent offence within the meaning of the *YCJA*, and S. has not previously been involved in the criminal justice system.

[51] Crown counsel, however, submits that this is an exceptional case where the circumstances are so aggravating that the imposition of anything less than a custodial sentence would be inconsistent with the *YCJA*'s purpose and principles.

[52] Counsel points to the following factors in support of her argument:

a) the extent of the damage caused to the CGC;

b) S.'s post-offence planned conduct of attempting to blame or cast suspicion on an unidentified First Nations girl, which is an identifiable racial group;

c) S.'s awareness of the dangers associated with starting the fire. Counsel conceded however, that S. likely did not intend to cause the damage that ultimately resulted;

d) S.'s failure to take advantage of opportunities to alert others to the fire;

e) S.'s threats to her 11-year-old companion;

f) S.'s celebratory response in the aftermath of the fire: and

g) S.'s lack of empathy and understanding of the consequential effect of the fire upon others.

[53] Counsel further notes that, although this is an exceptional case within the meaning of s. 39(1)(d), the Crown is not seeking that S. be sentenced to a custodial disposition that would be served at the Young Offender Facility because S. has been doing well in the community since the offence.

[54] In contrast, counsel for S. submits that s. 39(1)(d) does not apply to the circumstances of this case. He submits that, other than the extent of the damage caused, there is nothing exceptional or aggravating about the other factors the Crown has highlighted as being so. The other actions of S. were not significantly different from what one could expect of any 13-year-old youth who had caused a fire such as this. In essence, S. was scared because of what she had done, and she was afraid of being caught. She is immature and the cavalier attitude demonstrated was a reflection of her immaturity.

[55] With respect to the extent of the damage, Defence counsel submits that, as there was no intent on the part of S. to start a fire that caused such extensive damage, this

case is distinguishable from the other cases of arson where DFSOs have been utilized. In his submission he states that there is a real danger in overly broadening the definition of exceptional and aggravating in s. 39(1)(d), as the effect would be to compromise the purpose and principles of the *YCJA*.

[56] The meaning of the word "exceptional" in s. 39(1)(d) has been considered by various courts. In ***R.*** v. ***R.E.W.*** (2006), 79 O.R. (3d) 1 (C.A.), where the offence committed was that of accessory after the fact to a murder, the Court noted that:

> [31] The theme that runs through the use of the term "exceptional" in both criminal case law and legislation, is that it is intended to describe the clearest of cases. Such cases include those where applying the normal rules would undermine the purpose of the legislation, where the exercise of the unusual power is necessary or required, and where the exercise of the unusual jurisdiction is capable of explanation. The wording off s. 39(1)(d) is consistent with this approach. The exceptional power to commit a young person to custody is reserved for those circumstances where, in effect, any other order would undermine the purpose and principles of sentencing set out in s. 38. The analysis of s. 39(1)(d) must be set against the background of s. 38 which stresses the importance of interfering with a young person's liberty as little as possible...
>
> ...
>
> [43] The scheme of the YCJA suggests that the exceptional case gateway can only be utilized in those very rare cases where the circumstances of the crime are so extreme that anything less than custody would fail to reflect societal values. It seems to me that one example of an exceptional case is when the circumstances of the offence are shocking to the community.

[57] The British Columbia case of ***S.T.*** involved the theft and subsequent burning of a truck. The arson in that case was considered a deliberate attempt to destroy property rather than an impulsive act. The Court considered the "exceptional case" criteria of s. 39(1)(d) in paras. 46 – 49:

> [46] As I read s. 39(1)(d), in "exceptional cases" the aggravating circumstances of the offence render a non-custodial sentence inconsistent with the purpose and principles of s. 38 because factors such as proportionality, responsibility and rehabilitation demand a custodial sentence. That determination will necessarily require an assessment of the young person's circumstances and background. However, in the final analysis under s. 39(1)(d) the aggravating circumstances ultimately outweigh those other "relevant considerations" and, in that sense, render them irrelevant in the resulting imposition of a custodial sentence.
>
> [47] Thus, the issue in this appeal is reduced to this: are the circumstances of this "horrendous property crime" so aggravating that they outweigh other relevant considerations? The difficulty posed by the question is two-fold.
>
> [48] First, as the Supreme Court of Canada stated in *R. v. C.D.*, Parliament's intention in enacting the *YCJA* was to reduce the over-reliance on custodial sentences for young persons. To set the bar of "exceptional circumstances" too low would defeat Parliament's intention and bring a return to the high incarceration rates that the YCJA was intended to avoid.
>
> [49] Second, to achieve a semblance of consistency, it is necessary to compare, to the extent possible, the instant offence with similarly situated offences.

[58] The Court in ***S.T.*** reviewed a number of cases in which the s. 39(1)(d) criteria had been met. Included were: accessory after the fact to murder, sexual assault, trafficking in cocaine or heroin, perjury, impaired driving causing death, and five cases of arson. In the majority of the cases involving arson, the offence was considered to be a calculated, willful and deliberate act, intended by the offender to cause significant destruction.

[59] After considering the reasoning of the Ontario and British Columbia Courts of Appeal in ***R.E.W.*** and. ***S.T.*** with respect to the application of s. 39(1)(d), I find that the correct interpretation is as follows: the aggravating circumstances of the offence itself can, standing independent of the personal circumstances of the offender, open the doorway to the possibility of a custodial disposition. Before a custodial disposition can be imposed, however, the personal circumstances of the offender must be taken into

account in determining whether the case is "exceptional" such that a custodial disposition is warranted, regardless of whether it be closed, open or deferred custody.

[60] While the circumstances of the offence itself, including the consequences of the offence, can be separated from the circumstances of the offender for the purpose of determining whether a custodial disposition is available, the sentencing youth court judge cannot separate the offence from the offender in determining a just and fair sentence. To do so would contravene the principles in s. 38 of the *YCJA* which require that the personal circumstances of the youth be considered in determining an appropriate sentence.

[61] Therefore, while the aggravating circumstances of an offence itself may, at first view, appear to call for a custodial disposition, the personal circumstances of an offender can be such that the case is not ultimately "exceptional" within the meaning of s. 39(1)(d). The personal circumstances of the offender include the offender's pre-offence background and history, as well as conduct and steps taken post-offence.

[62] In the case of S., there is no question that her crime has shocked the community of Whitehorse. The shock is primarily a reflection of the extent of the damage caused and the significant loss of such a valuable community resource for so many for so long. The community is also shocked by the fact that the crime was committed by two young girls. I expect that the community will be further shocked by some of the facts that were put forward at sentencing, particularly with respect to S.'s attempt to blame a First Nations girl and the texting exchanges that took place.

[63] I find that the circumstances of this offence, standing alone, are sufficiently aggravating that they open the doorway to the possibility of a custodial disposition under s. 39(1)(d). While I agree with Defence counsel that there is a distinction to be made between a case where the resultant damage is intended or reasonably foreseeable and a case where it is not, when considering the aggravating features of the post-offence conduct, I do not find this distinction to be a determinative factor here. The actions of S. after the fire was started were reckless and were inconsistent with the notion of a "diminished intent" such as would require me to find that s. 39(1)(d) is not applicable.

[64] S. had opportunities to alert others to the existence of the fire at an early stage but chose not to do so. While I appreciate that I am assessing the actions and choices of a youth who had just turned 13, made quickly in somewhat "excited" circumstances, I nonetheless expect more. Had she immediately alerted others, there may have been an opportunity to respond in a way that would have reduced the consequential effect this fire had upon so many people.

[65] Even if, in the end, the same damage resulted, a correct response by S. would have been an important factor in my consideration as to whether the circumstances of the offence were so aggravating as to open the doorway for a custodial disposition under s. 39(1)(d). In all likelihood I would have found that s. 39(1)(d) did not apply.

[66] In making my decision that s. 39(1)(d) applies such that I can consider the appropriateness of a custodial sentence for S., I also place some emphasis on the attempt by S. to cast the blame elsewhere. I place the least emphasis on the "celebratory" response as I view this as being an immature reaction to the incident, well

before S. would have been able to appreciate the extent of the consequences of her actions. As noted, I place most of the emphasis on the failure by S. to alert others to the fire she had started. These are all actions that fall, in varying degrees, within what I consider to be the aggravating circumstances of the offence that bring it within the ambit of s. 39(1)(d).

[67] Having found that the aggravating circumstances of the offence are sufficiently serious that custody is available, I must consider whether the circumstances are "exceptional" such that S. should be sentenced to a custodial disposition.

[68] The fire started at the CGC by S. and K., while unquestionably a wilful and deliberate act in and of itself, clearly caused damage beyond what S. intended or foresaw. Both Crown and Defence counsel agree that this is the case and, on the evidence before me, I agree with their assessment.

[69] In this case, a 13-year-old, in concert with a 12-year-old, made a somewhat spontaneous decision to light the handle of a speed skating mat on fire. I say somewhat spontaneous, because S. had already determined that the mats would burn, having made a first attempt, and she nonetheless decided to put her lighter to another mat. There is unquestionably an element of recklessness here that differentiates these circumstances from the case where an initial attempt to start a fire got out of control.

[70] That said, there was no planning or pre-meditation beyond the few moments between attempts and, even as the Crown concedes, no realization of the extent of the damage that would ultimately be caused. Had the one mat S. lit on fire burned itself out

and the fire not spread, the community shock with respect to her actions would not be the same.

[71] I have already described the conduct of S. after starting the fire. Certainly the correct response would have been to alert facility staff or users to the fire, either by pulling the fire alarm or telling someone. The correct response would have been to accept responsibility right away and not to have concocted a story that laid the blame on another individual, albeit unidentified, and of an identifiable racial group who already suffers from negative stereotyping. The correct response would not have included threatening an 11-year-old with violence if he told someone who started the fire, in all likelihood adding to the fear he would have already felt. Rather than adopt the "bad ass" and celebratory attitude that she did, the correct response by S. would have been to immediately regret her actions, express her remorse, appreciate and understand the serious consequences of her conduct, and to empathize with those affected by her crime.

[72] Do these reprehensible actions of S. mean that a custodial disposition is the only disposition that accords with the purpose and principles of sentencing set out in the *YCJA*? Unless it is the only disposition that does so, I should not impose a period of custody, whether deferred or otherwise.

[73] While S.'s actions, both in starting the fire and her response in the immediate aftermath, are sufficiently blameworthy to take her beyond the least culpable youthful offender, I find that they are not such that she should be viewed as being among the worst, or frankly, even close to the worst youthful, non-violent offender.

[74] Prior to the offence, S.'s personal circumstances were unremarkable and gave no indication that she could be expected to have committed this arson or responded the way she did after starting the fire.

[75] S.'s actions since she was arrested for this offence have generally been positive. She has complied with the restrictive conditions of her Undertaking. She has involved herself in positive activities, both within and outside the school context. Notwithstanding her initial reaction to the fire and some indication that she "enjoyed" the notoriety she received for having started the fire, I accept that she is sorry for what she has done. S. is progressing on a positive rehabilitative path, she has acknowledged, both in words and actions, her responsibility for her crime and she has acknowledged the harm she has caused to the community.

[76] I keep in mind that I am required under s. 38(2)(d) to determine the sentence I am to impose on S. in accordance with the principles and purposes of sentencing set out in ss. 3, 38 and 39 of the *YCJA*, including the principle that all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons.

[77] S. must be held accountable for the crime she has committed. I recognize that there is no possible way that any sentence can even come close to compensating the community for the harm S. has caused. I can not, however, without violating the purpose and principles of sentencing, attempt to compensate the community or give voice to the community anger and frustration by imposing a denunciatory or punitive sentence on S.

[78] I find, considering the circumstances of S. and of the crime she has committed, that a custodial sentence is not required. If a custodial sentence is not required, then it should not be imposed. I find that a sentence of probation which requires S. to perform the maximum allowable number of community work service hours, in addition to requiring that she continue in her education, employment, recreational activities and counselling, accords with the purpose and principles of sentencing.

[79] S. must recompense the community to the best of her ability. The information before me in the PSR and in the submissions of counsel is that S. has already taken many positive steps on the pathway to becoming a responsible and contributing community member. In addition to requiring that she continue her pursuit of such positive activities, S. can further contribute to the community by way of community work service hours. In this way S. will be accountable to herself and to the community.

[80] Therefore, pursuant to s. 42(k) of the *YCJA*, S., you are sentenced to a period of probation for the maximum term allowable of two years. In accordance with the terms of this probation order you are required to:

1. keep the peace and be of good behaviour;

2. appear before the youth justice court when required by the court to do so;

3. report to a youth worker immediately, and thereafter when and in the manner directed by the youth worker;

4. notify your youth worker in advance of any change of name or address, and promptly notify your youth worker of any change of employment or occupation;

5. reside as directed by your youth worker, abide by the rules of that residence and not change that residence without the prior written permission of your youth worker;

6. for the first four months of this order obey a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 7:00 a.m. daily. For the next four months of this order you must obey a curfew by remaining within your place of residence between the hours of 10:00 p.m. and 7:00 a.m. daily. For next four months of this order you must obey a curfew by remaining within your place of residence between the hours of 11:00 p.m. and 7:00 a.m. daily. During these hours you must continuously be at your residence except when in the direct company or supervision of a parent, an adult approved in writing in advance by your youth worker, or otherwise with the advance written permission of your youth worker. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

7. perform 240 hours of community work service as directed by your youth worker or such person as your youth worker may delegate. Any hours spent in assessment, counselling, programming or treatment can, in the

discretion of the youth worker, count towards community work service hours. These community work service hours are to be completed within the first 12 months of this order;

8. attend and participate in a Victim Offender Reconciliation conference as directed by your youth worker and, if so directed, complete any recommendations derived from the conference;

9. attend any assessment, counselling, programming or treatment as directed by the youth worker;

10. attend school or any other place of learning, training or recreation that is appropriate as directed by your youth worker;

11. provide your youth worker with your consent to release information regarding your participation in any assessment, counselling, programming, treatment, learning, training or recreation that you have been directed to participate in pursuant to the terms of this order;

12. have no contact directly or indirectly or communication in any way with your co-accused, K., or such other person as your youth worker may specify in advance in writing, unless otherwise directed in writing in advance by your youth worker;

13. not attend at the Canada Games Center in Whitehorse unless you have the prior written permission of your youth worker in consultation with the Manager of the Canada Games Center, or his or her designate;

14. not have in your possession any matches, lighters or incendiary devices unless under the direct supervision of a parent or other adult approved in writing in advance by your youth worker;

15. not be in possession of a cell phone, IPod, IPad, Blackberry Playbook, smartphone, computer connected to the Internet or other analogous device used for the purpose of communication unless you are under the direct supervision of a parent or other adult approved in writing in advance by your youth worker, or otherwise unless with the advance written permission of your youth worker in consultation with your parent or parents;

16. carry with you at all times any written permissions granted to you under this order for any purpose if you are exercising a permission exception to one of the terms of this order;

17. attend for a review of your performance under this order in the Youth Justice Court as and when required, upon an application for review made by yourself, a parent, the Attorney General or your youth worker.

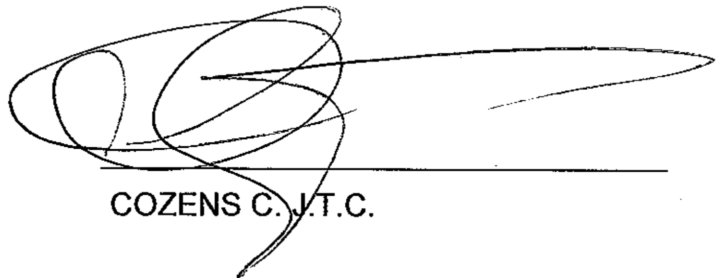
[81] The terms and length of this probation order may be varied by the Youth Justice Court upon review in accordance with s. 59 of the *YCJA*.

[82] The cell phone seized by the RCMP shall be forfeited to the Crown.

[83] As a last note, I see from a review of the photographs depicting the location where the fire was started that at the same location, ironically, there is a sign on the rink boards that states:

Play Hard
Play Fair
Have Fun

[84] I hope that in future S., and all users of the CGC facility, can adhere to this idea and enjoy the benefits of doing so.



COZENS C.J.T.C.

Appendix A

This letter is to my show my regret and apologies towards the people of Whitehorse regarding the fire at the Canada Games Center.

I realize that my irresponsible actions have frightened and caused destruction to the community.

I understand, after giving it thorough thought, that I put a lot of lives in danger and it frightened a large amount of people.

When I learned that sick people needed the centre for physio-therapy and were unable to continue their health activities, I was very ashamed of myself.

Also, the people that were participating in ice sports, such as hockey and skating were strongly affected. They had to practice elsewhere, or sometimes were not able to practice at all.

The daycare programs, the summer camps, and the little kids play area, were damaged as well. These programs had to be re-arranged, re-scheduled or in some cases cancelled.

The centre ~~had to~~ be closed down for a lengthy time and in general, and anyone who used it was shaken over the incident.

I would also like to acknowledge the employees that lost wages when they could not go to work.

Plus, I would like to thank the dedicated workers and volunteers that cleaned up the damage.

I am very remorseful towards my un-thoughtful and immature actions.

I completely understand why people would be angry with me; I have shamed myself and my family.

This apology is genuine and earnest, and I hope that the community can forgive me someday.