

Citation: *R. v. J.S.*, 2017 YKTC 23

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Docket: 15-03597  
Registry: Whitehorse

**YOUTH JUSTICE COURT OF YUKON**  
Before His Honour Judge Cozens

REGINA

v.

J.S.

**Restriction on publication: Publication of information identifying the young person(s) charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that Act.**

**Restriction on publication: Publication of information that could identify the complainant or a witness is prohibited by section 111(1) of the *Youth Criminal Justice Act*. Check with the court registry for details**

Appearances:

Leo Lane  
Amy Steele

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCE**

[1] I provided my oral reasons in court on May 11, 2017 with written reasons to follow. These are my written reasons.

[2] J.S. was convicted after trial of having committed the offence of sexual assault, contrary to s. 271 of the *Criminal Code* and unlawful confinement contrary to s. 279(2).

[3] The reasons for my decision in convicting J.S. are set out in *R. v. J.S.*, 2016 YKTC 63.

[4] Briefly stated, I found that on three separate occasions in the early morning hours of February 29, 2016, J.S. had sexual intercourse with G.I. without her consent. During the course of the sexual assault, J.S., through the application of force, prevented G.I. from being able to get away from him and also prevented her from leaving the residence, in order to continue the sexual assault.

[5] J.S. was significantly intoxicated at the time. G.I. had not been consuming alcohol. J.S. had just met G.I, who had come over to her friend's residence, where J.S. happened to be.

[6] J.S. was 15 years old at the time of the offences, with his 16<sup>th</sup> birthday approximately two weeks away. G.I. was several years older than J.S., although this is not explicitly stated in the Reasons for Judgment.

[7] As stated, J.S., who was much larger than G.I., used force, primarily in the nature of restraining and directing G.I., in the course of sexually assaulting her. This said, outside of the violence and injury, both physical and emotional, inherent in the sexual assault itself and this use of force by J.S., there was no additional violence, such as punching, kicking or choking, that caused any further injury to G.I. In saying this, I am not minimizing the seriousness of the offences which J.S. has committed. I am simply distinguishing the circumstances from cases where there is such additional violence, which is generally an aggravating circumstance, in particular in those cases where the threshold of the violence falls short of resulting in a charge of aggravated sexual assault contrary to s. 273 of the *Code*.

## **Victim Impact**

[8] A Victim Impact Statement was filed. While this statement was quite brief, G.I. notes that since these offences she has struggled with alcohol abuse, and has difficulty in speaking with others. She feels that she has become more aggressive. She is afraid of accidentally running into J.S.' friends.

[9] Clearly, the offences J.S. has committed have had a significant negative impact on G.I.

## **Positions of Counsel**

### Crown

[10] Crown counsel submits that a sentence of nine months in custody, comprised of six months closed custody and three months community supervision, should be imposed. This should be followed by a two year probation order.

[11] Counsel points to the aggravating factors as follows:

- using force to overcome G.I.'s resistance and her attempts to leave the residence;
- sexual assault is a violent offence;
- the impact on G.I.; and
- the lack of rehabilitative steps J.S. has taken prior to sentencing.

[12] Counsel acknowledges the following mitigating factors:

- J.S. is an Aboriginal youth; and
- he has no prior criminal record.

[13] Counsel submits that a deferred custody and supervision order would not be appropriate.

Counsel also seeks a DNA order.

### Defence

[14] Defense counsel submits that if there is to be a custodial disposition, it should either be open custody or deferred custody.

[15] Counsel stresses J.S.' youth at the time of the commission of these offences, the application of **Gladue** considerations (*R. v. Gladue*, [1999] 1 S.C.R. 688), in particular in relation to J.S.' dysfunctional upbringing, and the supports that are available to J.S.

### **Gladue Report**

[16] A **Gladue** Report was prepared for J.S.' April 6<sup>th</sup> sentencing date.

[17] J.S. is a 17 year old member of the Kwanlin Dun First Nation ("KDFN").

[18] He has been in permanent care since May 2015.

[19] J.S.' father, D.D., did not play a significant role in J.S.' upbringing. He and J.S.' mother, H.S., were separated at the time J.S. was born and, although briefly reconciled afterwards, separated permanently shortly thereafter. The relationship between D.D. and H.S. was an abusive one. J.S. briefly stayed with his father when he was 13 years old, but that did not turn out well due to his father's alcohol use and abusive behaviour.

[20] Despite some efforts on her part, H.S. has been unable to provide care for J.S. due to her own struggles with addiction and her frequent periods of incarceration. As a result, H.S.' father, R.S., provided much of the care for J.S. when he was growing up.

[21] R.S. described his own childhood as a mostly happy one, although he recalls many occasions of drinking and arguing. R.S.' extended family attended school in Dawson City. While not a residential school in the strict sense, it was very similar to one. R.S. states that by the time he was 39 years old all of his aunts and uncles were dead from alcohol-related causes associated with a rough lifestyle.

[22] R.S. stated that his life became more difficult when he and his siblings moved to Whitehorse with his mother. She became involved in a dysfunctional relationship and passed away when R.S. was 12 years old. R.S. and his sister moved in with an older sister. This household was a place for parties and drug use. R.S. left this home at the age of 16.

[23] R.S. was able to maintain positive employment and avoid becoming embroiled in an addictions lifestyle. However, he and his partner ended up separating. His ex-partner, with whom H.S. was living, began to live a destructive lifestyle of drug and alcohol dependence.

[24] R.S. took H.S. back into his care but she left around the age of fifteen and assumed a destructive lifestyle of substance abuse, in a somewhat cyclical pattern. She gave birth to J.S. at the age of 19. J.S. was soon in the child protection system while H.S. continued her addictive lifestyle. H.S. gave birth to two more children, one in 2006 and one in 2008. Although briefly able to maintain a sober lifestyle after the birth

of her daughter in 2006, that fell apart, in particular after the death of her mother in 2007. H.S. was again able to maintain a sober lifestyle after the birth of her son in 2008, however she became involved in drug use in 2014 and has been incarcerated several times since then.

[25] R.S. states that it was difficult trying to raise J.S. with his mother's in and out involvement in his life. He notes that J.S. was "a hard kid to raise.....big, rebellious, fighting, raising hell, stubborn". He notes that J.S. was able to play H.S. off against him. J.S. was regularly in trouble at the elementary school he attended. The report notes that, because of his larger size, J.S. was frequently bullied by kids in older grades.

[26] J.S. states that he had a good relationship with his maternal grandmother, although he recognized that her house was a "drug house". He acknowledges that he saw many things that he shouldn't have.

[27] He states that while his relationship with R.S. was pretty good, R.S. ran a strict household that J.S. considered to be verbally and physically abusive, in particular noting the abusive actions of his aunts towards him.

[28] J.S. moved out of R.S.' home when he was 14. It was noted that J.S.' behaviour became more unmanageable when he returned from having briefly resided with his biological father.

[29] Since he was taken into care in May, 2015, J.S.' behaviour has continued to deteriorate. R.S. states: "Basically he is on his own now...He's out there partying,

drinking. He doesn't need to listen to nobody. And he's been doing this for two years now. He's just checked out."

[30] J.S. dropped out of school in grade 9 after he was expelled from two high schools. He acknowledges he "was a pothead" while attending school. While registered for the Independent Learning Centre ("ILC"), he has not been attending.

[31] J.S.' child-in-care social worker estimated that J.S. had been attending at the group home perhaps only 5% of the time, although he is supposed to be staying there every night. She suggests that it might be helpful for J.S. to be cognitively assessed.

[32] R.S. also supports some additional counselling and support to deal with trauma and abandonment issues. R.S. feels that J.S. is experiencing dislocation and displacement from his immediate family that contributes to him seeking approval and a sense of belonging from his street associates. R.S. identifies the death of J.S.' maternal grandmother, and the abandonment of J.S. by H.S and D.D. as conveying a message to J.S. that he is not loved or wanted.

[33] At the time of the preparation of the **Gladue** Report for the April 6, 2017 sentencing, J.S. had worked at a local retailer for several weeks. This had been an improvement from his prior history of not following through on work and school commitments.

[34] He was also in a relationship of approximately nine months duration. He described this as a positive relationship in which he and his girlfriend tried to live a healthy lifestyle.

[35] The plan for J.S. going forward involves a number of supports, comprised of both family members and service providers. These supports were meeting regularly with J.S. as part of an on-going case management process. While noted to be more of a conceptual framework than a series of practical next steps, it was considered that J.S.' participation showed that he was moving in the right direction.

[36] J.S. indicated that he wanted to graduate from high school, obtain his driver's license, find a place of his own to live, and re-connect with his mother. Of note, however, was the lack of any specific plan to address J.S.' addictions issues, which all of his supports agree is critical if J.S. stated desire to live a healthy lifestyle is to be achieved. Of particular concern at the time of the preparation of the Report was J.S.' recent use of crack cocaine.

[37] It is clear that J.S. struggles with drug and alcohol addictions issues. It is noted that these issues may be the biggest obstacle preventing him from leading a healthy and productive lifestyle. J.S. states that his drug and alcohol use may be part of an attempt to fit in with an older and more street-wise crowd, as well as a way to deal with stress. It is noted that almost all of the negative behavioural actions of J.S. at the group home stemmed from J.S.' substance abuse.

[38] While J.S. hadn't ruled out the possibility of addictions treatment, he was noted to minimize the impact that alcohol and drugs has on his life. At the time of the preparation of the Report, J.S. was not committed to pursuing treatment for his drug and alcohol issues. He was also not communicating any sense that he was committed to

putting in the time and effort to return to the ILC and complete his high school education.

[39] J.S.' concerns about being further incarcerated seem to revolve primarily around the impact that incarceration will have on his relationship with his girlfriend.

### **Pre-Sentence Report (“PSR”)**

[40] A PSR was prepared. This report was not available for the April 6 sentencing date. The reason for this is that J.S. attended at only two of the appointments set aside for the preparation of the PSR. He failed to attend for meetings with his youth worker as directed at all between February 8 and April 6, 2016. Following the April 6, 2017 court date, J.S. attended only one of three appointments set aside for the preparation of the PSR. It was the opinion of the author of the PSR that J.S. seemed to be “inconvenienced” by having to show up at the three out of eight scheduled appointments that he did make.

[41] This non-attendance and non-compliance with directions is indicative of the general pattern of J.S.' lack of responsiveness to directions from his youth worker since he was placed on a Recognizance on March 17, 2016.

[42] J.S.' compliance with the residency requirements of his Recognizance seem to be superficial at best. He has also not shown any initiative in participating in any of the programming or educational opportunities that have been available to him. This is notwithstanding J.S. talking about having some goals in regard to education and perhaps dealing with his substance abuse issues. While speaking of a desire to

participate in residential treatment for his alcohol and drug abuse, he has not followed up by attending at any suggested meetings with a counsellor at Alcohol and Drug Services or with his social worker in that regard.

[43] J.S. advised the author of the PSR that he had begun to consume alcohol at the age of 14 and had been in the drunk tank approximately 10 times. He admitted to first consuming marijuana at the age of 13 and regularly using other drugs at the age of 16. The author of the PSR also is of the view, from the various collateral reports, that J.S. minimizes the extent and impact of his alcohol and drug use.

[44] J.S. continues to deny having committed the offences for which he has been convicted. He advised the author of the PSR that the victim had a history of “tricking” (prostitution) that justified his belief that he is innocent.

[45] The community resources available to J.S. include the Youth Achievement Centre, the Skookum Jim Friendship Centre, Kwanlin Dun First Nations (“KDFN”) services, the Youth High Risk Treatment Program (“YHRTP”), Alcohol and Drug Services (“ADS”), the Individual Learning Centre, the Education Outreach at the Youth Achievement Centre and the Riverfront School for alternative learning.

[46] The resources available to J.S. if serving a custodial sentence at the Young Offender Facility include: appropriate sex-offender treatment, substance abuse and anger management issues, and the services of a staff Forensic Psychologist who can provide sex-offender treatment through the YHRTP. J.S. would also be able to access ADS and KDFN counselling services, as well as educational opportunities, First Nation programming and life skills training.

[47] In addition, in addressing the court, the author of the PSR stated that in the Young Offenders Facility there is an array of programs including recreation, hygiene, time management and laundry.

[48] In short, if sentenced to custody J.S. will have access to a number of programs and individuals who will provide J.S. with skills he currently seems to be lacking and that will prepare him for life as an adult.

[49] Since the February 29, 2016 date of the ss. 271 and 279(2) offences, J.S. has been charged as follows:

July 31, 2016:	theft of a motor vehicle contrary to s. 333.1(1)
October 12, 2016:	assault contrary to s. 266
Dec 21, 2016 – April 21, 2017:	failure to report contrary to s. 145(3)
April 25, 2017:	possession of stolen vehicle contrary to s. 354(1)(a) failing to keep the peace and be of good behaviour contrary to s. 145(5.1)
May 4, 2017:	impaired operation of a motor vehicle contrary to s. 253(1)(a) operating a motor vehicle over .08 contrary to s. 253(1)(b) theft of a motor vehicle contrary to s. 333.1(1) failing to keep the peace and be of good behaviour contrary to s. 145(5.1) failing to comply with condition of an undertaking to a peace officer by being in a motor vehicle without the registered owner present contrary to s. 145(5.1) failing to abstain from the possession, purchase or consumption of alcohol contrary to s. 145(5.1)

[50] J.S. has entered a not guilty plea to the s. 333.1(1) charge from July 31, 2016.

This matter is set to proceed to trial on May 20, 2017. No pleas have been entered on the other files.

[51] In addition, in September 2015, J.S. successfully participated in extrajudicial measures in relation to a s. 354(1)(a) charge.

### **Case Law**

[52] I was referred to the cases of **R. v. K.S.**, 2016 YKTC 23 and **R. v. J.M.P.**, 2016 YKTC 24.

[53] In **K.S.** , after a lengthy review of the purpose and principles of sentencing under the *YCJA*, its governing provisions (paras. 91-96), the circumstances of K.S., and relevant case law (paras. 98-128), I imposed a six-month deferred custody and supervision order, followed by a period of probation of two years. K.S. had been convicted of sexual interference in respect two of his younger sisters, as well as an uttering threats charge.

[54] The sexual interference offences took place over several years, and primarily consisted of sexual touching, as well as acts of oral sex performed by the victims on the offender.

[55] K.S. had no prior criminal history. He was not struggling with any alcohol or substance abuse issues and had a positive work history and employment opportunities. He was raised in a somewhat non-conventional home environment.

[56] In **J.M.P.**, I imposed a 14 month closed custody and supervision order on a then 18-year old Aboriginal offender, to be followed by 22 months of probation, for having committed the offence of sexual assault contrary to s. 271 of the *Code*.

[57] J.M.P., who was significantly intoxicated at the time, had non-consensual sexual intercourse with his female cousin in his bedroom after she had gone there to sleep. He used force in order to prevent the victim from calling out for help.

[58] J.M.P. had a prior history of criminal convictions, including a prior sexual assault conviction.

[59] As in **K.S.**, I engaged in a lengthy and detailed review and analysis of the applicable governing purposes and principles of the *YCJA* (paras. 75-88) and the case law (paras. 54-74).

[60] In making my decision in regard to the appropriate sentence to be imposed on J.S., I am mindful of and adopt what I referred to in **K.S.** and **J.M.P.**, in regard to the considerations under the *YCJA* and the case law. I am also aware of and consider the differences in the circumstances of J.S. and his offence, as compared to the circumstances of the offence and the offender in **K.S.** and **J.M.P.**

[61] Defence counsel also supplied me with the unofficial translation of the case of **X**, **Appellant v. Her Majesty the Queen, Respondent**, 2011 QCCA 568. In this case the Court of Appeal substituted a five-month deferred custody and supervision order for an offender convicted of having committed the offence of sexual assault contrary to s. 271

of the *Code* during a four-year time frame during which he was between 12 and 16 years of age. The Court of Appeal found that the sentencing judge:

...determined the sentence on the basis of inadequate judicial reasoning, by omitting in particular a) to apply the sentencing principles set out in paragraphs 38(2)(d) and (e) of the YCJA, b) to consider alternatives to custody, as required by subsection 39(2) of the YCJA, and, lastly, c) to justify his decision to impose custody, as required by subsection 39(9) of the YCJA. ... (para. 9)

[62] I am mindful of the need not to commit similar errors in sentencing J.S.

### **Application to J.S.**

[63] I am well aware of the considerations that apply to the sentencing of J.S. He is a youth and has a diminished level of moral culpability as compared to an adult, setting aside those cases where an adult offender suffers from certain cognitive limitations.

[64] While deterrence and denunciation are still appropriate factors to consider when determining the proper sentence for J.S., in particular given the seriousness of these offences, clearly the emphasis is on rehabilitation.

[65] An important factor that contributes to the rehabilitation of J.S. is accountability. He needs to take steps to address the harm he has caused to G.I by his actions. While his ability to do so in respect of her is limited, there is also the concept of accountability towards society. An important aspect of accountability is the sense of acceptance or responsibility it provides a youthful offender with, and with this, the opportunity it provides the offender to feel like he or she is doing something to make some form of reparation. This contributes to the prospects for rehabilitation.

[66] J.S. struggles with a number of issues, most of which can be directly traced to his status as an Aboriginal person and the dysfunctional environment he grew up in, notwithstanding the efforts R.S. has made to provide him with a stable home environment.

[67] J.S.' actions since the commission of these offences, and since his conviction for these offences, show minimal effort on his part to address the issues of alcohol and substance abuse he faces, as well as the possible underlying issues related to the abandonment and displacement R.S. has identified. He is also ambivalent towards taking any steps in regard to his education. I appreciate that he is a young man from a troubled background. It is not surprising that he has not responded to his situation with all the best of actions. Nonetheless, what he has and has not done are still factors I must take into consideration when determining an appropriate sentence.

[68] He has incurred a number of new criminal charges. I am aware that he has not been convicted of having committed any of these offences, and as such I cannot consider them as evidence of J.S. behaving badly, so to speak. However, this nonetheless places him in a position different from a youth who comes before the court for sentencing having not come to the attention of the police in a negative fashion and who also has a track record of successful involvement in rehabilitative programs.

[69] I am aware that these offences are J.S.' first criminal convictions and that he was 15 at the time he committed them. I am aware that he is an Aboriginal offender and that for all youth, with particular attention to the circumstances of Aboriginal offenders, all

available sanctions other than imprisonment that are reasonable in the circumstances need to be considered.

[70] Unfortunately, J.S. has not provided me with any reasonable alternatives other than a custodial disposition. His submission for a non-custodial disposition is premised on what he intends to do. Given that he has done next to nothing at best with respect to accessing programming and counselling, I can hardly accede to this submission.

[71] These are serious offences and a lengthy custodial disposition is well within the range of an appropriate sentence for a youthful offender, even a first time offender. While there is certainly no presumption for a custodial disposition, in order to impose a non-custodial disposition I need to have something tangible that provides me with a reasonable alternative.

[72] In this case, I find that the imposition of a non-custodial disposition would be contrary to the purpose, principles and objectives of the YCJA. Not only would I not be giving appropriate consideration to the principles of denunciation and deterrence, I would not be enhancing J.S.' rehabilitative prospects. I would in fact be undermining the possibilities for rehabilitation that a custodial disposition affords.

[73] I have no reason to believe or to have a realistic hope that J.S. will basically "all of a sudden" engage himself in rehabilitative programming and make positive life choices if I give him a non-custodial disposition.

[74] Therefore I find that a custodial disposition is warranted.

[75] I find that a deferred custody and supervision is not an appropriate disposition. The maximum sentence that can be imposed is six months and I do not consider that to be a sufficient sentence for these offences. Further, and more significantly in my determination, is the lack of confidence I have that J.S. would comply with the requirements to participate in programming that he would be directed to do or otherwise respond to directions from his youth worker. Nor, I believe, would the potential consequences of acting contrary to the requirements of a deferred custody and supervision order have any meaningful impact on J.S. His actions, or lack of actions, while awaiting his sentencing hearing, are indicative of this, in my mind.

[76] For the same reason, I find that an open custody disposition is also not appropriate. I find that a closed custody disposition is required to hold J.S. accountable for his actions and to allow for him to participate in rehabilitative counselling and programming. This is his best opportunity, in the circumstances, to find his way to a positive and productive lifestyle.

[77] Incarceration through the imposition of a closed custody sentence is a last resort for a youthful, Aboriginal offender. It is to be used only when there is no other reasonable sanction available. I have determined that this is such a circumstance.

[78] The sentence I am imposing on each offence, concurrent to each other, is a nine month custody and supervision order, with two-thirds to be served in closed custody and one-third under supervision in the community. J.S. will also be subject to a probation order for a period of 18 months on each offence. The terms of the probation order will be as follows:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Remain within the Yukon unless you obtain written permission from your Youth Probation Officer or the court;
4. Report to a Youth Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by the Youth Probation Officer;
5. Reside as directed by your Youth Probation Officer and not change that residence without the prior written permission of your Youth Probation Officer;
6. Abide by a curfew between the hours of 10:00 pm and 6:00 am daily. During these hours you must be continuously at your residence, the only exception is if you have written permission from your Youth Probation Officer to be away from your residence or if you are in the actual presence of another responsible adult approved in advance by your Youth Probation Officer. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;

[79] With respect to the curfew, I do not expect it to be on for the full time of the order; it will only be on as long as necessary. If we are having positive reports during the course of the community supervision under the custodial disposition during the early part of the probation order, I expect, that upon review, that curfew could be changed.

That is going to be in the hands certainly of J.S. to do that. It is easier to take it off and not possible to add it, so that is the starting point.

7. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;
8. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
9. Attend and actively participate in all assessment, counselling and treatment as directed by your Youth Probation Officer, and complete them to the satisfaction of your Youth Probation Officer for the following issues: substance abuse, alcohol abuse, anger management, psychological issues, sexual offending and any other issues identified by your Youth Probation Officer, and provide consent for release of information to your Youth Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

[80] In particular, with respect to the psychological issues, I suggest that it would be appropriate in this case that cognitive assessment opportunities be provided to J.S. so that he is able to participate in those that may be helpful going forward and helpful in any probation reviews.

10. Have no contact directly or indirectly or communication in any way with G.I.;
11. Not attend any known place of residence, employment or education of G.I.;

12. Attend and participate in such educational or life skills programming as directed by your Youth Probation Officer and provide your Youth Probation Officer with consent to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;

13. If not participating in educational or life skills programming, make reasonable efforts to find and maintain suitable employment and provide your Youth Probation Officer with all necessary details concerning your efforts.

[81] I order that J.S. provide a sample of his DNA.

[82] There will be the mandatory firearms prohibition order for the period of two years pursuant to s. 51 of the *YCJA*.

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COZENS T.C.J.