Citation: *R. v. M.J.H.*, 2019 YKTC 11

Date: 20190304
Docket: 17-00019
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

M.J.H.

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

Appearances:
Noel Sinclair — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR SENTENCE

[1] M.J.H. was convicted after trial of the offence of break and enter and commit sexual assault contrary to s. 348(1)(b) of the Criminal Code (***R.*** v. ***M.J.H.***, 2018 YKTC 45). A conviction on the s. 271 offence of sexual assault was conditionally stayed pursuant to the principle in ***R.*** v. ***Kienapple,*** [1975] 1 S.C.R 729.

[2] I found that following an afternoon in which M.J.H., C.S. and L.D. had been drinking at L.D.'s residence, M.J.H. returned uninvited in the early evening hours and had vaginal intercourse with L.D. without her consent. I accepted L.D.'s evidence that

she awoke on her mattress on the living room floor to find M.J.H. on top of her having this non-consensual intercourse. I found that when she woke up, realized what was happening, and told M.J.H. to leave that he did so.

[3] Sentencing submissions were made on December 11, 2018, and on December 14, 2018 I sentenced M.J.H. to a custodial disposition of two years less one day, after giving him credit for three and one half months time served in custody on remand. I also ordered that he be placed on probation for a period of two years. I indicated at that time that my reasons for sentence would follow. These are my Reasons for Sentence.

Submissions of Counsel

[4] Crown counsel submitted that a custodial disposition of four to six years would be appropriate, in addition to ancillary orders.

[5] Counsel submits that the break and enter aspect of this sexual assault is sufficiently aggravating to take this offence out of the range of 12 to 30 months established in ***R.*** v. ***White***, 2008 YKSC 34.

[6] Counsel for M.J.H. submits that a sentence of 18 to 24 months custody, in addition to time already served in custody on remand, would be appropriate. As of the date of the sentencing hearing on December 11, 2018, M.J.H. had been in custody on remand for a period of approximately 68 days or just under three and one-half months.

Victim Impact

[7] L.D. stated that the impact of this offense has resulted in her incurring significant negative consequences on her physically, emotionally and in the areas of her employment, relationships and family life. She became depressed, experienced suicidal thoughts and began to drink a lot of alcohol and use illicit drugs. She began to isolate herself from her family, friends and community. The downward spiral continued.

[8] I note that, as mentioned in her Victim Impact Statement and as was apparent in court, L.H. ended up involved in a serious accident that has left her with significant physical limitations. While this accident cannot be considered to be attributable to the actions of M.J.H. in committing the sexual assault, such that he could be held accountable in law for this impact, there is no doubt that the repercussions of this accident have further contributed to the negative consequences in L.D.'s life already occurring as a result of the sexual assault.

[9] L.D.'s mother spoke about the pain of watching L.D. enter into a negative downward spiral after having been sexually assaulted, and how it has contributed to a once happy family now "living in crisis" and struggling not to give up.

Circumstances of M.J.H.

[10] Information about the circumstances of M.J.H. was provided in a ***Gladue*** Report (***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688), a Pre-Sentence Report ("PSR"), other documentation, and the submissions of counsel.

[11] M.J.H. is a 47-year-old First Nations member of the Swan River First Nations situated in the Slave Lake, Alberta region, through his mother, C.H. (nee H.). Their First Nation is known as the Woodland Cree. The Woodland Cree historically lived a traditional hunting and trapping lifestyle. The fur trade introduced European influences into their traditional territory.

[12] The first Catholic missionaries arrived in the 1840's and the St. Bernard Mission was built in Grouard in 1871. This became the site of the Grouard Indian Residential School. C.H. attended this Residential School.

[13] M.J.H. has had little contact with his mother's family as a youth and no contact since then. M.J.H. did not have a close relationship with his mother and, although he says that he has forgiven her, he admits that he is still resentful for how he was treated as a child. He states that his mother struggled as a parent, largely neglecting him and seldom showing him any affection. He stated that she did not work and drank a lot. He says that she was illiterate.

[14] I note that M.J.H. left the Yukon for a period of time in 2018 to provide care for his mother who was dealing with medical issues in Alberta.

[15] His father, who died from lung cancer approximately 15 years ago, was of Metis/Irish descent. He worked as a carpenter and was able to provide financially for the family.

[16] M.J.H. states that his father was disowned by his family for marrying a First Nation' woman. As a result, he has never had any contact with his father's family.

M.J.H. did not have a positive or close relationship with his father. He said that his father drank a lot.

[17] M.J.H. says that he witnessed his parents arguing and was subject to verbal abuse, however he did not witness, and was not subjected to, physical or sexual abuse at home. M.J.H. has five older siblings, only two of whom he has had any contact with in recent years. His oldest brother was a half brother who had been in and out of jail for as long as M.J.H. can recall. He states that on one occasion, when he was approximately three years old, he was held hostage by this brother in order to try to get money from his father. Police intervention was required on this occasion. He recalls other occasions when the police would show up at his house in order to get his brother, and would sometimes get him to call his brother down from upstairs to assist them in doing so.

[18] Information from community members confirms that there was alcohol drinking in almost every home at the time M.J.H. was growing up. It was a commonplace occurrence, as well as it was for the children to pretty much take care of themselves. To them, this was normal.

[19] At the age of 15, M.J.H. was removed from his home in Slave Lake by Family and Children Services ("F&CS"), due to neglect resulting from his parents' drinking. M.J.H. recalls a number of occasions prior to that when he would be removed from his home and be placed with other families, but does not know whether these occasions were informal placements or not. M.J.H.'s older sister confirms what he says in this regard but said that she was never removed from the family home, perhaps because

she was the oldest girl. She confirmed that there were issues with their home life, in particular with respect to their oldest brother, and that she would babysit in order to get food so the children could eat.

[20] M.J.H. states that there was a lot of drinking in the first foster home that he was placed in for two years. He felt that he was not cared for and it "was all about the money" for them. He states that the second foster home he was placed in encouraged him to attend school and provided for him, however, notwithstanding their support, he continued to run away from home. He ended up at the age of 18 in the Youth Development Centre in Edmonton.

[21] He says that the RCMP and F&CS were often involved with his family. He states that he was essentially raising himself at home without rules, expectations or discipline. Special events, such as birthdays and Christmas were not recognized. He states that he never felt loved or cared for at home.

[22] M.J.H. states that he hated his mother and his father because he was always being taken away.

[23] M.J.H. has a grade three education. He describes difficult experiences in his early school years. He is functionally illiterate.

[24] His employment history is primarily comprised of labourer-type work. At times, his employment was seasonal. M.J.H. suffered a serious work-related injury in 2016, which continues to limit his ability to be employed. While he says that he was always able to find employment, he admits to having lost a number of jobs due to his drinking.

[25] M.J.H. has six children. He did not meet his eldest daughter until she was 18 years old. He does not have a relationship with her.

[26] M.J.H.'s other children reside in the Yukon. Two of these were his former partner's children but he raised them as his own. M.J.H. has a very good bond and relationship with his children and they participate in numerous activities together. They have many positive things to say about the love and support that M.J.H. has shown them growing up, and they continue to express their love and support for him.

[27] M.J.H. and the children's mother separated a number of years ago.

[28] M.J.H. has no stable residency, and has moved around with friends and family over the past two years.

[29] M.J.H. has no source of income. He is far behind in child-support payments. He has little in the way of assets.

[30] M.J.H. scores as having a substantial level of problems associated with alcohol abuse. He first consumed alcohol when he was 10 years old, stealing liquor from his mother. He drank considerably as a teenager. While stating that his drinking has slowed in the last few years, he admits that he is an alcoholic who will binge drink until he is intoxicated. He admits that all of his involvement in the justice system has been due to alcohol use.

[31] He attended at residential treatment for his alcohol use when he was 19 and again at 27. He has never attended any counselling or programming beyond this.

[32] One of M.J.H.'s daughters states that her father can limit his drinking when he is around her and her children, and/or in a positive environment. When he chooses to be with the wrong people, that is when his drinking becomes problematic. It is when he is drinking that he also starts to talk about the difficulties he had as a child growing up. She believes that these difficulties are a causative factor for his continuing struggles with alcohol abuse.

[33] M.J.H. scores as having a high level of criminogenic need, as requiring a high level of supervision and as having a medium criminal history risk rating. Noted with respect to the latter is that M.J.H. has never been imprisoned as the result of committing a criminal offence, has no history of violence or threats, and has a gap in his criminal record of convictions between 1997 and 2014.

[34] M.J.H. has completed the Substance Abuse Management Program while in custody at Whitehorse Correctional Centre ("WCC") awaiting sentencing, and he has participated in other programming. According to the PSR, M.J.H. has no negative behaviour reports from WCC, although I note that in the ***Gladue*** Report there is mention of four very minor infractions that were provided to the author of the Report from WCC, in the form of an Incarceration Report dated December 6, 2018.

[35] There is information from M.J.H.'s children that they have noticed him making improvements in his life with respect to his drinking. They believe that he is opening up more about his past when he is sober and expressing his feelings instead of bottling them up.

[36] Besides learning how to overcome his addictions and trauma issues, M.J.H. expresses a desire to work at a plan to address his educational deficits.

[37] M.J.H. has worked with an addictions counsellor on taking steps to seek out residential treatment options in British Columbia and Alberta.

Analysis

Case law

[38] The ***White*** case is the leading sentencing authority for sexual assault cases in the Yukon. In ***White***, Gower J. reviewed the sentencing decisions of numerous sexual assault cases. He 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.

[39] In ***White***, the 39-year-old Aboriginal offender was found to have removed the pants and underwear of the intoxicated and sleeping victim, who was known to him, and continuing to attempt to have vaginal intercourse with her, despite her repeatedly telling him that she did not want to. He ultimately ceased his attempts to have intercourse. The offender, who was raised in a dysfunctional adoptive family, had been a victim of mental and physical abuse. He had 10 prior convictions for having committed criminal offences, the most serious of which was an aggravated assault.

[40] After being convicted at trial, the offender was sentenced to 26 months' custody. Gower J. cited the principles of denunciation and deterrence as being the paramount

principles (para. 88). He also noted as aggravating factors that there was an element of breach of trust, due to the fact that the offender and the victim knew each other and the offender had provided assurances for the victim's safety to the victim and the victim's friend, the physical injuries caused to the victim, the offender's serious drug and alcohol addiction, his high risk for re-offending in a general and violent manner, and his moderate risk of reoffending in a sexual manner. This was in addition to the aggravation noted in the offender taking advantage of the sleeping victim, and his criminal record.

[41] In mitigation, Gower J. noted the offender's Aboriginal ancestry and related dysfunctional upbringing, his attempts to upgrade his education in the face of severe dyslexia and possible learning disabilities and his letters of support.

[42] With respect to M.J.H., the submission of Crown counsel, however, is that due to the fact that M.J.H. entered the residence of L.D. without her consent and then committed the sexual assault, the range of sentence set out in ***White*** is inappropriate. The sentence needs to be significantly higher in order to take into account the break and enter or "home invasion" aspect of the sexual assault.

[43] Crown counsel filed the following cases in support of this proposition:

R. v. ***Cromwell***, 2006 ABCA 365;

R. v. ***K.A.S.*** 2016 BCPC 401;

R. v. ***Sikyea***, 2015 NWTCA 06;

R. v. ***Barr***, [1984] B.C.J. No. 2076 (C.A.);

R. v. ***Engerdahl***, (1993) 33 B.C.A.C. 317; and

R. v. ***Hollingworth***, [1984] B.C.J. No. 1701 (C.A.).

[44] The fact pattern in ***Cromwell*** was significantly more aggravated. A sentence of 20 years' custody was imposed for eight offences involving violent sexual assaults of four victims aged between 13 and 29, taking place over a four-year period. The assaults occurred in the middle of the night upon sleeping victims involving the use of weapons, restraint and/or confinement, threats, and resulted in injuries. The invasion of the sanctity of the home was cited as an aggravating factor. In para. 18, the Court stated:

> …The Court was also correct in characterizing these crimes as home invasions and relying on the principle set out by this Court in *R. v. Matwiy* (1996), 105 C.C.C. (3d) 251. The Court stated in that case at 263:
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> > We are of the view that the home invasion robbery merits a higher starting-point sentence than the armed robbery of a bank or commercial institution While offences of violence are abhorrent where they occur, offences which strike at the right of members of the public to the security of their own homes and to freedom from intrusion therein, must be treated with utmost seriousness. Individuals in their own homes have few of the security devices available to commercial institutions. They are often alone, with little hope that help will arrive. Such offences, whether they result in injuries or not, are almost always terrifying, traumatic experiences for the occupants of the residence often leaving them with a total loss of any sense of security.

[45] In ***K.A.S.*** the 22-year-old offender, at the time of the offences, was being sentenced after entering guilty pleas for break and enter and commit sexual assault and robbery, involving one victim, and robbery and assault causing bodily harm to another victim.

[46] The sexual assault occurred when the offender broke into the victim's house, forced her to perform fellatio, and then forced intercourse upon her, using threatening language against her and her family. He otherwise physically assaulted the victim.

[47] In sentencing the offender to seven years for the break and enter and commit sexual assault, the Court, in para. 21, referred favourably to ***Barr***, in which the Court of Appeal stated at p. 5:

> Breaking and entering…by itself is a very serious offence, but when it is coupled with sexual assault of the nature of this assault it is extremely serious. I think that the range for this type of case would normally be between six to eight years.

[48] In ***Barr*** the 24-year-old offender pleaded guilty to breaking into the victim's home and forcing intercourse upon her at knifepoint. He received an eight-year sentence.

[49] The Court in ***K.A.S***. accepted that in some circumstances sentences lower than this general range were also imposed, stating in para. 41:

> In my view, the application of sentencing principles must be weighed very carefully. Competing sentencing principles need to be balanced and there is no one sentencing principle that should ever be overemphasized. An offender is always entitled to the benefit of the doubt.

[50] In ***Sikyea***, a seven-year sentence imposed after trial was upheld on Appeal for the offence of break and enter and commit sexual assault. The Aboriginal offender had entered the victim's house without her consent and forced sexual intercourse upon her while she was sleeping on the couch. He fled the residence when she resisted the sexual assault. The offender's actions were considered to have been thought out in advance, and it was noted that he had not been deterred from committing this offence

despite having been relatively recently released from custody after having served time for a similar offence, and after spending most of the previous decade in custody for offending behaviour.

[51] The Court stated in para. 16:

> …As to the gravity of the offence, it has been recognized in our law for centuries that (howsoever modest or penetrable a private residence may be) an occupant is entitled to live there safely and unmolested. Added to this is the fact that the complainant was also entitled to be respected and protected in her personal autonomy and integrity in her own home, and the violation was very grave. …

[52] In ***Engerdahl***, the 36-year-old offender, at the time of sentencing, had broken into the home of the victim, who was unknown to him, and forced sexual intercourse upon her while she was in a deep sleep after having taken a sleeping pill and consuming alcohol. Upon awakening, the victim resisted the sexual assault and managed to restrain the offender until the police arrived. The offender had a dated and unrelated short criminal record. The three-year sentence imposed upon the offender after trial was upheld. In para. 6, Hinds J.A. noted the following comment of the trial judge:

> When this case is reduced to its bare facts, it becomes apparent that it is a situation in which a very serious offence has been committed by a person with no prior criminal record and for no apparent reason. British Columbia Court of Appeal has held in various cases, and in particular in the cases of *Hollingworth* and *Morrison* that to deter others and to deter an offender in circumstances such as these, a sentence of three years is required unless there are some mitigating circumstances that would indicate that a less severe sentence would be appropriate.

[53] Concurring, McEachern C.J.B.C. stated:

> …I would have decided that three years in prison and two years probation was a lenient but fit sentence for an offence which involves the invasion of a woman's home, bed and person even for a person such as the appellant without any relevant record…

[54] While noting that there would be benefits in the imposition of a longer period of restraint upon the offender through a probationary period to follow the custodial disposition, McEachern C.J.B.C. agreed that the initial two-year probationary period imposed was illegal, as held by Hinds J.A., and would not reduce the otherwise fit sentence of three years in order to allow for a probationary period to follow.

[55] In ***Hollingworth***, the 25-year-old offender with no prior criminal record, entered the home of a stranger and raped her. This was considered to be an out-of-character offence for him. He had entered a guilty plea, had a supportive family, was not considered to be a risk for reoffending and did not need to be specifically deterred. However, in substituting a sentence of four years' custody for the two years less one day custody imposed at trial, the Court stated in para. 11:

> The term of imprisonment must be long enough in a case of this type to recognize the severity of the crime which the offender has committed. His personal background and previous unblemished record, of course, stand him in good stead. If it were not for that then the sentence to be imposed for such a terrible crime as this would be much greater. Here, the circumstances are aggravated. This is no ordinary case. This is the case of an offender entering the house of a stranger, at night, and raping a defenceless woman in her bed. It is impossible to explain why this happened, but the circumstances are such that the term of imprisonment must be sufficient that others will be deterred from conduct of this type. The sentence also must adequately represent the repudiation by the Courts and the revulsion of society to the circumstances of the particular offence. I would agree that a sentence of 2 years less a day was not fitting, and that 4 years in all the circumstances is a fit sentence.

[56] In ***R.*** v. ***Munt***, 2012 BCCA 228, the Court upheld a sentence of 30 months imposed on the 30-year-old first offender (26 at the time of the offence) after trial for break and enter and commit the offence of sexual assault, noting in para. 15 that the sentence was at the low end for this type of offence.

[57] The offender, who had a brief acquaintance with the victim, drove her to her house while she went inside to get more liquor. The victim, however, passed out on her bed from the effects of the consumption of Gamma-Hydroxybutyrate ("GHB"), commonly known as the "date rape drug".

[58] The offender then made several attempts to enter the victim's house, ultimately being able to do so by using a ladder to enter her bedroom through her window. He then had intercourse with her while she was incapable of resisting.

[59] The sentencing judge, while not able to determine the offender as having been responsible for the administering of the GHB to the victim, nonetheless described the circumstances of the offence as "callous and cruel", noting that it would have been obvious to the offender that the victim was vulnerable and defenceless.

[60] General deterrence and denunciation were the primary sentencing considerations.

[61] In upholding the sentence, the Court referred to the decision of ***R.*** v. ***J.S.S.***, 2001 MBCA 144 at para. 37 where, after considering that the inappropriateness of the imposition of a conditional sentence (a sentence available in law at that time) for this offender, stated:

> … The answer lies in the need to say, as loud as the judicial system can say it, that conduct of this kind will simply not be tolerated. In particular, potential victims must be assured that, to the extent possible, the law protects them and potential offenders must know that, if they dare to commit such an offence, the firm hands of the law, without kid gloves, will be upon them.

[62] In the Yukon case of ***R.*** v. ***Johnson***, 2014 YKTC 46, I imposed a sentence of 16 months' custody on a 24-year-old Aboriginal offender for having committed two sexual assaults against different victims. The first instance involved sexual intercourse with the sleeping victim in a residence where a number of people, including the offender and the victim, had been drinking. When the victim awoke during the sexual assault and resisted, the offender continued the assault, including after the victim passed out again.

[63] The second sexual assault occurred in a residence where a number of people had been drinking, when the offender got into a bed beside the sleeping victim and penetrated her digitally.

[64] The offender had no prior criminal history and considerable community support. These were considered to be out-of-character offences.

[65] It is important to note that the sentence I imposed was an acceptance of a joint submission by counsel. While a joint submission is not binding upon a sentencing judge, in the normal course it will not be deviated from unless there is a compelling reason to do so. Joint submissions often take into account factors not necessarily known to the sentencing judge but which counsel have agreed are relevant in putting forth the joint submission.

[66] In ***R.*** v. ***Anderson***, 2011 YKSC 6, Veale J. imposed a four-year sentence on a 55-year-old Aboriginal offender convicted after trial on a s. 271 charge of sexual assault. He was also designated a long-term offender.

[67] Mr. Anderson had given the 56-year-old Aboriginal victim a ride home from a bar at her request. They, as well as some others, drank alcohol at the victim's residence. Everyone subsequently left the victim's residence, including Mr. Anderson. He, however, returned uninvited, and had sexual intercourse with the victim, who had little to no recollection of events due to her level of intoxication. Veale J. characterized this as a "…planned and calculated sexual assault upon a woman he had been friends with for almost 40 years….it was a betrayal of trust to a woman who sought his assistance in getting a drive home."

[68] In addition, the victim was good friends with Mr. Anderson's spouse, and the victim felt that she could trust Mr. Anderson due to their long relationship.

[69] Mr. Anderson had three prior convictions for sexual assault: two in 1991 for over-the-clothes touching of a 10-year-old girl and one in 2009 for the under-the-clothes vaginal touching of a 10-year-old girl. Mr. Anderson committed the offence for which he was being sentenced in 2008, which was prior to the conviction in 2009 for what was an offence committed in 2006. Veale J. nonetheless considered this prior conviction to be an aggravating factor for the purpose of sentencing (para. 44).

[70] Mr. Anderson suffered from minor cognitive disabilities. He was considered to be at a high risk for further sexual reoffending against children and vulnerable adults.

[71] Regardless of what Courts have stated about the general range of sentence for certain offences, it must be remembered that sentencing remains an "inherently individualized process" (***Anderson*** at paras. 37-39).

[72] As stated in ***Gladue*** in paras. 76-81, in consideration of the application of an individualized sentencing process to an Aboriginal offender:

> 76 In R. v. M. (C.A.), [1996] 1 S.C.R. 500, at p. 567, Lamer C.J. restated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place. Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As he stated:
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> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.
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> 77 The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.
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> 78 In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the

importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

[73] I am also mindful of what I stated in the sexual assault sentencing of ***R. v. Atkinson***, 2012 YKTC 62, at para. 33:

> While courts properly make inquiries into the Aboriginal heritage of offenders in order to determine the appropriate sentence to be imposed and to give full effect to the purpose and principles of sentencing, the Aboriginal heritage of victims is also an important consideration for the Court in ensuring that the offender understands the impact and consequences of his or her crime. This is particularly true in cases of sexual assault. All too often the Aboriginal heritage of a victim has contributed to the occurrences of many other prior forms or acts of victimization. The full impact of the crime an offender is being sentenced for having committed upon the victim needs to be placed in the context of the victim's past and heritage as well. The leadership and members of communities need to be alert and give recognition to both the offender's and the victim's Aboriginal heritage when a crime is committed and when dealing with the consequences of it. While this is particularly true when both offender and victim are of Aboriginal heritage and are of the same Aboriginal community, it is true to some extent in all cases.

[74] In ***R.*** v***. R.R.M.***, 2009 BCCA 578, the Court, in para. 24, made the following comments in regard to the sentencing of Aboriginal offenders for sexual assault offences:

> The sentencing of Aboriginal offenders for serious sexual assaults, where there is evidence that they have suffered from historical and systemic abuses, is not an easy task. This Court has observed that in sentencing Aboriginal offenders, while judges must be "sensitive to the conditions, needs and understandings of Aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentencing objectives such as deterrence and denunciation." See *R. v. Morris*, 2004 BCCA 305 at para. 55, 186 C.C.C. (3d) 549. Chief Justice Finch further noted at para. 53 that *Gladue* made clear that it was not the principles of sentence that varied in sentencing Aboriginal offenders but the application of those principles to a particular case. …

Application to M.J.H.

[75] M.J.H. does not have the mitigation of a guilty plea and associated acceptance of responsibility for the offence. He continues to deny having committed the offence of which he was convicted. M.J.H. was certainly within his rights to plead not guilty and take the matter to trial. Given his continuing denial of having sexually assaulted L.D., it is not surprising that he does not accept any responsibility for the offence and/or express any remorse. I say this only to make it clear that in no way do I consider this to be an aggravating factor in determining an appropriate sentence for M.J.H. He simply lacks the mitigation that a guilty plea and/or an acceptance of responsibility would provide.

[76] M.J.H. has no prior related criminal record. His criminal record is mostly dated and I note that he has never been sentenced to a period of imprisonment for having committed a criminal offence.

[77] The negative impacts of the systematic discrimination against Aboriginal peoples, as noted in ***Gladue*** and ***R.*** v. ***Ipeelee***, 2012 SCC 13, are apparent in M.J.H.'s life.

[78] As is the case with all offenders, but with particular attention to the circumstances of Aboriginal offenders, I must consider all reasonable alternatives to imprisonment in imposing sentence on M.J.H. This includes, of course, the length of any sentence of imprisonment.

[79] A custodial disposition is warranted in this case. This offence occurred in the victim's home, where L.D. had every right to believe that she should be safe. By its very

nature, this is a serious offence of violence against the victim. I recognize that, outside of the violence itself inherent in the sexual assault against L.D., there was no additional violence, such as threats, punches, choking and other forms of assault, or forcible confinement. This in no way diminishes the serious nature and violence within the sexual assault itself; it simply distinguishes the circumstances from situations where such additional violence also forms part of the circumstances of the offence.

[80] In the same way, when L.D. awoke and resisted the sexual assault, M.J.H. stopped. Again, this does not diminish the seriousness of the sexual assault; it simply distinguishes the circumstances from cases where the sexual assault continues despite the efforts of a victim to resist the sexual assault.

[81] It is certainly an aggravating factor that M.J.H., without invitation to do so, re-entered L.D.'s residence in order to commit the sexual assault. This, in law, constitutes a break and enter. I, however, in considering this aggravating factor, do not place it in the same category as a "home invasion" where an individual uses violence to force his way into a residence, proceeds to terrorize and/or threaten the victim or victims, perhaps utilizing a weapon to do so, and then commits an offence of sexual assault, perhaps over a lengthy and sustained period of time.

[82] In saying this, I bear in mind the seriousness of an offence of sexual assault where a victim sleeps in a bedroom or other area of a residence, and awakes in the course of a sexual assault perpetrated by an offender, who was perhaps already in the residence by invitation. The seriousness of such a sexual assault also remains considerable.

[83] While I recognize the element of safety that a victim should feel, that L.D. should have been able to feel, inside her own residence, I believe that a person should be able to go to sleep or pass out in a residence and nonetheless feel safe and not have to fear that he or she will be sexually assaulted while they are unable to resist the offender, regardless of whether the offender is inside the residence with invitation or not.

[84] The violence against the victim, against the integrity of the victim of a sexual assault, does not differ so much that a markedly differential sentence should necessarily be imposed upon an offender simply on the basis of the manner of entry into the location where the victim is found. I recognize, of course, that the circumstances of differing instances of break and enter and commit sexual assault offences are not the same, and that in some circumstances, the aggravating factor of the break and enter will be a more serious consideration as an aggravating factor than in others.

[85] This said, I find it aggravating that this offence occurred in L.D.'s home and was committed by M.J.H. after he entered her house without invitation. His moral culpability and blameworthiness is greater as a result of this factor. In my view, however, this does not necessarily mean that the general range of sentence established in ***White*** is no longer appropriate.

[86] In my view, the principles of denunciation and deterrence, and recognition of the impact of this offence upon L.D., as well as adherence to the sentencing principle of parity in s. 718.2(b), can be met through the imposition of a territorial sentence of two years less one day, after giving M.J.H. credit for his three and one half months of time in custody on remand.

[87] Through the imposition of such a sentence, I am able to place M.J.H. on a period of probation to further monitor his behaviour in the community and to provide him assistance in taking rehabilitative steps to prevent the commission of any further offences and encourage him to pursue a positive and pro-social lifestyle.

[88] A probation order also provides the possibility for risk-reduction and thus better protection for the community. In my view, in the circumstances of this case, the additional period of time that M.J.H. is monitored under court-ordered conditions through a probation order results in a more balanced sentence that accords with the purpose and principles of sentencing than would be achieved through a longer custodial disposition without such monitoring.

[89] I note that M.J.H.'s familial supports reside in the Yukon and, in my view, sending M.J.H. to a federal penitentiary would significantly impact his rehabilitative prospects while not achieving an equally beneficial message of denunciation and deterrence. In other words, it would result in more harm than good.

[90] The deterrent and denunciatory principles of sentencing can also be additionally achieved through the imposition of a period of probation. Despite its primary rehabilitative function, a probation order nonetheless constitutes a restriction on the offender's liberty and carries the potential for a further criminal charge and consequence to M.J.H. if he fails to comply with the conditions.

[91] Therefore, for the s. 348(1)(b) offence, after being granted credit for three and one half months pre-trial custody, M.J.H. is sentenced to a further custodial disposition of two years less one day.

[92] The custodial portion of this sentence is to be followed by a period of probation of two years on the following terms:

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 L.D. except with the prior written permission of your Probation Officer and with the consent of L.D. in consultation with Victim Services;

5. Do not go to any known place of residence, employment or education of L.D. except with the prior written permission of your Probation Officer and with the consent of L.D. in consultation with Victim Services;

6. Remain within the Yukon unless you obtain written permission from your Probation Officer or the court;

7. Report to a Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by the Probation Officer;

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

9. 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 the following issues: alcohol abuse, and any other 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, unless otherwise ordered by the court;

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

11. Participate in a Victim Offender Reconciliation process if so directed by your Probation Officer, with the consent of L.D., in consultation with Victim Services.

[93] M.J.H. will be subject to an order under s. 490.012.[1]

[94] Pursuant to s. 487.051, M.J.H. will provide a sample of his DNA.

[95] He will also be subject to a s. 109 prohibition for a period of 10 years.

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COZENS T.C.J.

[1] I note that when I passed sentence I stated this would be for a period of ten years. However, the s. 348(1)(b) offence was in relation to a dwelling house, which under s. 348(1)(d) carries a maximum sentence of life imprisonment. Therefore, under s. 490.013(2)(c), the length of this order should have been for life. This is a matter that, I expect, can be corrected on appeal should an appeal on that ground occur.