Citation: *R.* v. *Atkinson*, 2012 YKTC 62

Date: 20120611
Docket: 11-00540A
Registry: Whitehorse

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

REGINA

v.

JOHN ATKINSON

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

Appearances:
Joanna Phillips — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): John Atkinson has entered a guilty plea to a charge of having committed a sexual assault against C.S. An Agreed Statement of Facts was filed as follows:

> 1. On 3 November, 2011, in Ross River, Yukon Territory, the Complainant. C.S., age nineteen, was drinking with her brother, R.O.
>
> 2. Around about 7:00 p.m. on 3 November, 2011, the Complainant and her brother left their home and met Robert Jepp and William Jepp.
>
> 3. The four went to the residence of John Atkinson.
>
> 4. The group partied with John Atkinson at his residence for some period of time, until Robert Jepp and William Jepp left Mr. Atkinson's residence. The Complainant and R.O. remained behind.

5. Due to heavy alcohol consumption, the Complainant and R.O. passed out in the living room of Mr. Atkinson's residence.

6. The Complainant came to find Mr. Atkinson talking to her and touching her vagina.

7. The Complainant does not recall everything that happened, but does recall that Mr. Atkinson got on top of her, at which point she told him to not touch her.

8. Mr. Atkinson did not stop, but instead removed her pants and underwear, and attempted to insert his penis into her vagina.

9. The Complainant hit Mr. Atkinson several times and again told him not to touch her.

10. The Complainant also called out to her brother, who was passed out in the residence, but he did not respond at that time.

11. The Complainant does not recall how the incident ended, but before she left the residence, she told her brother, who was at this point awake, that she had been sexually assaulted by Mr. Atkinson.

12. Mr. O. and the Complainant left the residence at that point and met briefly with Robert Jepp and William Jepp. The Complainant also disclosed to them what had just happened at the Atkinson house.

13. The Complainant and Mr. O. then proceeded to the Ross River Nursing Station where a sexual assault kit was conducted at 11:05 a.m. on 3 November, 2011.

14. The nurse found no specific injuries but did find semen on her public hair.

15. DNA tests were subsequently conducted which confirmed that the semen on the Complainant belonged to Mr. Atkinson, and Mr. Atkinson was found to have the Complainant's DNA on his penis.

16. At 2:15 p.m. on 3 November, 2011, the RCMP arrested Mr. Atkinson without incident. He has been in custody since that date.

Position of the Crown

[2] Crown counsel submits that the appropriate sentence is that of two years less a day, less credit for Mr. Atkinson's 218 days of remand as of the date of sentencing submissions. Counsel notes the following factors to be aggravating: Mr. Atkinson's

criminal record, in particular, the related offence in 1980 for which he received a one-year sentence; the vulnerability of the victim, being 19 years old, intoxicated and passed out; the element of trust in that she was known to Mr. Atkinson, again, highlighting the age difference between her 19 and his 50 years, and it being his residence; Mr. Atkinson's failure to stop attempting to penetrate her, despite her resistance, and his moderate to high risk factors for reoffending in conjunction with his alcohol problems.

Position of Defence Counsel

[3] Mr. Atkinson's counsel submits that the appropriate sentence would be 14 to 16 months less credit for time in remand custody, followed by the maximum period of probation of three years.

Circumstances of Mr. Atkinson

[4] Mr. Atkinson is 51 years of age. He is a member of the Ross River Dena Council. He comes before the Court with a lengthy criminal record that starts in 1979. Between 1979 and 1989 he amassed 30 criminal convictions including five for assaultive behaviour and a related conviction for indecent assault on a female. In all, during that period of time, he was sentenced to approximately five years in custody, excluding concurrent custodial sentences.

[5] Mr. Atkinson then had no criminal convictions until a conviction in 2005 for assault causing bodily harm for which he received a suspended sentence and probation. I will return to the circumstances of that assault later in this decision.

[6] His final conviction was in January of 2011 for breach of an undertaking to a

Peace Officer for which he received a suspended sentence.

Pre-Sentence Report

[7] Mr. Atkinson was first brought before the Court on these charges in November 2011. He was detained after show cause on December 2, 2011, and changed his plea from not guilty to guilty on February 13th. The Agreed Statement of Facts was filed that day and a Pre-Sentence Report ordered, returnable for the sentencing hearing on April 20, 2012.

[8] The Pre-Sentence Report was not ready for April 20th and defence counsel voiced his concerns regarding the lack of the Pre-Sentence Report and the decision by the Adult Probation Office to not assign the preparation of the Pre-Sentence Report to a Whitehorse-based probation officer, given Mr. Atkinson's incarceration in Whitehorse at the Whitehorse Correctional Centre. The officer assigned the Pre-Sentence Report was based in Watson Lake. The sentencing was adjourned to June 7th.

[9] Counsel and the Court received a Pre-Sentence Report on the morning of June 7th. Included with the Pre-Sentence Report was a psychological screen and risk assessment prepared by Craig Dempsey. To put it bluntly, apart from the materials provided by Mr. Dempsey, the balance of the Pre-Sentence Report was of limited assistance to the Court in its content, and the circumstances regarding its preparation are the cause of considerable concern.

[10] Counsel for Mr. Atkinson advised the Court that no one from Adult Probation ever actually met with him or spoke with him in order to prepare the Pre-Sentence Report. None of the collateral contacts he listed in the application form he filled out were ever

contacted. Much of the information appears to have been obtained from information already on Probation files, including the files of a brother. To the extent that the Pre-Sentence Report makes reference to Mr. Atkinson describing his circumstances, these references appear not to be in relation to anything Mr. Atkinson directly told the author of the Pre-Sentence Report, but were obtained from other sources, which may include his application information form, no copy of which was available for the Court. I note that the author of the Pre-Sentence Report lists his sources of information as follows:

> John Atkinson
> Corporal Walker, Ross River RCMP
> Constable Nixon, Ross River RCMP
> Craig Dempsey
> Probation Files
> Circumstances

I understand that none of these were the collateral contacts Mr. Atkinson set out in his application. I have no reason to doubt the accuracy of defence counsel's submissions regarding the process involved in the preparation of the Pre-Sentence Report.

[11] I note that the author of the Pre-Sentence Report states the following in his summary and recommendations:

> Corporal Walker recommended a lengthy period of incarceration with a lengthy probation order to follow. The writer agrees with Corporal Walker. This is a serious event that will have long lasting effects on the victim and the witnesses and the community.

[12] Firstly, in regard to the above excerpt, such a recommendation is wholly inappropriate in a Pre-Sentence Report. The Court, in ordering a Pre-Sentence Report, is not interested in the author of the Pre-Sentence Report's opinion as to what sentence

should be imposed. What the Court wants is information regarding the personal circumstances of the offender, both historical and present; information related to the offender's ability to comply with terms of community supervision, both historical and present and including available supports; recommended terms of community supervision; and information regarding any risk assessments that are available.

[13] Secondly, the lack of information provided regarding Mr. Atkinson's Aboriginal heritage falls far short of that required in law. As I stated in *R.* v. *Blanchard*, 2011 YKTC 86:

> [25] I note that the onus of ensuring sufficient information about an aboriginal individual's particular circumstances rests on all of us, Crown, defence, and the sentencing judge. In the absence of a true *Gladue* Report, it is critical that pre-sentence reports contain some details about an offender's aboriginal status and circumstances. Where the pre-sentence report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence. In *R.* v. *Kakekagamick* (2006), 81 O.R. (3d) 664, the Ontario Court of Appeal stated in paragraphs 52 and 53:
>
> > The original pre-sentence report in this case was deficient in that it failed to address adequately aboriginal circumstances and alternative approaches (as described in the second report ordered by this court after the appeal was heard). I would note that the Criminal Code was amended in 1996 to include s. 718.2(e) and Gladue was decided in 1999. One would expect that Correctional Services, Probation and Parole would by now fully appreciate the nature and scope of the information required in a pre-sentence report for an aboriginal offender.
> >
> > Given the deficiencies in the pre-sentence report, counsel and the trial judge should have considered the desirability of a further report or other evidence. Counsel, and perhaps especially the Crown, could and should have raised the issue in this case. They

> did not, and it fell to the sentencing judge to consider whether or not further inquiries were either appropriate or practicable. No such inquiry took place.

[26] Again, in *R.* v. *Gladue* [1999] 1 S.C.R. 688, the Court stated in paragraph 83:

> Where a particular offender does not wish to have such evidence to be adduced, [Gladue evidence] the right to have particular attention paid to his or her circumstances an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

[27] I am aware that, at present, some efforts are being made by the Council of Yukon First Nations (CYFN) to have workers provide *Gladue* Reports to the Court. I am also aware that Probation Services has indicated that they are not prepared to engage in the process of preparing full-scale *Gladue* Reports. These reports are very labour intensive, and while the present efforts of CYFN should be encouraged and commended from a purely logistical perspective it is not realistic at present to expect that every aboriginal offender that could or should be the subject of a *Gladue* Report will have one prepared with respect to his or her personal circumstances. Where a *Gladue* Report is not being prepared in such circumstances, the Court would find it highly useful to at least be provided some basic information in a pre-sentence report. In fact, in some circumstances, the Crown may not properly be able to proceed without the benefit of such information. I would be concerned if Probation Services moved further away from providing such information in future reports regarding aboriginal offenders.

[14] In *R.* v. *Ipeelee*, 2012 SCC 13, the Court, in commenting upon the jurisprudence that followed the seminal decision in *Gladue* regarding the sentencing of Aboriginal offenders and, in particular, the notion that *Gladue* principles do not apply to serious offences, stated in paras. 85 and 87 that:

> 85. Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear, at para. 82, that sentencing judges have a *duty* to apply s. 718.2(*e*): "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence." Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that
>
> > [t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.
>
> This element of duty has not completely escaped the attention of Canadian appellate courts …
>
> 87. The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

[15] A *Gladue* Report was not requested and prepared for Mr. Atkinson's sentencing hearing, to my knowledge. While I am not sure why that was the case, I recognize that there are only limited personnel and resources available to prepare such reports, noting that these do not emanate from the Adult Probation Office. I reiterate that where there is not a *Gladue* Report before the Court, it is incumbent upon the author of a Pre-Sentence Report, where one has been ordered, to ensure that the Pre-Sentence Report

includes sufficient *Gladue*-type information for the Court to render a decision in compliance with the principles of sentencing and the direction of the Supreme Court of Canada.

[16] I note that both Crown counsel and defence counsel in this case were alive to the issue of the lack of *Gladue*-type information, and their concerns were noted. In the present case, were it not for the additional information provided to the Court by Mr. Atkinson in a handwritten letter, I would have had to seriously consider further adjourning the sentencing hearing in order to obtain the necessary information regarding his Aboriginal heritage. As it is, I am satisfied that I have sufficient information to allow me to render a decision.

[17] Further, I recognize that I am not aware of the totality of the underlying reasons for why the preparation of the Pre-Sentence Report was wholly left in the hands of a probation officer situated in Watson Lake when a Whitehorse-based probation officer situated minutes away from the Whitehorse Correctional Centre could perhaps at least have made in-person contact with Mr. Atkinson to assist in the preparation of the Pre-Sentence Report, if not entirely take over primary responsibility for it. This said, I find it hard to comprehend that there could be any legitimate reason to justify or excuse what occurred in this case.

Letter from Mr. Atkinson

[18] Mr. Atkinson shares how, while he did not attend residential school, he has nevertheless suffered. He states that all of his older brothers and sisters, and I gather there are a total of five, attended residential school. His mother died as a result of

alcohol abuse. His father also was an alcoholic before his death. Mr. Atkinson states that he became an alcoholic like his father. He was able to quit at times, but when he drank he would binge for months. Prior to starting to consume alcohol shortly before committing this offence, Mr. Atkinson had maintained sobriety for approximately 15 years. He indicates that his return to alcohol was precipitated by his former partner's entering into a new relationship and his struggles to deal with this. He has two children, age seven and 11, whom he has raised mostly on his own, being both father and mother to them. The children's mother, also a Kaska Dena from Ross River, struggles with alcohol abuse. Her mother died when she was young, and her father, who attended residential school, was an absentee parent. As a result, the children's mother was bounced around from group home to group home.

[19] During the period when Mr. Atkinson was with the children's mother, she, although initially sober, continued to struggle with alcohol abuse and dependency. While she did not drink alcohol during her pregnancy with their older son, she did during the period she was pregnant with their youngest son. Mr. Atkinson, in response to a question from me during the sentencing submissions, stated that he believes that this son suffers from the effects of pre-natal alcohol consumption, although he has never been formally diagnosed.

[20] The children's mother still struggles with alcoholism and, although employed in mining camps, drinks up most of her money and provides little financial assistance to Mr. Atkinson. Currently, the two boys reside in Ross River with Mr. Atkinson's sister.

[21] Mr. Atkinson noted his grandmother's advice to him before she died:

> She told me, when you have kids never ever let them go or taken away …No matter if your by your by yourself, take care of your kids, Love them because their part of you.

Mr. Atkinson then wrote:

> I've done that until I started drinking. I was selfish, that I put alcohol first. Now being away from them this long, has given me strength and will that I can beat this evil thing alcohol.
>
> This is the longest I've ever being away from my boys. I phoned them every night, sometimes twice a day. They keep asking me when I'm coming home. They are my heart.

Additional Information

[22] The information provided in the Pre-Sentence Report indicates that all of Mr. Atkinson's family has been involved with the courts with the exception of the sister the children are currently living with. Besides his parents, an older brother and one sister are deceased. Mr. Atkinson has a Grade 8 education, has not been employed since 2001, and helps support his children as a carver.

[23] When Mr. Atkinson was assessed using the LSI-R in 2005 he was rated as having an 80.5 percent chance of reoffending within one year. In fact, he did not commit any criminal offence for several years. As I understand the circumstances of the 2005 offence, Mr. Atkinson, while sober, assaulted an individual who was providing his then-pregnant partner with alcohol. While this was not a defence to the charge against him, it may be, as defence counsel suggests, that this context assists in explaining the suspended sentence and probation he received.

[24] Mr. Atkinson was not reassessed using the LSI-R for the purposes of the present Pre-Sentence Report. Counsel for Mr. Atkinson points out that despite the 80.5

percent estimated chance of his reoffending within the year he did not, in fact, commit a substantive criminal offence until the present one.

[25] Craig Dempsey's report notes that he considers Mr. Atkinson as being at a moderate/high risk for future sexual violence based upon the Risk for Sexual Violence Protocol and the STATIC 99. He was assessed as being at a moderate risk for future violence using the HCR-20 assessment criteria. He was assessed to be at a high rate of reoffending generally, using the LS/CMI. Underlying these risk assessments were the following factors:

> Past offending sexual behaviour;
> Relationship instability;
> Impulsivity;
> Poor behavioural controls;
> Minimization;
> Criminal behaviour;
> Lack of employment;
> Substance Abuse; and
> Anti-social personality traits and features.

He notes in his report that to Mr. Atkinson's credit he appears motivated to get the help he requires in order to address his risk-related factors.

[26] Mr. Dempsey, who had for a period during Mr. Atkinson's remand at the Whitehorse Correctional Centre been his caseworker, provided a letter that stated Mr. Atkinson had behaved appropriately at Whitehorse Correctional Centre while on remand, with no behavioural difficulties. He was unable to work due to priority being given to serving prisoners. There was also no programming provided to him as there was none suitable that was available. Mr. Dempsey further stated that Mr. Atkinson

was actively seeking treatment for his alcohol abuse and had been in contact with his First Nation to seek assistance.

[27] I note that there has likely been a negative impact upon Mr. Atkinson as a result of having his sentencing not proceed on April 20th, due to possible lost employment or counselling opportunities he would have perhaps had as a serving prisoner.

[28] The Reverend Timothy Colwell, Minister of Dena Dadengak Koa and Executive Director of the Ross River Hope Society, provided a letter of support for Mr. Atkinson in February, and I understand that Mr. Colwell and Mr. Atkinson have maintained contact since.

Victim Impact Statement

[29] The victim impact statement makes it very clear that the impact of Mr. Atkinson's crime is significant. The complainant states:

> I feel like I am The one who did [the] Assault Not the victim. Feel like a outcast. Community member are looking & treating me different. I have no Self confident. No trust to Anybody I'm always scared. My family feels like there outcast from the community. It's hard to get help from leadership. The offender is his family. I Don't go out in the community Anymore to Afraid. I Don't feel happy anymore, cry more. I have hurt feelings.

[30] It is unfortunately not unusual in small communities in the Yukon, where an offender has a significant family network in the community, for the family to rally around the offender and alienate the victim, even when the victim is a member of the same community. While it is understandable and generally a good thing for family members to continue to support a loved one regardless of the commission of a criminal offence,

such support cannot and should not override justice and fairness. Sometimes the best support the family of an offender can provide to the offender is to ensure that he or she understands how wrong, unacceptable and harmful his or her behaviour was. In the absence of such honesty an offender may not be able to fully address his or her underlying issues and the causes of the criminal behaviour.

[31] I say this not being in a position to state with any degree of certainty that Mr. Atkinson's family and the community have acted in the way the victim suggests. It is clear, however, that this is the victim's perception. I believe it is important for the community, including Mr. Atkinson's family, to take positive steps to ensure that the victim does not feel this way. She was a victim.

[32] It is not clear from the victim impact statement or any other information provided to me whether the victim is also a member of the Ross River Dena Council or is otherwise of Aboriginal heritage. I also am not aware of her or her family's connection to the community other than that they continue to live there. In retrospect, this is information I should have inquired into and will endeavour to do in future in appropriate cases.

[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.

Case Law Sentencing Range

[34] The leading case in the Yukon with respect to sentencing sexual offenders in circumstances similar to the present case is that of *R.* v. *White,* 2008 YKSC 34. Mr. White was convicted after trial for sexual assault on evidence that he attempted to have sexual intercourse with an intoxicated and sleeping 21-year-old woman with whom he had been drinking earlier. He advised the author of the Pre-Sentence Report that he did not accept responsibility for the sexual assault. He was a 39-year-old Aboriginal person from a dysfunctional background. He had a criminal record which included at least one conviction of an offence for violence, but no related offences for sexual offending.

[35] Justice Gower in para. 21, adopted the reasoning of Lilles C.J. in *R.* v. *G.W.S.*, 2004 YKTC 5, at para. 20 where Lilles CJ. "spoke of the profound effects on a woman's well-being which can result from a sexual assault even where intercourse is incomplete":

> "... Typical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. …."

After a detailed review of relevant case law Justice Gower stated his view in para. 85, 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.

In paragraph 87 he states:

> Further, as noted in *Bernier*, I am not suggesting this range is conclusive. Greater or lesser sentences will be justified where circumstances warrant. This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

[36] Stressing the principles of deterrence and denunciation as paramount in the circumstances before him, Justice Gower imposed a sentence of 26 months. As Justice Gower reiterated, sentencing remains an inherently individualized process.

Application to this case

[37] I have considered the purpose and principles of sentencing set out in s. 718 to 718.2 of the *Criminal Code.* Certainly the objectives of denunciation and deterrence remain as leading considerations in cases of sexual assault that occur in circumstances

such as those before me. This said, this is a case where the objective of rehabilitation also must be a leading consideration.

[38] Mr. Atkinson is an individual who has demonstrated in the past that he can live a pro-social life. He, despite the difficulties he and his family have struggled with, managed to turn around a criminal lifestyle and maintain sobriety for 15 years, raising two children primarily on his own. While stating that he does not recall having committed the sexual assault, he has accepted responsibility for having done so and I accept that he is genuinely remorseful.

[39] He has been separated from society for 222 days as a result of having committed this crime, and I must consider the extent to which he continues to need to be separated from society. To some degree, the longer he is separated from society the longer it will take him to provide reparations for his crime to his community, of whom the victim is a member, to his family, in particular his children, and to the larger societal community. While there are certainly aggravating factors in this case similar to many of those listed in para. 17 of *White, supra*, there are also mitigating circumstances, the primary of which is Mr. Atkinson's acceptance of responsibility. I also find his commitment to maintaining sobriety in future to be genuine and, based upon his past track record, a very real possibility. In looking at his risk factors, I am satisfied that if he maintains sobriety, something he is committed to and can achieve, his risk of reoffending is greatly reduced.

[40] This is a case where s. 718.2(e) is directly applicable and which assists in determining the extent to which Mr. Atkinson's separation from society remains

necessary. I agree with defence counsel that this may well have been a case where a conditional sentence could have been an appropriate disposition, and due to the ability, based upon the comments of the Supreme Court of Canada in *R.* v. *Proulx,* [2000] 1 S.C.R. 61, to make the conditional sentence longer than a straight period of incarceration, have allowed for the imposition of a sentence closer to that suggested by Crown counsel. Due to amendments made to the *Criminal Code*, however, such an option is no longer available to me. I must work with what options are available in order to impose a sentence that is just, fair and balanced.

[41] In order, therefore, to give full effect to s. 718.2(e) in this case and its application within the larger sentencing purposes and principles, and full effect to the judgments of the Supreme Court in *Gladue,* and *Ipeelee,* insofar as they apply to the circumstances of this case, I find that a sentence at the lower end of the general range must be imposed. To incarcerate Mr. Atkinson for a longer period of time based upon the need to denounce his conduct and deter others would fail to give proper weight to the remaining purposes of sentencing and to the guiding principles of which s. 718.2(e) is one.

[42] It is beyond dispute that the negative impacts of the treatment of Aboriginal peoples by the Government of Canada and its agents, including, but not limited to, the residential school system, are passed down from generation to generation. The abused and neglected child so often becomes the abuser and neglecter of his or her children. The child of the alcoholic so often becomes the alcoholic parent of a child. It is incumbent upon courts in sentencing Aboriginal offenders to use such restraint as is necessary in recognition of the particular circumstances of the offender, both immediate

and historical. Justice, insofar as it is possible within the proper balancing of all the purposes and principles of sentencing, must make every effort to assist in breaking down the destructive cycle that is the result of the systemic discrimination of Aboriginal peoples.

[43] Mr. Atkinson has a demonstrated past ability to successfully live outside the criminal justice system, and I believe he also has a very realistic ability to do so in the future. He has two young sons whose lives will be shaped by his choices. He must make the right choices to guide them away from the destructive life that he and others in his family have experienced. His children's lives will also shape the lives of others around them. I believe that the imposition of an additional lengthy period of incarceration for Mr. Atkinson is not necessary and would likely make it more difficult to break the destructive lifecycle he and his family have experienced.

[44] I find that a shorter period of incarceration followed by a lengthy probation order is the appropriate sentence and in accord with the purpose and principles of sentencing. I therefore sentence Mr. Atkinson to 15 months custody. Pursuant to the reasoning in *R.* v. *Vittrekwa*, 2011 YKTC 64, which I find applies in this case based on the evidence and submissions before me, he will receive credit at 1.5 to 1 for his 222 days in custody. This amounts to 333 days for which I will allow 11 months credit. He therefore has a remanet of four months custody to be served.

[45] This will be followed by a period of probation of three years. The terms of the probation order will be as follows:

1. Keep the peace and be of good behaviour; appear before the Court where required to do so by the Court;
2. Notify the Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any change of employment or occupation;
3. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
4. Report to a Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;
5. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
6. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
7. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
8. Take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
9. Take such other assessment, counselling and programming as directed by your Probation Officer;
10. Have no contact, directly or indirectly, or communication in any way with C.S. except with the prior written permission of your Probation Officer in consultation with Victim Services;

The reason I have included the permission exception is that it may be necessary or beneficial at some point in time for Mr. Atkinson to make an apology to the victim in recognition of the harm that he has caused her. I am only saying that that may be possible, and that is why this is phrased in this manner.

11. Not attend at or within 25 metres of the home of C.S.;

12. Perform 60 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. This community service is to be completed by the 18th month of this probation order. Any hours spent in assessment, programming or counselling, may, in the discretion of the Probation Officer, be counted as community work service hours;

The reason there are community work service hours is that crimes like this are, yes, firstly a crime against the immediate victim, but in the Yukon are crimes against the community as a whole.

13. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

14. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling or employment that you have been directed to do pursuant to this probation order.

[46] Pursuant to s. 109 there will be an order prohibiting you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for a period of ten years.

[47] This is a primary designated offence. There will be a DNA order under s. 487.051, and there will be an order under s. 490.012(1) of the *Criminal Code* known as a *SOIRA* order, S.C. 2004, c. 10, and it shall last for 20 years according to s. 490.013.

[48] I will waive the victim fine surcharge in this case. Is there anything further from either counsel?

[49] MS. PHILLIPS: No, Your Honour.

[50] THE CLERK: The remaining counts, Your Honour?

[51] MS. PHILLIPS: Stay of proceedings.

[52] THE COURT: Mr. Atkinson, you have the ability and the responsibility to do well, and I believe there is every reason that that can be what occurs in your future. I wish you well in your efforts.

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COZENS C.J.T.C.