COURT OF APPEAL OF YUKON

Citation: *R. v. Charlie*,
2015 YKCA 3

Date: 20150129
Docket: YU735

Between:

Regina

Appellant

And

Franklin Junior Charlie

Respondent

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

On appeal from: An order of the Territorial Court of Yukon, dated April 23, 2014 (*R. v. Charlie*, 2014 YKTC 17, Whitehorse Registry No. 13-00104).

Counsel for the Appellant:	N. Sinclair
Counsel for the Respondent:	K. Hawkins
Place and Date of Hearing:	Vancouver, British Columbia January 6, 2015
Place and Date of Judgment:	Vancouver, British Columbia January 29, 2015

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Neilson

Summary:

Crown appeal from a sentence of nine weeks in custody plus 14 months served for one count of robbery, contrary to s. 344 of the Criminal Code. The Crown seeks in substitution a sentence of two years less one day in jail, for a global sentence of 38 months in custody accounting for pre-trial custody. Mr. Charlie is an Aboriginal offender suffering from Fetal Alcohol Syndrome (FAS). In comprehensive reasons, the sentencing judge took particular note of the special circumstances facing the offender as the basis for the sentence. Held: Appeal dismissed. The sentencing judge did not err in principle by crafting a sentence outside of the usual range, and the sentence cannot be said to be unfit on the basis of the principles of sentencing or the circumstances of this offence and this offender.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] Franklin Charlie pleaded guilty in the Territorial Court of Yukon to one count of robbery, contrary to s. 344 of the *Criminal Code*, R.S.C., 1985, c. C-46.

[2] The Crown appeals from the sentence imposed of nine weeks in custody plus the 14 months served in custody while on remand, followed by a three-year period of probation.

[3] The Crown seeks, in substitution, a sentence of two years less one day in jail, after giving credit for time in pre-trial custody, for a global sentence of 38 months in custody.

CIRCUMSTANCES OF THE OFFENCE

[4] In reasons for sentence, indexed at 2014 YKTC 17, Judge Cozens described the circumstances of the offence:

> [3] As set out in an Agreed Statement of Facts, on May 12, 2013, Mr. Charlie, in the company of two female youth and a 21-year-old adult, all of whom were intoxicated to some degree, went to the Ross River residence of Little Charlie Dick and knocked on his door. Mr. Charlie and the others were looking for alcohol which they believed Mr. Dick kept in his residence. Although not invited in by Mr. Dick, they entered his residence after knocking. When Mr. Dick refused to provide any alcohol, either Mr. Charlie or the other male pushed Mr. Dick to the ground. Mr. Dick, who was 78 years old at the time, then left his residence and went to another residence where police were called.

> [4] After Mr. Dick left the residence, the others entered it and broke into his bedroom, which was locked. Mr. Dick's jacket, which contained his wallet and medication was taken, as was a mickey of liquor. The jacket was recovered on a trail near Mr. Dick's residence. Missing from the wallet, however, was $1,700. The medications were recovered, however the alcohol was not.
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> [5] Mr. Charlie was observed at the Dena store in Ross River later that day with an undetermined number of $100 bills. The other three individuals provided statements to the RCMP. These statements were not entirely consistent; however each individual denied any knowledge of the wallet being taken. They all stated that Mr. Dick was harassed or roughed up. They all indicated that Mr. Charlie was present and a participant in these events, although there was no additional detail provided as to exactly what Mr. Charlie's involvement was.
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> [6] Mr. Charlie states that due to his level of intoxication, he has no recollection of these events.

CIRCUMSTANCES OF THE OFFENDER

[5] Mr. Charlie, who is of Aboriginal descent, suffers from Fetal Alcohol Syndrome (FAS). He was 29 years of age at the time of sentencing. He has an extensive criminal record, including offences committed when he was a youth for breaking and entering with intent to commit an indictable offence (s. 348(1)(a)), five offences under s. 348(1)(b) for breaking and entering, and one mischief offence under s. 430.

[6] Mr. Charlie's criminal record, as an adult, includes a 2000 conviction for theft. There were also convictions in 2001 for taking a motor vehicle without consent, theft over $5,000, and failing to comply with an undertaking. In 2004, Mr. Charlie was convicted of two offences of failing to comply with his probation order, trespassing at night, and escaping lawful custody. In 2006, Mr. Charlie was convicted of further offences for failing to comply with a probation order and mischief.

[7] In 2008, he was convicted of an array of offences (including break and enter; dangerous operation of a motor vehicle; theft under $5,000; mischief; flight while pursued by a peace officer; and failing to comply with a probation order and recognizance). He was sentenced on all charges to incarceration for two years less one day, after being given credit for eight months of pre-trial custody.

[8] In 2011, Mr. Charlie was convicted of a robbery charge that has many parallels to the offence in this case. In extensive reasons for sentence, Judge Lilles, in reasons indexed at 2012 YKTC 5, reviewed the circumstances of the offence and, in particular, Mr. Charlie's Aboriginal circumstances as elucidated by a comprehensive Gladue Report and a Fetal Alcohol Syndrome (FAS) Evaluation, all of which Cozens T.C.J. also considered.

[9] It is clear from the reasons of Lilles T.C.J. that the MediGene report, a detailed psycho-educational assessment, influenced his decision to impose a six month sentence in prison, taking into account credit of 27 months' pre-sentence custody, for an effective total sentence of two years and nine months' incarceration, followed by a three year period of probation.

[10] Lilles T.C.J. detailed the depth of Mr. Charlie's limitations by reference to the MediGene report. Twenty-four observations were enumerated:

- Although he has some mild evidence of FAS facial features, Mr. Charlie exhibits no evidence of growth failure. His normal appearance deceives people into assuming that his cognitive functioning is better than it actually is.
- His formal diagnosis is "static encephalopathy, alcohol exposed," which means he suffers from FASD.
- He has exhibited severe behavioural and learning issues since he was a child, which has resulted in unstable living placements, educational opportunities, social difficulties and ongoing problems with the law. His cognitive deficiencies are exacerbated by his significant addiction issues.
- Mr. Charlie was diagnosed with ADHD as a child, and it is likely that this condition is secondary to his brain dysfunction and thus will not respond to typical ADHD protocols.
- Mr. Charlie has "pockets of skills" within his underlying brain dysfunction. It is important to identify and build on his strengths in a concrete way in order to overcome his areas of needs.
- Mr. Charlie's general Full Scale Intelligence Quotient (FSIQ) is 61, indicating "Extremely Low" range of intellectual functioning.
- Mr. Charlie is a concrete thinker with limited reasoning skills. He can only deal with the exact literal information provided to him and he struggles to read into a situation or idea. He can only process a small amount of information at a time and does not understand abstract or complex concepts. His answers and decisions tend to be very egocentric and based on what is immediately in front of him or his immediate needs. He

has limited understanding of the big picture or the impact of his answers or behaviours and gives little to no thought to the link between concepts, ideas or outcomes. Mr. Charlie often misinterprets dialogues and situations, which leads to significant confusion and frustration, which results in excessive emotional and behavioural reactions.

- As indicated in many reports in his file, he needs increased structure, routine and direction.
- Expectations and interactions must be very concrete in nature. He cannot transfer generalized skills, infer meaning, reason through abstract scenarios or use deductive or inductive reasoning for problem solving.
- Keep concepts or tasks as simple as possible. This is also relevant to any orders the Court may make.
- Mr. Charlie demonstrates severe deficits in all areas of memory: short term, rote memory, working memory, visual memory and long term memory. He will require external cues and prompts to deal with new information and to retrieve what information he may have stored in memory.
- Do not be fooled by Mr. Charlie's ability to simply repeat what he has heard. Parroting back information does not require thinking.
- Mr. Charlie demonstrated significant deficits in information processing and it takes him significantly longer to figure out what has been said and to come up with an appropriate response.
- Mr. Charlie is essentially illiterate. His reading and writing skills are at a Grade 2 level. He does not have the skills to manage any of the reading requirements of daily living.
- His math skills are slightly stronger than the Grade 3 level. He has not memorized any of the basic facts but understands the basic concepts of addition and subtraction. He can tell time to the half hour.
- Mr. Charlie does not mind being in prison as he feels safe, the rules are simple and he knows what he has to do every day. This provides a clear indication of the direction, structure and supervision he will need when he is released if he is to come close to meeting society's expectations.
- Franklin Charlie is a young man with a severe disability. He does not have the capacity to successfully live as an independent adult. He requires placement in a living situation equipped to manage complex developmental delayed adults.
- He does not have capacity to manage his personal needs. His parents and his First Nation should explore options related to the *Public Guardian and Trustee Act*, SY 2003, c. 21, Schedule C, and the *Adult Protection and Decision Making Act*, SY 2003, c. 21, Schedule A. He would benefit from continued involvement with the Fetal Alcohol Syndrome Society of the Yukon (FASSY).
- In general, Franklin presents as a person aged ten to 12 years, much younger than his 26 years. To build future success and reduce

behaviours, language, expectations, responsibilities, accountability, and supervision should be altered to the level of a ten to 12-year-old.

- Mr. Charlie does not have the cognitive ability to respond to traditional therapy. He will respond better to concrete supports in his own environment.
- He is a follower and can be easily led. He is at very high risk of being victimized by others. His social interactions need to be monitored to prevent others from using him as a pawn or taking advantage of him.
- Franklin has significant problems with substance abuse. Any limited cognitive skills that he has when sober become non-existent when he is drinking. Managing his substance abuse when he is released will be critical. Addictions counselling based on cognitive principles will not work for him. He should simply be made to understand that he cannot drink.
- He will do well in a structured and supervised treatment program (including prison), but once he is released, he will quickly return to his past habits and friends, unless there is a dramatic change in his day-to-day situation.
- FASD is not an excuse for antisocial behaviour. Franklin should be held accountable for his behaviours, utilizing relevant and meaningful consequences.

[11] In sentencing Mr. Charlie in December 2011, Lilles T.C.J. expressed his expectations for Mr. Charlie:

> [42] It is my expectation that during the remaining time of his custodial sentence, his Probation Officer, Health and Social Services, his parents, his First Nation, FASSY, and other supporting agencies will work together to develop a treatment, supervision and support plan to take effect upon his release. It is imperative that a transition plan be put in place before he is released, and that there are responsible individuals present on his release to receive him. I am respectfully requesting that Mr. Charlie be brought back to court on March 16 at 9:00 a.m. for a review of that transition plan. It would be helpful if those individuals and agencies working with Mr. Charlie, including his parents, could be present at that time.

[12] On May 13, 2013, Mr. Charlie committed the within offence while serving the probation order imposed by Lilles T.C.J.

[13] However, as the pre-sentence report filed in the within case demonstrates, Mr. Charlie ultimately made progress following his 2011 conviction:

> Franklin started his sentence at the Whitehorse Correctional Centre on 16 December 2011. During the time he was incarcerated, he took no programming whatsoever. Jennifer Stellbrink, Franklin's case manager, says that very little programming was available because of the move to the new

> facility which opened in February 2012. During his stay, Franklin racked up a couple of internal convictions and was written up eight times for negative behaviour. He was hospitalized briefly for punching a wall, and lost his job at the kitchen after testing positive for marijuana. He attempted to substitute another inmate's urine for his own during the urine test and was further penalized for that. He was also caught with contraband.
>
> Just before Franklin was released from the Whitehorse Correctional Centre in late April 2012, he found out about a heavy equipment operator training program near Kelowna, British Columbia. Immediately upon his return home to Ross River, Franklin says he phoned the school and asked for an application form. His mother, Nora, helped him fill it out. He was accepted the same day, and the Ross River Dene Council agreed to pay for his tuition and living expenses. "Everyone in Ross thought I was going to fail it," says Franklin. "They thought I was wasting the Band's money and stuff like that. A lot of people thought that, and I proved a lot of people wrong back home."
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> Franklin successfully completed the course, which ran between 16 July and 7 September 2012. Jen Thomson, a student advisor with the Interior Heavy Equipment Operator School, confirms that Franklin completed training on the excavator, loader, 'dozer and grader.
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> > Franklin displayed a good level of operating skill on the equipment and his assessments were consistently average without notable fluctuation. There were no noted behavioural or attendance issues with this student. His final attendance percentage was approximately 89%. He was in attendance 35.5 days out of 40.
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> In addition to completing the operator training, Franklin also got a number of industrial safety certificates, including Workplace Hazardous Materials Information System, Construction Safety Training System, Ground Disturbance, Transportation of Dangerous Goods and the Oil Sands Safety Association Regional Orientation Program.

[14] Most unfortunately, Mr. Charlie's efforts did not result in employment. He returned to his home in Ross River, but his life continued to drift for the reasons described by Cozens T.C.J.:

> [59] It appears that Mr. Charlie was released in late April 2012. I note that Mr. Stevens' *Gladue* report states he was released in late April. This offence occurred on May 12, 2013. Between the time of his release and his incarceration for the present offence, Mr. Charlie was able to complete his heavy equipment operator schooling and obtain his workplace certifications. He was unable to obtain employment as a heavy equipment operator however, due to a lack of experience. He worked for a while building houses for the First Nation in Ross River until he quit, due to teasing about only getting the job as his father worked at the Band office. He re-commenced a relationship with his son's mother and drank very moderately. That relationship, however, ended in March 2013 and Mr. Charlie started drinking heavily in May 2013. He stated that at the time of the offences he felt lost,

> that his life was “fucked up” and that he “didn't give a shit no more” and that he just felt like giving up.
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> [60] I wonder how much of what Lillies J. recommended was, in fact, followed up on and put into place. It appears that according to Mr. Stevens' *Gladue* report, little in fact was done. As Mr. Stevens states in the report:
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> > In his decision, Judge Lillies did his best to provide some judicial motivation for the development of a treatment supervision and support plan for Franklin. ... Unfortunately, in spite of Judge Lillies' encouragement, this plan was either never developed or implemented.
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> [61] In his conclusion, Mr. Stevens states that Franklin:
>
> > .... like so many aboriginal offenders with disabilities who find themselves at odds with the law, runs a risk of being penalized twice by a system that is at least partially responsible for putting Franklin where he is today. It is right and proper that Franklin should be sentenced for his role in the robbery for which he is being sentenced today. His evaluators were unequivocal in stating that FASD is not an excuse for his behaviour and that he should be held accountable for his behaviour and salient consequences must be provided. But Franklin may end up being penalized a second time precisely because of the lack of support services available for people with his level of disability. Without adequate supports in place, Franklin may find himself incarcerated by default and, as we all know, Franklin's continued incarceration can only be a short-term solution for him and for society. If doing the same thing over and over again and expecting different results is one of the definitions of madness, then we might all be crazy.

[15] In crafting an appropriate sentence, Cozens T.C.J. was obviously influenced by Mr. Charlie's difficult circumstances and the long-term impact of the systemic failure to address his needs.

[16] In addition to the Gladue Report, Cozens T.C.J. also had a psychiatric report prepared by Dr. Shabehram Lohrasbe. Dr. Lohrasbe interviewed Mr. Charlie on February 20, 2014. He also consulted Mark Stevens, the Gladue Report author, and reviewed the FAS MediGene report filed in 2011, the 2014 Gladue Report and numerous other materials.

[17] Dr. Lohrasbe, having read the materials referred to above, was aware of Mr. Charlie's intellectual and cognitive impairments. However, Dr. Lohrasbe found

Mr. Charlie to be "far less impaired, intellectually, cognitively, and interpersonally, than the person I expected to meet …"

[18] Dr. Lohrasbe found it difficult to reconcile Mr. Charlie's clinical presentation with the background information he had reviewed in advance of his assessment. He acknowledged that his findings likely reflected Mr. Charlie "at his best".

[19] Ultimately, Mr. Lohrasbe accepted the FAS assessor's comments:

> Franklin's concrete, egocentric approach to life is consistent with his significant weaknesses and variability in executive functioning and higher-order thinking skills (ability to engage in goal-directed behaviour; to plan, to use past, present and future learning and experiences to guide decisions; to develop and alter strategies or rules based on feedback; and to manage time and space). Franklin deals with the information directly in front of him and struggles to see the big picture, the present and long-term impact at decisions/behaviours. The feasibility of ideas being presented or discussed, etc.
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> To help compensate for Franklin's weaknesses in executive functioning, he will require ongoing external supports and external controls. Teaching him very specific, concrete systems that apply to a specific situation will allow for success in that situation. Providing him with a broad base of these systems will increase his overall success. Use of pictorial protocols that guide his progress through concrete tasks is recommended. Increased structure, direction and predictability in his life will allow Franklin to operate on 'auto-pilot' and reduce his struggles with in-the-moment judgment and problem-solving issues on a daily basis.

[20] Cozens T.C.J. provided thoughtful, detailed reasons − over 110 paragraphs in length − in which he carefully reviewed Mr. Charlie's Aboriginal circumstances, the two Gladue Reports, the FAS Evaluation, the MediGene Report, and the psychiatric report prepared by Dr. Lohrasbe.

[21] Cozens T.C.J. articulated the conundrum posed by Mr. Charlie's deficits:

> [78] There is considerable information before me regarding Mr. Charlie's challenges and his capabilities. It may be that, on a good day, and with the structured supports in place, he can operate at a level above the 10- to 12-year-old range the MediGene evaluation concludes he functions at and that was relied upon by Lillies J. in sentencing him. However, in the absence of such supports, it is clear from the materials provided that Mr. Charlie struggles to control his behaviours. As noted in these materials, when Mr. Charlie consumes alcohol, things deteriorate quickly and his negative behaviours are magnified. Underlying Mr. Charlie's decision to consume

> alcohol are, of course, the cognitive limitations he has as a result of his suffering from FASD. It is a circle from which the avenues of escape are narrow and limited and one that Mr. Charlie is often drawn back into, in large part due to a lack of support. Notwithstanding the strength and capabilities that Dr. Lohrasbe knows Mr. Charlie to, at least at times, and in pockets, possess, I find that Mr. Charlie is an individual of diminished moral culpability to whom the objectives of denunciation and deterrence are of somewhat limited applicability.
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> [79] Further, while repeat offenders, generally speaking, receive greater sentences for subsequent offences, in my view, the "step principle" as it is known, should have little application to offenders such as Mr. Charlie. To a large extent this principle is based upon the notion that an individual should have been deterred from committing further offences because of having received a sanction for an earlier offence. If the objective of specific deterrence is less applicable to Mr. Charlie, he cannot therefore be subject to the normal application of the step principle for his failure to have been specifically deterred.
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> [80] More difficult is the principle of separation from society. Is it necessary to separate Mr. Charlie from society? Doing so will protect society for the period of time that he is in custody. If this time in custody is utilized properly, with Mr. Charlie able to access and participate in suitable programming that meets his particular needs, perhaps the protection offered society extends to the period of time after his release. If not, however, then the protection is only temporary and, upon Mr. Charlie's release, the risk continues as it was or perhaps at an even more elevated level, if his time in custody is not only not beneficial to him but negative in impact.
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> [81] I must consider the degree of violence that Mr. Charlie participated in, either directly or as a party, on the facts before me in order to assess the extent to which the separation of Mr. Charlie from society by the imposition of a jail sentence is necessary. The greater the degree of violence and physical and psychological harm that resulted, the greater the risk of substantial harm if Mr. Charlie were to reoffend.
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> [82] This is not Mr. Charlie's first such act of violence. Should I accede to the sentence proposed by Crown counsel, society - at least society outside of WCC -- will be protected from any further acts of violence by Mr. Charlie for up to two years less one day, or up to one-third less than that if he earns remission while in custody.

[22] Ultimately, the judge concluded that the interests of society and Mr. Charlie were best served by attempting to rehabilitate him:

> [83] When considering the necessity of separating Mr. Charlie from society, the objectives of rehabilitation, providing reparation for harm done and promoting a sense of responsibility in Mr. Charlie and an acknowledgment of the harm done through the commission of this offence, must also be considered.

> [84] Rehabilitation, in the sense that Mr. Charlie can be "cured" from the effects of FASD, is of course not possible. It is, however, possible for him to be rehabilitated, in that he can learn to make choices that are acceptable and not conducive to an anti-societal and pro-criminal lifestyle. If Mr. Charlie can learn to make positive choices and reject the impulse to make negative ones, then there is a much greater likelihood that the remaining objectives of sentencing will be achieved. This, of course, requires more than just willpower on Mr. Charlie's part; it requires a supportive structure to assist and guide him.
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> [85] To some extent, Mr. Charlie has, at times, greater capabilities than what may have been earlier thought. While potentially raising to some degree his moral culpability, it also brings to the forefront the fact that he may actually have greater abilities to operate pro-socially than people may have thought and may respond better to structure and supports than people may have believed, and this should encourage these supports and structures to be put in place for him.

[23] Cozens T.C.J. considered the appropriate period of incarceration. In his view, it was important for Mr. Charlie to have an opportunity for employment and to be on the land before winter. He stated:

> [97] When I consider whether a further period of custody is necessary, I recognize that this is April and the opportunities for employment for Mr. Charlie and for his being on the land are greater than in mid-winter. Were I to impose a sentence that results in Mr. Charlie being in custody at WCC for an additional lengthy period of time, the opportunities for him to obtain employment and benefit from being on the land are diminished. Mr. Charlie's best prospects for entering into the community and working and spending time in the bush are unfolding in the next few months, and not in late summer or fall. I find that it is not necessary in accord with the purposes, objectives, and principles of sentencing to impose a sentence that will result in Mr. Charlie remaining in custody for a further lengthy period of time. While a sentence in the range of 18 to 20 months would have the result of having Mr. Charlie released in time for the late spring and summer of 2015, and the result of separating Mr. Charlie from society for a further period of time, I find that such a sentence would be disproportionate for this offence committed by this offender.
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> [98] As such, in addition to the 14 months he has served in custody on remand, I impose an additional nine weeks of custody. This should allow for his release in June. This additional time in custody has the benefit of allowing the present somewhat unstructured and detailed plan for Mr. Charlie to be strengthened. It also has the benefit of allowing Mr. Charlie to put into practice what he has said he wishes to do with respect to employment and with respect to dealing with his issues of substance abuse.

ON APPEAL

[24] The Crown submits the sentence imposed fails to reflect the gravity of the offence. In that regard, the Crown argues the judge erred in principle when he said, at para. 88, that he did "not consider this to be a 'home invasion' per se, as that term is generally understood and for which lengthy prison sentences are imposed."

[25] The Crown submits the offence was clearly a pre-meditated "home invasion" robbery in which the victim was pushed to the ground, and liquor and money were stolen. Counsel for Mr. Charlie notes that the agreed statement of facts does not particularize who, among the four involved in the robbery, pushed the victim (who managed to escape) and adds that there is insufficient detail to support an inference of pre-meditation.

[26] The core of the Crown's submission rests on the proposition that the range of sentences for similar crimes is three and a half to eight years' imprisonment.

[27] The Crown contends the "starting point" for crimes such as this begins at three and a half years. In *R. v. Sidney*, 2008 YKTC 40, the court noted that:

> [9] Such crimes demand that denunciation, deterrence and protection of the public be the primary focus of sentence. Most Yukon cases similar to the case at bar have suggested a range of sentence beginning at around three and a half years. In this case, the Crown sought a sentence of four to six years. It should be noted, however, that the enactment of s. 348.1 and recent decisions from the British Columbia Court of Appeal, particularly the *R. v. Moore* case, [2008] B.C.J. No. 600, suggests to me that the range may now actually have a significantly higher starting point than prior Yukon cases might have indicated.

[28] There is further support for the suggested range from the decision of Lilles T.C.J. in his sentencing reasons concerning Mr. Charlie:

> [14] The predicate offence, that of robbery, occurred on August 30, 2010, and is a serious offence for which the *Criminal Code* provides a maximum penalty of life imprisonment. Where a "home invasion" is involved, penitentiary terms in the range of four to eight years are not uncommon. …

[29] However, as was made clear in *R. v. Bernier*, 2003 BCCA 134, there is no crime of "home invasion". As Madam Justice Newbury elaborated:

> [97] Turning first to the matter of "home invasions", there is of course no offence known as "home invasion" under the *Criminal Code*. As counsel agreed, the term is a shorthand expression describing a combination of breaking and entering a dwelling house with intent to effect a robbery, with recklessness as to whether the dwelling is occupied at the time, and the confinement, terrorizing or assaulting of the occupants, who in many instances are elderly or particularly vulnerable people. I do not think that judges need to have statistical evidence to take notice of the fact that this phenomenon has grown in recent years in this province, and seems to reflect a very disturbing malaise in our society.

[30] Furthermore, as has been said many times, "ranges" of sentence are merely guidelines and must not distract the sentencing judge from fashioning a sentence that is fit. As Madam Justice Prowse explained in *Bernier*:

> [81] As noted by my colleagues, the difficulty with a discussion of range of sentences with respect to home invasions is that there is no single crime known as "home invasion". Rather, that term is loosely used as a shorthand expression for a combination of offences involving a breaking and entering with intent to commit theft or robbery, with knowledge or recklessness as to whether the dwelling is occupied at the time, and frequently involving an assault on one or more occupants.
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> [82] Because the combination of crimes charged in these cases will vary to some extent, it is difficult to determine a relevant range of sentence. For this reason, the Court should exercise more caution than usual in attempting to suggest general ranges of sentence for home invasions.

[31] It is with these principles in mind that we must assess whether the sentence imposed in this case is unfit as contended by the Crown − that it failed to have regard to protection of the public − which, the Crown says, will inevitably be put at risk given Mr. Charlie's criminal record, history of two "home invasions", and the absence of a concrete plan for his rehabilitation.

DECISION

[32] The evidence is clear that Mr. Charlie suffers from the effects of FAS and that the effect is serious, although potentially not as serious as was thought at the time of sentencing before Lilles T.C.J. Nonetheless, the FAS effects are directly linked to his parents' forced placement in a residential school. Specifically, the FAS is the product of Mr. Charlie's mother consuming high levels of alcohol during her pregnancy, which consumption of alcohol is linked to her experience in the residential schools.

[33] The judge was aware that these circumstances, while important and relevant to sentencing, do not relieve Mr. Charlie from responsibility for the offence; they do, however, reduce his moral culpability, in keeping with the jurisprudence in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13.

[34] It is also clear that the judge was confronted with a dilemma: incarceration would only provide a respite from the risk Mr. Charlie poses to society because his condition does not allow him to fully benefit from any rehabilitative potential of incarceration.

[35] This was reflected in the assessment by Cozens T.C.J. of Mr. Charlie's poor record while on remand:

> [93] To the extent that Mr. Charlie struggled with behavioral issues and made little progress while in remand custody, it is quite likely there will not be a substantial difference for him in serving a further period of custody. I recognize that a proper consideration and application of the purposes of principles of sentencing requires much more than just a consideration of the impact of a jail sentence upon Mr. Charlie. It is finding the appropriate balance between the, at times, apparently competing interests that presents the greatest difficulty in sentencing an offender such as Mr. Charlie.

[36] Cozens T.C.J. concluded that "the risk of further violence that would result in significant harm is towards the lower end of the spectrum". Thus, "in the circumstances of this offender, a penitentiary sentence is not necessary or warranted."

[37] There is little doubt that the sentence imposed in this case is beyond the low end of range of sentences imposed on similar offenders for similar offences. However, as has been repeatedly said, sentencing ranges are merely guidelines.

[38] In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92, the Supreme Court of Canada explained the underlying justification for the reliance on sentencing ranges, which is to "minimiz[e] the disparity of sentences imposed by sentencing judges <u>for similar offenders and similar offences committed</u>…" (Emphasis added). The Supreme Court discussed the relationship between the wide discretion granted to

sentencing judges and the range of sentences for particular offences in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
>
> [Emphasis added.]

[39] A sentencing judge does not commit an error in principle simply by crafting a sentence that falls outside of the typical range for a particular offence. The appropriate sentence is determined by the circumstances of the offender and the offence, whether aggravating or mitigating. It is for this reason that, as the Supreme Court explains in *C.A.M.* at para. 92, "a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes..." (Emphasis added).

[40] Further, as the Supreme Court of Canada explained in *R. v. Ipeelee*, 2012 SCC 13, sentencing judges enjoy a broad discretion in the sentencing process:

> [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing —the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code,* the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a

> just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.
>
> [38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter* scrutiny, a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this discretion and granted considerable deference to a judge's choice of sentence. ...
>
> [Emphasis added.]

[41] In this case, the sentencing judge was faced with exceptional circumstances.

[42] Mr. Charlie presents a serious challenge to the sentencing process. He is seriously compromised, but has the potential to do well in a controlled community environment. Although he is the author of his misdeeds, they flow from his inability to control himself when he consumes alcohol or drugs. This inability derives from his FAS, which, in turn, originated from problems flowing from his Aboriginal background. Without rehabilitation, his pattern of offending clearly will continue. With rehabilitation, he has a chance to lead an effective life. Society is best served if that were to occur.

[43] These are the factors that led the judge to impose the sentence that he did. In my view, he did not err. In a sense, this may be Mr. Charlie's last chance. He is given the opportunity to turn his life around. If he does not, society cannot continue to be compromised by his conduct.

[44] A perhaps fortuitous aspect of this case arose from the delay in the prosecution of this appeal. The sentence was imposed on April 13, 2014. The Crown's Notice of Appeal was filed on May 13, 2014. Mr. Charlie was personally served with the Notice on June 11, 2014. During the summer months, Mr. Charlie was in the bush, having been released on probation, and did not take steps to obtain counsel.

[45] His probation order had attached to it 17 strict conditions. We were advised that since his release, which would appear to be about six months ago, he has not breached any conditions. He resides in the small community of Ross River which has a RCMP detachment. One need no evidence to infer that, in such a small community, the RCMP will be aware of breaches and can keep track of Mr. Charlie's whereabouts.

[46] In my view, this suggests that, contrary to the Crown's urging, Mr. Charlie has a promising chance to rehabilitate.

[47] In my opinion, when one considers all of the principles of sentencing and the circumstances of this offence and this offender, the sentence cannot be said to be unfit or based on an error in principle.

[48] I would grant leave and dismiss the appeal.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Neilson"