Citation: *R. v. Mathieson*, 2018 YKTC 23

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Docket: 17-00368
17-00368A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

DARYL MICHAEL JOHN MATHIESON

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Kevin MacGillivray — Counsel for Crown
Malcolm Campbell — Counsel for Defence

REASONS FOR SENTENCE

[1] Daryl Mathieson has entered a guilty plea to having committed the offence of sexual assault contrary to s. 271 of the *Criminal Code*. The Crown has elected to proceed by way of summary election.

[2] The charge arose out of an incident in Prince Rupert, British Columbia and was waived to the Yukon for disposition.

[3] Mr. Mathieson was 27 at the time of the commission of the offence. The victim, S.B. was 14. Mr. Mathieson was a frequent visitor at S.B.'s residence and became friends with her. On February 18, 2017, Mr. Mathieson and S.B. were

sharing a two-litre container of alcohol. The arrangement was for Mr. Mathieson to sleep in the top bunk bed. However, at approximately 5:00 or 6:00 a.m., S.B.'s mother looked into the room and saw that Mr. Mathieson was having sexual intercourse with S.B.

[4] She told him to leave, which he did. S.B. also got out of bed and left with Mr. Mathieson. The Crown's disclosure includes a notation that S.B. stated that "she was leaving to be with her boyfriend". She remained with Mr. Mathieson until he was arrested on February 22, 2017.

[5] Mr. Mathieson provided a statement in which he admitted to having had sexual intercourse with S.B. on two occasions and having oral sex once.

[6] Mr. Mathieson's only prior criminal conviction was in 2010 for break and enter with intent, contrary to s. 348(1)(a). He was sentenced to serve a 90-day sentence conditionally in the community, followed by a one-year period of probation.

[7] The position of the British Columbia Crown counsel's office on the waiver was a sentence of 12 – 16 months' custody to be followed by a 30-month period of probation.

[8] Counsel before me is seeking a sentence of 12 months' custody, to be followed by 12 months of probation. Mr. Mathieson is entitled to 36 days' credit for time spent in remand.

[9] Counsel stresses that the sentencing principles of deterrence and denunciation are paramount and points to the statutorily aggravating factor of S.B.'s age, as set out in s. 718.2(ii.1)

[10] Counsel also points to the element of trust that was breached in the commission of this offence in that Mr. Mathieson was a trusted visitor to S.B.'s house.

[11] Counsel also notes as aggravating the fact that Mr. Mathieson failed to report to his bail supervisor on nine separate occasions between November 8, 2017 and January 3, 2018. A charge was laid for a portion of this period but a guilty plea was not entered, with an agreement that the facts could be read in as aggravating.

[12] Crown counsel points to the mitigating factors as follows:

- Guilty plea;
- Youth of Mr. Mathieson;
- Minimal unrelated criminal history;
- ***Gladue*** factors;
- Efforts made at managing his addiction issues; and
- His proactive efforts to obtain and maintain employment.

[13] Counsel for Mr. Mathieson submits that he should receive the minimum sentence of six months' custody, less 36 days' credit for time served.

Victim Impact

[14] No victim impact statements were provided, nor were there any submissions with respect to the impact on the victim and her family. That does not mean there was no impact. Generally speaking, I am prepared to accept that there is a negative impact on a 14-year-old when an older individual has sexual contact with him or her, whether the youth is a "willing" participant or not. As stated in ***R.*** v. ***Rosenthal***, 2015 YKCA 1, in which no victim impact statement had been filed, in para. 6:

> The trial judge did not err in declining to take judicial notice of the specific psychological consequences Crown counsel submitted would occur. In sentencing for sexual assault it is, however, proper to consider the likelihood of psychological harm to the victim….That likelihood is a reason that the principle of general deterrence is significant in sentencing for sexual assault. …

Personal Circumstances

[15] A Pre-Sentence Report was prepared.

[16] Mr. Mathieson is a 28-year-old member of the Nisga'a First Nation. He states that he has not had a lot of exposure to his First Nation's culture, but he is interested in gaining more knowledge of his heritage.

[17] He comes from a home in which neglect was prevalent. His biological father has been mostly absent from his life since he separated from Mr. Mathieson's mother when Mr. Mathieson was very young. Mr. Mathieson believes his father attended residential school and had a difficult childhood. He struggled with alcohol addiction issues. Mr. Mathieson recalls hiding under the

kitchen table when his parents would be screaming at each other. He currently speaks infrequently with his father, who lives and works in Prince Rupert.

[18] His mother, who was his primary caregiver, was addicted to crack cocaine. Her addiction became severe when Mr. Mathieson was 10 years old. This was the point at which Mr. Mathieson's relationship with his mother began to deteriorate. His mother has been sober for several years now, however their relationship remains unsettled.

[19] As a result of his mother's addiction, Mr. Mathieson was often left to care for his younger half-brother, at times without adequate food and supplies.

[20] Mr. Mathieson had a positive relationship with his step-father, despite him separating from Mr. Mathieson's mother when Mr. Mathieson was approximately eight years of age. His stepfather continued to be supportive of Mr. Mathieson, and has provided care for him and his brother, including after the separation. Mr. Mathieson continues to maintain contact with his stepfather.

[21] Mr. Mathieson was kicked out of his mother's home at the age of 15. He resided with a friend and his family for approximately two years. He states that, while this was generally a positive environment, there was also some physical violence towards himself and his friend in this home.

[22] Mr. Mathieson has a grade 10 education. He stated that while he enjoyed school, his attendance began to slip in grades eight and nine due to issues at home. He stated that, due to coming from a poor home, he was subjected to

bullying at school, and often called “welfare boy”. He states that he was diagnosed with a learning disability, the specifics of which he cannot remember, and placed in a special education program and prescribed Ritalin. He stated that, while he attempted to obtain his GED, his struggles with alcohol effectively de-railed these attempts. This is something he still wishes to pursue.

[23] Mr. Mathieson began to drink alcohol at 16 years of age. It has been a struggle for him, however he has maintained sobriety for the past 15 months since he was arrested for this offence. He successfully completed an intensive five-week residential treatment program in September 2017. He continues to attend Alcohol and Drug Services (“ADS”) for follow-up counselling and Alcoholics Anonymous regularly, and has signed up to participate in an AA Round-up event occurring on the long-weekend in May.

[24] Based upon his recent period of sobriety, Mr. Mathieson scores as having no problems related to alcohol abuse, although based on his alcohol use prior to this period of sobriety, he would have scored as having a severe level of problems.

[25] Mr. Mathieson has also struggled with drug use, starting with marijuana use when he was 13 and cocaine use when he was 18. However, he states that when he quit drinking alcohol he also quit the use of these drugs. He scores as having a low level of problems related to drug abuse.

[26] Mr. Mathieson indicated that he has always had difficulty in developing and maintaining meaningful relationships. Since being in Whitehorse he has

worked at developing relationships with people "…that won't enable me or push me to drink". He feels that these relationships, unlike his previous ones, are more balanced.

[27] Mr. Mathieson has a positive relationship with his 19-year-old brother.

[28] He has a seven-year-old son that resides with his ex-partner. He pays $300.00 per month in child support. He is currently in arrears. He believes that his drinking caused problems in the relationship and was ultimately the reason for this relationship ending.

[29] Since achieving sobriety, he has developed stronger relationships with his extended family. He states that his Aunt and Uncle have offered him employment in their restaurant in British Columbia, an offer he is considering. He intends to remain in Whitehorse until his court matters are concluded, and is uncertain whether he will continue to stay here or re-locate to British Columbia afterwards.

[30] Mr. Mathieson's employment record has been marked with numerous short-term periods of work with different employers. His most recent employment at a restaurant in Whitehorse ended due to his absences to deal with medical and personal issues. He has managed to obtain several work-related certificates. He has been on Social Assistance for several months and states that he is focusing on dealing with his health issues rather than employment at this time.

[31] He has struggled with insomnia and mental health issues over the years. He had suicidal ideations and was involved in self-harming as an older teenager. Mr. Mathieson states that he was admitted to a psychiatric facility when he was 23 years old and diagnosed with ADHD, depression, anxiety and insomnia. He feels that his struggles with anxiety and depression have become better since he has maintained sobriety, although he indicated that he had a severe panic and anxiety attack in early April 2018, for which he went to Emergency at WGH and was admitted for treatment. He continues to take prescribed medication for treatment of these issues.

[32] Mr. Mathieson continues to work with ADS counselling services and hopes to be referred to a psychiatrist for help with his issues.

[33] Several sex offender risk assessments were completed for Mr. Mathieson.

[34] His assessment results are as follows:

- Static 99: moderate-low risk for being charged or convicted of another sexual offence, based upon him being 27 years old and having an unrelated victim;

- Stable-2007: moderate risk for being charged or convicted of another sexual offence, based on Significant Social Influences, Capacity for Relationship Stability, General Social Rejection/Loneliness, Impulsive Acts and Sex as Coping. Notably, the assessment results indicate no clinical concerns with respect to the following Risk/Needs areas; Hostility Towards Women, Lack of Concern for Others, Poor Problem Solving Skills, negative Emotion/Hostility, Sex Drive/Preoccupation, Deviant Sexual Preferences and Co-operation with Supervision. The writer of the Pre-Sentence Report stated that:

> Mr. Mathieson may benefit from any interventions that may introduce and/or reinforce positive and pro-social influences, and this may work to address feelings of loneliness and rejection. Furthermore, Mr. Mathieson may benefit from counselling to explore and/or address any issues around social rejection/loneliness, impulsive behaviours, and to gain additional coping strategies for general stress in his life.

[35] The composite scores for these two assessment tools place Mr. Mathieson as:

- Having a moderate level of stable dynamic needs; and
- Being in the moderate-low overall priority category for supervision and intervention in comparison to other sexual offenders assessed using these measures.

[36] With respect to the Criminogenic Risk Assessment, Mr. Mathieson scored as:

- Requiring a low level of supervision;
- Having a low criminal history risk rating; and
- Having a medium level of criminogenic needs.

[37] Mr. Mathieson accepts responsibility for his actions and admits that it was wrong for him to have had any sexual contact with S.B. He states that he views his arrest as being a “positive” as it was a “wake-up call” and has helped him to address his out-of-control drinking. He understands that his actions have affected S.B. and her family.

[38] The writer of the Pre-Sentence Report notes that Mr. Mathieson shows insight into how his actions may have impacted S.B. and her family. He also shows insight into several of his risk factors.

[39] Besides maintaining his sobriety, Mr. Mathieson's goals include surrounding himself with sober and positive people and taking responsibility for his actions in general. He currently has little in the way of concrete plans.

Legal Authorities

[40] I have reviewed the following cases that were filed in the sentencing hearing:

[41] In ***R.*** v. ***Quintal***, 2016 YKTC 46, the 18-year-old offender had sexually assaulted the victim when she was 16 years of age.

[42] Mr. Quintal and the victim were acquaintances. Mr. Quintal had given the victim a ride in his car, something he had done periodically. On this occasion he drove to an abandoned office, put his hand on her leg, and asked her to move to the back seat of the car where he took off her pants and had sexual intercourse with her. She was too scared to say anything to him.

[43] In her victim impact statement she stated that the offence had a negative emotional and psychological impact on her, leaving her depressed, angry and engaging in self-harming behaviours.

[44] At the time of sentencing, following a guilty plea, Mr. Quintal, who was of Metis ancestry, had moved back to the Northwest Territories. He was employed, with a good work history, and received a positive report from his employer.

[45] He had a supportive family and letters of reference were filed that supported the fact that this was an out-of-character offence for him. He had no prior criminal history.

[46] ***Gladue*** factors were applicable in ***Quintal***. In particular, Mr. Quintal had been the victim of a sexual assault by an extended family member when he was a child. He had also been subjected to bullying at school. His family had been impacted by the unexpected deaths of two family members in recent years.

[47] In imposing sentence, Chisholm J. considered the invasive nature of the offence, the serious harm to the victim and the fact that Mr. Quintal had taken no steps to establish what some courts have labelled as *de facto* consent, in emphasizing the need for general and specific deterrence.

[48] In mitigation were the guilty plea and remorse shown by Mr. Quintal, his youth, his prior good character, his role as a productive member of society, his low risk rating for reoffending and the ***Gladue*** considerations.

[49] Chisholm J. stated that the range of sentences for this type of offence were, arguably, 12 months and upward.

[50] Mr. Quintal was sentenced to 11 months' imprisonment, followed by two years of probation.

[51] In ***R.*** v. ***Menicoche***, 2016 YKCA 7, an almost 27-year-old Aboriginal offender had a sentence of 23 months' imprisonment reduced to 17 months, for having had unprotected anal sex with a passed-out 15-year-old victim. The victim and Mr. Menicoche were acquaintances. At his invitation, she came to his family's residence at approximately three to four a.m. and drank alcohol he had provided to her. When she tried to sleep, Mr. Menicoche lay down beside her and held and kissed her. She told him to stop and he did. She passed out but awoke to him having anal intercourse with her. She told him to stop and he did. He then immediately apologized.

[52] Mr. Menicoche took full responsibility for the offence and expressed remorse.

[53] Mr. Menicoche had a prior conviction for assault when he was 19.

[54] ***Gladue*** factors were a significant consideration.

[55] He was a new father and was noted as having the potential to become a productive and contributing member to his First Nation and to society at large.

[56] In ***R.*** v. ***Tom*** (1991), 3 B.C.A.C. 175, the 19-year-old offender pled guilty to touching a female under the age of 14 for a sexual purpose. The victim was 11 years old and the offence constituted kissing her and extensive fondling of her vaginal and posterior area over her clothing, on at least two occasions. The victim was stated to be "a not unwilling participant".

[57] Mr. Tom, who was a resident of the Pinche Reserve in British Columbia, was from a dysfunctional background, including impoverishment, neglect and abuse.

[58] In recognizing the principles of general deterrence and rehabilitation, the Appeal Court, in upholding the sentence of 15 months' custody imposed by the sentencing judge, stated at para. 7:

> This offence before us today cannot be regarded as anything other than serious. For here we have an adult involved in a sexual way with a mere child in a small community after he had been warned by the child's mother to stay away from her.

[59] I note that the ***Gladue*** case post-dated the sentencing of Mr. Tom.

[60] In ***R.*** v. ***William***, 2014 BCSC 1639, the offender was convicted after trial of the offence of sexual assault and touching a person under the age of 16 for a sexual purpose. He was sentenced to one year of imprisonment followed by three years of probation.

[61] The offender and the 15-year-old victim, in the company of several others, had been drinking alcohol and consuming drugs. While the victim was lying on the hallway floor outside the bathroom, the offender digitally penetrated her before taking her to a couch, removing her pants and underwear and had sexual intercourse with her, holding her arms above her head.

[62] The offence had a significant traumatizing effect on the victim, and it was noted that she was struggling with what I take to be post-offence behavioural issues.

[63] Mr. William was of Aboriginal ancestry and ***Gladue*** factors were a significant consideration.

[64] At the time of sentencing it was noted that Mr. William "…had made significant progress in dealing with his addictions and is committed to continuing counselling and therapy".

[65] The aggravating factors were:

- The impact on the victim, which included the additional emotional damage of having to testify at trial;
- The offence was full intercourse with a victim in a vulnerable position due to the consumption of alcohol and drugs, which were "heinous" circumstances; and
- Mr. Williams asked a witness to lie in court.

[66] The mitigating factors were:

- Post-offence willingness to undertake substance abuse counselling;
- Post-offence acceptance of responsibility, remorse and an apology to the victim;
- Reduced likelihood of re-offending;
- Lack of prior criminal convictions.

[67] In ***R.*** v. ***G.J.W.***, 2012 YKTC 54, the offender pled guilty to an offence contrary to s. 153(1.1) of the *Criminal Code*. A sentence of 32 months' custody was imposed, less credit for time served, which allowed for a two-year probation order as well.

[68] A ***Gardiner*** hearing was held in which the victim was required to testify as to the details of the offence.

[69] The 42-year-old Aboriginal offender had sexual intercourse with his 16-year-old niece at a remote cabin during a snowmobiling trip. The victim tried to push him off and told him to stop, which he eventually did.

[70] He had eight prior criminal convictions but all were approximately 12 or more years before his sentencing for this offence. However, he had a conviction for sexual interference in 1999 in which the victim was nine years of age, and a conviction for sexual assault in 2000 involving his 13-year-old niece. Both cases involved fondling and he received conditional sentences.

[71] ***Gladue*** factors were present for the offender, including the fact that he had been the victim of sexual offences as a child on more than one occasion.

[72] There was a significant impact on the victim, as well as the both the victim and the offender's extended family.

[73] The community was not supportive of the offender returning to the community.

[74] Aggravating factors emphasized by the sentencing judge were stated at para. 23 as follows:

> The aggravating factors are clear and include the position of trust, prior record of sexual offences, significant premeditation, serious nature of the crime and that he did not stop immediately when told "no" by the victim, consequences to the victim, their family and the community, and that the offender's risk of reoffending is high.

[75] The Court noted that the offender "…was shown to be opportunistic and calculating in his approaches to young females". With respect to this particular victim, the Court noted a pattern of grooming in the spending of time alone together, texting, holding hands, and kissing.

[76] In determining the appropriate sentence, the sentencing judge emphasized in particular the range of sentences as set out in ***R.*** v. ***White***, 2008 YKSC 34. In ***White*** Gower J., after an extensive review of case law, stated in para. 85:

> …it is my view that the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.

[77] The sentencing judge in ***G.J.W.*** also referred to ***R.*** v. ***Torres***, 2012 ABQB 4 in which in para. 23 the Court cited from ***R.*** v. ***Revet***, 2010 SKCA 71 as follows:

> There is certainly a difference between an assault against a child that involves force, violence, intimidation, or trickery and an assault against a child where the child actually consents to the activity or simply does not resist it. That being said, the whole purpose of the legislation is to protect children, who are not sufficiently mature to

> appreciate all the consequences of sexual activities. We agree that a child's participation is not, *per se*, a mitigating factor in the imposition of a sentence for sexual assault upon that child. It means nothing more than an absence of aggravating factors such as the use of force, violence, intimidation or trickery.

[78] In the case of ***Torres***, the 22-year-old offender engaged in sexual activity with the 13-year-old victim on two occasions. The offender, who pled guilty after trial based upon having advanced a defence of mistaken age, was sentenced to 36 months' incarceration.

[79] I note that the case law in Alberta has for many years incorporated a categorized range of sentencing which distinguishes "major sexual assaults" and considers the starting point for such offences to be three years' incarceration, assuming a mature offender with no criminal record and of previous good character. When the victim is a child, the starting point is said to be four years (***Torres***, paras. 18-20).

[80] However, the Yukon sentencing regime for sexual offences does not categorize sexual offences or impose starting points based upon such categorizations. Therefore, while the statements in Alberta jurisprudence with respect to the purpose, principles and objectives of sentencing offenders who have committed sexual offences may well be applicable in considering an appropriate sentence for an offender convicted of sexual offences in the Yukon, the actual sentences imposed by Alberta courts are less helpful in determining the sentence to be imposed in the Yukon in any particular case.

[81] In addition, counsel for Mr. Mathieson referred to the unreported decision of Deputy Judge Orr in ***R.*** v. ***Ross***, (2017), December 14 (YKTC).

[82] In ***Ross*** the offender entered a guilty plea to having committed an offence contrary to s. 151. The Crown proceeded by way of summary election.

[83] The victim was 15 years old. Mr. Ross was 25 years old. The victim and a friend had been hanging out at victim's residence. They obtained a 26-ounce bottle of vodka. The victim contacted the accused and asked him to bring her cigarettes. Sometime later, the victim's friend passed out on a bed. Mr. Ross and the victim went together to a mattress in the residence, where Mr. Ross performed oral sex on the victim and had sexual intercourse with her. There was an unresolved difference in the facts as to whether Mr. Ross had taken reasonable steps to establish the victim's age and whether she was consenting to the sexual contact.

[84] The victim subsequently told her friend that she had not wanted to have sexual contact with Mr. Ross. She asked Mr. Ross to get her Plan B emergency contraception for her, which he did.

[85] Mr. Ross entered the guilty plea on the day of trial. The matter had been adjourned from previous trial dates.

[86] Crown and defence counsel proffered a joint submission of a 90-day intermittent sentence to be followed by a 90-day period of probation.

[87] Orr J. requested counsel to explain the circumstances in order to provide a foundation for the joint submission, given that she considered the sentence to vary significantly from the usual range of sentences for such an offence.

[88] Mr. Ross had no criminal record.

[89] He was a member of the Champagne and Aishihik First Nations. His parents had separated when he was one year old. He moved from home to home as a child. Nonetheless, he came from a supportive family, whose support continued with several members of his family present in Court for the sentencing hearing.

[90] Mr. Ross had a grade 10 education. Although he seemed to do well at school in his early years, at the age of seven he became extremely ill to the point where there were concerns for his life. He was subsequently diagnosed with Kawasaki syndrome. Although he recovered, there was a noticeable negative impact on his learning abilities. Counsel agreed that although he was 25 years old, his diminished mental capabilities effectively "lowered" his age.

[91] Prior to the commission of the offence, Mr. Ross had been involved in an eight and one-half-year common law relationship that ended suddenly. The termination of this relationship and the circumstances in which it occurred caused him confusion and depression. Although he had been sober during the relationship, he started to drink afterwards for approximately a one-year period.

[92] At the time of sentencing, Mr. Ross was in a relationship. His partner was pregnant and, when he learned that, he quit drinking.

[93] He had obtained fulltime employment in Haines Junction as a carpenter's helper with his First Nation. It was going well and would, in all likelihood, result in long-term employment after the probationary period ended. Generally Mr. Ross had demonstrated a good work history employed in seasonal labour-type jobs.

[94] There were some legal challenges for the Crown in prosecuting, not the least of which was the vulnerability of the victim. She struggled with emotional and behavioural issues, which were not necessarily wholly attributable to the offence committed by Mr. Ross. She had not been particularly cooperative with the Crown in respect of the prosecution of the case, however on the trial date on which the guilty plea was entered she was present and prepared to testify, although she did not want to do so.

[95] In acceding to the joint submission, Orr J. stressed that denunciation and deterrence were the primary sentencing considerations.

[96] With respect to rehabilitation, Orr. J. noted the absence of a criminal record, the cognitive issues and ongoing consequences of Mr. Ross' childhood illness and that he had been able to overcome some of these negative consequences, and his ability to obtain and maintain employment.

[97] Orr J. also stressed as mitigating the guilty plea, notwithstanding as it had been proffered on the day of trial, as it nonetheless spared this vulnerable victim

from the very difficult experience of having to testify, as well as the saving of time and the resources required to conduct a trial.

[98] Orr. J. noted that the joint submission was at the very lowest end of sentencing range and stated that if this case was to be presented as a precedent, the unusual details of this case and circumstances giving rise to the sentence be considered.

[99] Crown counsel objected to this case being used for the purposes of considering an appropriate sentence for Mr. Mathieson, on the basis that, as there was no reported decision or transcript of the sentencing proceedings or of the decision available at the hearing, he was unable to make submissions. I note that counsel for Mr. Mathieson was counsel for Mr. Ross at the sentencing hearing, and thus was in a better position to recount the details of the decision. What I took from Crown counsel's objection was that he wished to be given the opportunity to make further submissions on the ***Ross*** case should I decide to rely on it for the sentencing of Mr. Mathieson.

[100] Notwithstanding Crown counsel's submissions, I am satisfied that I can refer to this case without hearing any further submissions from counsel. The factors that are both similar and distinguishing between ***Ross*** and the circumstances of the present case are not complex and I am satisfied that I am able to take them into account. In order to determine this, I listened to the entirety of the sentencing hearing on the Courts' Digital Audio Recording System ("DARS").

[101] Further, it is a common practice for a sentencing judge to refer to cases that he or she has located subsequent to the conclusion of submissions, without requiring the need for counsel to make further submissions, particularly so when it is an appropriate range of sentence that is at issue. Obviously, were it a discrete legal issue that was being considered, then it would generally be necessary to afford counsel the opportunity to make submissions before making a decision. That is not the case here.

[102] I expect that, had counsel wished to do so, he could have listened to the DARS recording of ***Ross*** subsequent to the sentencing hearing, and requested the opportunity to make submissions on the case, either orally or written.

[103] I note that subsequent to submissions having been made, Crown counsel provided the case of ***R.*** v. ***Hajar***, 2016 ABCA 222.

[104] The 20-year-old offender had communicated on-line with the 14-year-old victim through the internet. The offender had convinced the victim to send him topless photos and to discuss sex acts with him. They met on four occasions and on the fourth occasion the offender had the victim perform oral sex on him.

[105] The offender had pled guilty to sexual interference and online sexual luring. The sentence imposed was 15 months' custody for the sexual interference and three months consecutive for the luring.

[106] On appeal, the Court found that an appropriate disposition would have been two and one-half years on the sexual interference conviction with a further

one year to be served consecutively on the luring conviction. In determining the appropriate disposition, the Court reinforced that the starting point for sentencing in sexual interference cases should be three years, as it was in respect of major sexual assaults. The Court also, at length, explored the concept of *de facto* consent, stressing the Parliamentary objectives in raising the age of consent to sexual activity to 16. In summary, the Court stated in para 102:

> For these reasons, relying on any alleged voluntary acts by the child to mitigate gravity or *mens rea* degree of responsibility of the offender is improper. Thus, *de facto* consent of the child is not by itself a mitigating factor in sentencing for sexual interference or sexual assault…Our approach to sentencing must recognize and give effect to Parliament's intent in establishing the crime of sexual interference and raising the age of consent to 16 years.

[107] However, due to the unusually lengthy delay in the substantive appeal being heard, the Court declined to interfere with the sentence imposed.

Sentence to be imposed

[108] The purpose, principles of sentencing are set out in ss. 718 – 718.2 of the *Criminal Code*.

[109] Section 718.01 prescribes that when the victim is under the age of 18, the objectives of denunciation and deterrence are to be given primary consideration. These objectives are reflected in the mandatory minimum punishment of six months' incarceration as prescribed in s. 271 when the victim is under 16 years of age.

[110] Section 718.1 requires that a sentence be proportional to the gravity of the offence and the degree of responsibility of the offender. The sexual assault of the 14-year-old victim by Mr. Mathieson, a 27-year-old adult offender, is a serious offence. There is no mitigation in the responsibility or the moral blameworthiness of Mr. Mathieson because the victim was apparently not opposed to the sexual contact. The law is clear that a 14-year-old is not in a position to be a willing participant in sexual activity with an adult, subject to some exceptions.

[111] Counsel for Mr. Mathieson noted in submissions that there are circumstances in which a 14-year-old is presumed to be in a position to consent to sexual activity, such as in s. 150.1(2.1):

> If an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused:
>
> (a) Is less than five years older than the complainant; and
>
> (b) Is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitive of the complainant.

[112] This statutory exception allows for a 14-year-old to have sexual contact with a 19-year-old adult in circumstances such as, for example, where the 14-year-old has a birthdate of January 1, the 19-year-old has a birthdate of July 1, and the sexual contact takes place July 2. The adult, born after the youth in the

12-month calendar period, is actually less than five years older than the 14-year-old. A 15-year-old can likewise consent to sexual activity with a 20-year-old.

[113] Therefore to the extent that ***Hajar*** refers to the presumptions behind the Parliamentary recognition of non-consensual capacity between a child and an adult, it does not include adults who fall within the s. 150.1(2.1) exception.

[114] In the present case, the most that can be said is that the sexual contact occurred in the absence of aggravating factors such as force, violence, intimidation or trickery. There does not appear to be any evidence of coercion.

[115] Nonetheless, the presumption of harm to the victim exists and, to his credit, I am satisfied that Mr. Mathieson recognizes the wrongfulness of his actions and the harm caused, and that he is remorseful for his actions.

[116] With respect to Mr. Mathieson, the information before the Court supports a finding that, despite his chronological age, his level of maturity would appear to be somewhat less than that associated typically with a 27-year-old. His background, cognitive, emotional and social struggles place him in a different position with respect to moral blameworthiness than an offender without any such difficulties.

[117] It is a statutorily aggravating factor that the victim was under the age of 18, as set out in s. 718.01. I am satisfied, however, that this aggravating factor is already recognized in s. 271(b) by the mandatory minimum punishment that is to be imposed on the basis of the victim's age. To further increase the sentence for

sexually assaulting a person under the age of 16, on the basis that the victim is under the age of 16, would not be logical or appropriate.

[118] None of the other statutorily aggravating factors are present and I find, despite Mr. Mathieson's position as a welcome visitor to the household, that he did not occupy a position of trust towards S.B. in a manner that would be statutorily aggravating.

[119] Sections 718.2(d) and (e) express the principle of restraint in sentencing:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[120] Obviously, even in cases where a custodial disposition is necessary, such as here, the principle of restraint applies in determining the length of the custodial disposition. Custody should be imposed for only as long as is necessary. In determining the extent to which a custodial disposition is necessary, and giving effect to the requirement to pay particular attention to the circumstances of Aboriginal offenders, a sentencing judge must strive to find a balance between the purposes, objectives and principles that are applicable.

[121] In this case, deterrence and denunciation are the primary sentencing objectives. Given the mandatory minimum sentence of six months, it should be

accepted that, in certain circumstances, these objectives can be accomplished by the imposition of this minimum sentence.

[122] Even in cases where denunciation and deterrence are the primary objectives, rehabilitation is still, where the prospects for rehabilitation are present, an important objective. In imposing a sentence that supports and encourages the rehabilitation of an offender, a court is also accomplishing the objective of specific deterrence and providing protection for the community from further offending in the future.

[123] I note the significant and ongoing steps Mr. Mathieson has taken towards dealing with his substance abuse issues that has resulted in him currently being noted as having no problems associated with alcohol abuse and a low level of problems with respect to drug abuse.

[124] I note the steps that he has, and is in the process of taking, with respect to dealing with his mental health issues.

[125] I note his moderate/low ratings with respect to the risk for sexual re-offending assessments that were conducted. In particular in this regard, I consider the lack of "…clinical concerns with respect to the following Risk/Needs areas; Hostility Towards Women, Lack of Concern for Others, Poor Problem Solving Skills, negative Emotion/Hostility, Sex Drive/Preoccupation, Deviant Sexual Preferences and Co-operation with Supervision".

[126] I note his medium/low risk rating results on the criminogenic risk assessments that were conducted.

[127] I am satisfied that, in the circumstances of this offence, the circumstances of Mr. Mathieson, the statutory considerations and the jurisprudence in this area, that the appropriate sentence is one of six months' custody to be followed by a period of probation of 15 months. After receiving credit for one and one-half months' time served, that leaves Mr. Mathieson four and one-half months remaining to be served in custody.

[128] Mr. Mathieson will also be placed on probation for a period of 15 months.

[129] 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. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with S.B. except with the prior written permission of your Probation Officer and with the consent of S.B.;

5. Do not go to any known place of residence, employment or education of S.B. except with the prior written permission of your Probation Officer and with the consent of S.B.;

6. Report to a Probation Officer immediately after your release from custody and thereafter as and when directed by your Probation Officer;

7. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

8. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for any issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

9. Participate in such education or life skills programming as directed by your Probation Officer and provide your 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

10. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

[130] Pursuant to s. 490.012, Mr. Mathieson shall comply with the requirements of the *Sex Offender Information Registration Act* and, in accordance with s. 490.013(2)(a), this order shall be for a period of 10 years.

[131] Pursuant to s. 487.051, Mr. Mathieson will provide a sample of a bodily substance for forensic DNA analysis.

[132] Mr. Mathieson is required to pay a $100.00 victim surcharge. I make this payable forthwith, note Mr. Mathieson to be in default, and order that he serve his default time concurrent with his time in custody on the s. 271 conviction.

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COZENS T.C.J.