Citation: *R. v. K.S.*, 2016 YKTC 23

Date: 20160525
Docket: 14-03538
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

K.S.

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

Publication of information that could identify the complainant or a witness is prohibited by section 111(1) of the *Youth Criminal Justice Act*.

Appearances:
David McWhinnie — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCE

[1] K.S. was before the Court for sentencing after having been convicted at trial of offences contrary to s. 151 (x2) (sexual interference) and 264.1(1) (x2) (uttering threats). Two charges of having committed sexual assaults contrary to s. 271 of the *Criminal Code* were stayed pursuant to the principle in ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 729.

[2] I provided oral Reasons for Sentence on May 5, 2016 and indicated that written Reasons would follow. These are the written Reasons for Sentence.

[3] The victims of these offences were K.S.' younger sisters. S. was seven years old and Z. 10 years old when the first incidents of sexual contact occurred. They were 11 and 13 respectively at the time of testifying at trial. The sexual contact continued over a substantial period of time in each case. The date range for these offences as set out in the Information is between January 2010 and October 2014 with respect to Z. and January 2011 and October 2014 with respect to S.

[4] Briefly stated, my findings in ***R.*** v. ***K.S***., 2015 YKTC 23 were as follows:

> [126] In particular I find that the accused touched S.'s bum and vagina on numerous occasions and that, on numerous occasions he forced her to perform oral sex on him to the point that he ejaculated in her mouth. I find that he touched S.'s vagina with his penis and that he uttered threats to S. to kill her if she told anyone what was happening.
>
> [127] I also find that he touched Z.'s bum on numerous occasions, and that he forced her to perform oral sex on him to the point of ejaculation on a number of occasions. I accept the evidence of S. and find that the accused ejaculated in Z.'s mouth. I find that the accused touched Z.'s hand with his penis and that he uttered threats to cause death to Z.

Positions of Counsel

[5] Crown counsel submits that an appropriate disposition is one of six to twelve months custody to be followed by a period of probation.

[6] Counsel submits that custody is available because, firstly, the weight of case law supports the notion that sexual offences involving child victims, including s. 151 offences, should be classified as violent offences and, secondly, because the s. 264.1(1) convictions are violent offences.

[7] Crown Counsel acknowledges that a custodial disposition is not inevitable, as K.S. has no prior youth record of findings of guilt and he has been compliant with the terms of the various undertakings, as amended, that he has been subject to since October 17, 2014.

[8] Crown Counsel notes an absence of any particular mitigating features, other than the absence of any previous youth record.

[9] Noted as aggravating are the following:

- the young age of the victims
- the offences occurred over a four-to-five year period and on numerous occasions
- the victims were members of his own family and, as the eldest of the children, there was a breach of trust involved to some extent
- the offences were more than exploratory touching, as they involved oral sex and ejaculation, and touching of the vaginal area of one victim
- threats were used to secure the silence of the victims.

[10] Counsel notes that K.S. spent a total of 12 days in custody on remand plus an additional 94 days on an undertaking that required him to reside at the Young Offenders Facility Open Custody Unit in a bail bed, due to a lack of other viable options for residence.

[11] Counsel for K.S. agrees with Crown counsel's analysis of principles, but submits that further custody is not required. He submits that K.S. should be sentenced to a period of probation.

Circumstances of K.S.

Pre-Sentence Report ("PSR")

[12] K.S. turned 19 years of age earlier in 2016. The offences occurred over a period of time when he was 14 – 17 years old.

[13] It was noted by the author of the PSR that K.S. continues to maintain his innocence in respect of the charges that he was convicted of.

[14] At the time of the preparation of the PSR for the October 23, 2015 date originally set for sentencing, the author noted that K.S. had spent approximately one year on very strict conditions without any issues as to compliance.

[15] He had been employed and, after his employment ceased, he was engaged in full-time programming at the Youth Achievement Centre ("YAC").

[16] He also received support and counselling from the Youth High Risk Treatment Program ("YHRTP"), focused on his adjustment to living at the Young Offenders Facility ("YOF").

[17] While residing at the YOF, K.S. was frequently given permission to stay with various adults for both recreational and employment purposes.

[18] K.S. was raised by a family with strong Christian values. K.S. states that he is not religious. He found his upbringing in the Christian faith to be "very controlling". He states that he rebelled and challenged his parents on their rules.

[19] K.S.' parents struggled over the use of physical discipline with K.S., finally reaching an agreement when K.S. was nine or ten years old not to use corporal punishment.

[20] K.S. describes being physically punished by his father many times, including being picked up by his ears and thrown against a wall. He states that he used to leave the house and isolate himself from his family after being physically disciplined.

[21] There was one incident relating to physical discipline of K.S. when he was 15 years old that resulted in the involvement of a social worker. Although the social worker expressed her concerns regarding how K.S.' parents were using discipline, there was no follow-up involvement on the part of Family and Children's Services.

[22] K.S. states that he loves his father and trusts him the most. He says that he is close to his father right now.

[23] K.S. says that he has a very strained relationship with his maternal grandfather and describes having suffered abuse (non-sexual) at the hands of this grandfather while growing up.

[24] K.S. stopped living with his own family in May 2014 when he went to work with a Yukon outfitter. After he was arrested and released from custody in the fall of 2014 he lived for a period of time with his employer's family.

[25] The author of the PSR reports that this was a good experience for K.S. and he acquired some life skills that he seemed to be lacking before.

[26] K.S.' plans after he is sentenced are to live on the property of an employer/support person and work on the construction of two cabins. These plans have been confirmed by the owner of the property.

[27] K.S. was almost entirely home-schooled. He attended public school for a two-year period. Although initially excited about doing so, he found the transition difficult. He was subjected to numerous incidents of significant bullying and ended up fighting a lot. He stated to the author of the PSR that he hated school. He continues to be disinterested in furthering his education.

[28] K.S. is very skilled at working with his hands, and on machinery in particular. He has worked as a firewood cutter and on various construction projects. He has also been employed for several seasons with an outfitting company.

[29] The Program Facilitator at the YAC notes that the staff has never seen a youth operate in the Wood Shop Program at such a high level as K.S. He was noted to have many employable hands-on skills, and to rarely cause any problems. The one criticism was that he needs to develop his interpersonal skills and to be more open-minded and accepting of criticism.

[30] His outfitting employer describes K.S. as "the best (worker) I have ever seen". K.S. is noted to be incredible working with horses and as having a very good rapport with people. He describes K.S as being very even-tempered. He notes that the only two occasions he saw K.S. lose his temper were when someone punched a horse and when one horse became lost.

[31] K.S.' goal is to own his own outfitting business someday and also run a firewood business. He owns some horses and equipment. He has a bank account and is saving towards these goals. He has the support of his father in this regard. The author of the PSR feels that K.S. has realistic goals.

[32] K.S. is not interested in using illicit drugs or consuming alcohol. He states that he is "not into partying". I note that recent information is inconsistent with this, however. He began smoking at the age of 11.

[33] The author of the PSR reports that K.S. presents as "friendly, respectful and honest". A social worker refers to him as gentle in nature and well-socialized with adults.

[34] K.S.' mother has a somewhat different viewpoint. She describes him as "being a behaviour problem" as a child. She states that he was aggressive and a bully, including towards his sisters. She described him having tantrums when he was young and lashing out in anger, throwing things and grabbing her. She said that K.S. has shown disrespect towards women. K.S. relayed to the author of the PSR that he "does [not] (omitted in error I believe) show respect towards his mother due to his feelings towards her".

[35] K.S. participated with a psychologist for the purpose of a safety/risk assessment in the fall of 2014. At that time it was noted that an overall cognitive ability evaluation of K.S. was difficult due to the significant difference between his non-verbal and verbal reasoning abilities. He balanced out between low/borderline to average. He scored as moderate on his overall risk rating.

[36] K.S. indicated that he missed some of his siblings. He stated that he would be interested, however, in contact only with one of his older sisters and his younger brother.

[37] The author of the PSR states that it is her belief that K.S. would be able to comply with a community sentence.

[38] Available programming in the community would include

- YAC;
- Skookum Jim Friendship Centre;
- Youth Probation;
- Yukon College;
- Youth High Risk Treatment Program or Offender Supervision Services Sex Offender Treatment Program; and
- Access to a psychologist.

Progress Report

[39] A Progress Report for the sentencing date of December 1, 2015 was provided.

[40] This Report noted that as of October 2015, K.S. had attended on approximately 40 outings with a Youth Service Worker staff member, under direct line of sight supervision. There were some minor issues during these outings, including some inappropriate comments being made about females or K.S.' general attitude towards females.

[41] K.S. also attended at the YAC and participated in the Recreation/Fitness and Woodworking/Wood shop for a total of 74 days.

[42] On October 30, 2015, K.S.' release conditions were varied to allow him to reside on his father's property by himself and to work there. He was working his firewood business with his own and his father's equipment. He was working very hard for long hours. It was noted by the author that, despite the very isolated lifestyle, K.S. seemed to be adjusting and doing well.

[43] At that time there had been no indications that K.S. had not been abiding by the terms of his Undertaking.

[44] The author expressed concerns about the fact that K.S.' maternal grandfather lived in the area. The allegations K.S. disclosed pointed to his suffering some serious abuse at the hands of this grandfather when K.S. was approximately 10 years old. There was an ongoing RCMP investigation underway as of the time the Progress Report was filed. The author's concern was that the grandfather may approach K.S. and cause a violent situation. (I note that there has been no subsequent information that points to any such occurrence).

[45] K.S. had attended at the YHRTP for two appointments in November, 2015. He was on time for these appointments and actively engaged in the process.

[46] At that time the author noted that if K.S. was to be sentenced to a custodial disposition, the intent was to allow him to serve this sentence at the YOF, due to his positive behaviour and the opportunities for rehabilitation and reintegration within the youth system.

Psychological Consultation Note (the "Note")

[47] K.S. had a psychological consultation with Dr. Anne Pleydon for the purpose of preparing the Note. Much of the information in the Note is consistent with observations made in the PSR and updated Progress Report.

[48] Dr. Pleydon noted some limitations with respect to her ability to administer the psychological consultation. These were particularly in relation to the lack of collateral information available, in part due to K.S. having been home-schooled and his disengagement from education at a relatively young age. Also of significance was K.S' denial of the offences or of any history of sexually inappropriate behaviour, his low frustration tolerance, his anger management problems and/or interpersonal/social difficulties, as well as his "inordinate amount of time alone in the community".

[49] She noted that while K.S.' level of insight was low, he demonstrated reasonable attention and focus. Overall, he was "polite, cooperative and at least superficially compliant".

[50] She noted K.S.' verbal abilities to be low-average and described him as a concrete thinker not prone to introspection. There was no evidence of thought disorder or psychosis.

[51] K.S. is currently isolated from his family, with the exception of his father who provides a supportive relationship. K.S.' mother expressed her reluctance to reconcile until K.S. accepts responsibility for having committed these offences, and apologizes.

[52] There is no intention at this time to work towards reunification of the family.

[53] From what collateral resources were available, it appears that as a child, K.S. exhibited a fairly detached and sometimes conflicted relationship with his mother and his sisters. While he gravitated towards his father and outdoor activities, because K.S.' mother was responsible for home-schooling him she was often required to attempt to re-direct him. As K.S. had little desire to please his mother, this compromised her attempts to manage his behaviour.

[54] K.S. was easily frustrated in the family home and there were frequent power struggles and arguments with his parents. His longstanding presentation of resentment towards his siblings and any visitors to his home is thought to be a combination of attachment difficulties, perceived rejection from his mother, and his personality traits.

[55] K.S. states that while he believes that both his parents loved him, he only loved his father. He had little to say about his mother. He said he never spent time alone with her and never felt close to her. He states that he has not heard from his mother since he was arrested. He supposes that this means "She doesn't care about me anymore. But I don't care. I don't like her".

[56] His attitudes towards his sisters seem to be in conflict; on one hand being protective, silly and expressing typical sibling irritation, but on the other hand, denoting dominance, aggression, bullying behaviours and sexually inappropriate talk.

[57] He is noted to have a poor attitude about women and to use sexually inappropriate language toward and in the presence of his sisters and other female relatives. He frequently intimidated his sisters and "intimated that he would be violent

toward them and his mother". On one occasion, his father observed K.S. raise his fist in a motion to strike his mother.

[58] K.S.' father notes K.S.' denial of having committed these offences to be "in keeping with his son's long-term attitude that he 'never wanted to admit to things' when he was in trouble".

[59] K.S. regularly viewed pornography from pubertal onset onward. While on a religion-based trip to Europe when he was 15, he engaged in binge drinking behaviours and frequent, casual sexual behaviour with older females.

[60] According to collateral sources, K.S. is noted to have poor day-to-day adaptive functioning/life skills.

[61] K.S. was administered some additional tests for the purpose of Dr. Pleydon's evaluation. His receptive and expressive language skills fell in the low-average range. In a self-reporting component, K.S. "did not endorse any difficulties related to inattention, Hyperactivity/Impulsivity, Learning Problems, Defiance/Aggression, or family relations. Although this measure is considered valid, some results are contrary to collateral information. This suggests he is either under-reporting and/or has low insight".

[62] The drawing component of the psychological evaluation indicated "immaturity, lack of security, and limited ability or desire to connect with others (including family)".

[63] Contrary to information from collateral sources, K.S. denies any current frustration, anger difficulties, aggressive tendencies, ever being physically aggressive,

being intimidating with females, familial or otherwise, or being sexually inappropriate, verbally or behaviourally, with anyone.

[64] K.S. appears to have a basic knowledge regarding consent and sexual health. He has been a regular viewer of pornography since he was approximately 12 years old. He was fairly comfortable talking about sex. He endorsed an attraction to only teenage and young adult females. He believes he has a normal sex drive when compared to males his age.

[65] With respect to K.S.' risk factors, Dr. Pleydon noted that her risk assessment is only to be considered to be valid for one year from the date of the assessment, due to the potential change in the context in which a youth's individual characteristics are considered.

[66] With respect to general recidivism, K.S. was assessed as being in the Low range for engaging in delinquent/overt criminal behaviour, but as being in the Moderate-High range for aggression, "*if no efforts are made to manage that risk*". She notes that it is likely that if K.S. were to be aggressive, the likely victim would be male and probably a family member. With respect to his interaction with females, he would likely use bullying and intimidating behaviours.

[67] With respect to sexual re-offending, a number of factors that relate to both risk and the mitigation of risk were outlined, as well as risk factors that were unable to be rated at this time.

[68] Keeping in mind that the base rate of sexual recidivism for all young offenders is low regardless of the assessment for risk, K.S. was deemed to be in the Moderate-High risk range for "*sexual re-offending at the time of the assessment if no efforts are made to manage his risk*." Due to K.S. not accepting responsibility for his having committed these offences, he is to be considered as a High Risk, particularly in relation to children under the age of 16 until the noted critical risk factors outlined are addressed.

[69] In her summary, Dr. Pleydon writes that:

> It is unclear whether [K.S.] is desensitized to violence due to a history of harsh discipline and alleged physical abuse. He has traditional views of women, but also distrusts them, is prone to sexualize them, and sees females as more sexualized than males.

[70] She attributes K.S.' sexually inappropriate behaviour as likely being the result of

> …increased sexual arousal and inappropriate managing strategies (even emulating what was seen in pornography), being undersocialized, cognitive distortions about the sexually inappropriate behaviour (that it was tolerated and harmless), personality traits of desire to dominate, use, and control others, as well as family and environmental factors (such as lack of sexual education, monitoring/supervision, resentment towards siblings).

[71] Dr. Pleydon considers K.S.' to find the "…idea of sexual offending against children and his sisters likely ego dystonic (upsetting and inconsistent with his beliefs about himself as a good person and man); thus he reinforces a narrative for himself that he did not do it".

[72] His critical risk factors will be "attitudes supportive of violent and sexually inappropriate behaviour, supervision/monitoring of pornography use and access to

children, social isolation, healthy sexuality and romantic relationships, knowledge of consent laws, and other personality traits".

[73] She notes that K.S. "demonstrates low insight, perspective-taking ability, and empathy when speaking about the victims and other people in his life. He has little appreciation for the need for intervention or supervision targeting his risk for sexual re-offending at this time".

[74] Dr. Pleydon recommends individual therapeutic intervention and structured supervision/monitoring to target the above-listed critical risk factors. K.S. should have no unsupervised or unmonitored contact with children under the age of 16 until he has completed any conditions he is required to comply with.

[75] K.S. should be referred to the YHRTP for individual, sex-offence specific therapy, as well as to assist with emotional regulation and to potentially strengthen his social and adaptive living skills.

[76] Noted as a problem, however, is what Dr. Pleydon sees as K.S.' inability at present to view his anger/aggression, interpersonal difficulties and risk for sexually offending behaviour as relevant, present or problematic. As such, he is not interested in addressing these issues. She notes:

> If [K.S.] continues to deny the offences, he may complete some psycho-educational aspects of treatment, but not comprehensively address his risk to re-offend sexually. There is a high risk that he will ultimately be discharged from YHRTP with the sex-offence specific components of therapy deemed ***incomplete***.

[77] Dr. Pleydon considers it to be highly speculative that K.S.' attitude and approach will improve after he is sentenced and attending treatment.

Post-sentencing Submissions Progress Report

[78] An updated Progress Report was provided to the Court on May 4, 2016. The information in this report is somewhat less favourable to K.S. than the information provided in previous reports.

[79] It appears that K.S. has had to be provided direction through a case management meeting regarding his compliance with the terms of his undertaking in regard to residency. Although K.S. was unhappy with the direction he was given, it appears that he has complied with it.

[80] Also, information indicates that K.S. has been frequently attending bars and consuming alcohol in a way that raises concerns. Following a further case management meeting, K.S. has indicated that he has cut back on his drinking, in part because he is not presently associating with the individuals who were encouraging him to attend at bars.

[81] Of some concern and of relevance to the s. 113 application of defence counsel, it appears that the RCMP confiscated K.S.' firearms due to his not being in possession of a valid Possession and Acquisitions License ("PAL"). This is contrary to the information provided at the hearing of the s. 113 application that K.S. did, in fact, possess a valid PAL.

[82] K.S. has encountered some difficulties in operating his firewood business with equipment failures and a shortened season due to warmer than anticipated weather. K.S. indicates that this legal process is somewhat restrictive and problematic in his being able to operate his business.

[83] His employer in the outfitting business continues to support him and says that an employment position is “still on the table” for him. This position is on hold pending the outcome of the sentencing decision. How this position will be impacted, however, by the form of sentence I impose is not clear to me. While less relevant for the purposes of determining a fit sentence, such information could potentially impact on the s. 113 application.

[84] K.S. has been reporting as required, whether to his youth worker, to the RCMP or to his counsellor at the YHRTP.

[85] A change from the earlier information is that if K.S. is sentenced to a custodial disposition in the form of a period of incarceration, he will be serving his time at the Whitehorse Correctional Centre. The information previously provided was that he would in all likelihood be serving any period of incarceration at the YOF and would only be transferred to WCC if his behaviour were to become unmanageable (Progress Report dated December 1, 2015).

Victim Impact

[86] The victims have declined to provide a Victim Impact Statement although being given the opportunity to do so. I did not receive any further information regarding the impact that these offences have had upon them. I understand that they received some counselling based outside of the Yukon, but I have no further information than that. The PSR's only reference to harm was that the mother of the victims indicated that she did not want the author of the PSR to phone the house because the girls were "on the edge".

[87] I also note that no Victim Impact Statement was provided by either parent of the victims.

[88] This is not to say that, in the absence of any additional information, I can presume that there has been no harm caused to the victims by the actions of K.S. As stated in para. 13 of ***R.*** v. ***G.J.R.***, [1985] B.C.J. No. 2141 (C.A.), a case where four minors were the victims of indecent assaults by the father of two of the victims:

> …One needs no psychiatric assistance to conclude that these girls have been injured emotionally and mentally and the trauma which has occurred to them will last for many years, if not for the rest of their lives…

[89] I observed Z. and S. on the witness stand and it was apparent to me that the actions of K.S. have certainly had a significant and, in respect of Z. in particular, profoundly negative impact upon them.

[90] Certainly, the family unit has been broken apart and it is unclear to what extent there can be any meaningful reconciliation between all the parties involved. I suspect

that this has also impacted the victims, although I have no actual evidence in this regard before me.

Legislation

[91] The Preamble to the *Youth Criminal Justice Act* ("*YCJA*") states that:

> **Preamble**
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> WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;
>
> WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;
>
> WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;
>
> WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;
>
> AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

[92] Section 3 of the *YCJA* is identified as a Declaration of Principle, and reads:

> **3** (1) The following principles apply in this Act:
>
> (a) the youth criminal justice system is intended to protect the public by

(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,

(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and

(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

> (d) special considerations apply in respect of proceedings against young persons and, in particular,
>
> (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
>
> (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
>
> (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
>
> (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.
>
> (2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).[1]

[93] The youth criminal justice system is intended to be a separate system from the adult criminal justice system with a different approach to sentencing, taking into account the diminished moral culpability of youth in general. In saying this I am aware that the objectives of denunciation and specific deterrence have been incorporated into the *YCJA* as of October 23, 2012.

[94] The purpose and principles of youth sentencing are set out in s. 38 as follows:

[1] Prior to the coming into force of ss. 167 to 203 of the *Safe Streets and Communities Act*, S.C. 2012, c. 1, (the "*SSCA*") on October 23, 2012, s. 3(1)(a) of the *YCJA* read that the youth criminal justice system is intended to: (1) prevent crime by addressing the circumstances underlying a young person's offending behavior; (2) rehabilitate young persons who commit offences and reintegrate them into society; and (3) ensure that a young person is subject to meaningful consequences for his or her offence. As per s. 195 of the *SSCA*, the current version of s. 3(1)(a) does not apply to the offences of K.S. that occurred prior to October 23, 2012, only to those that occurred after. See discussion in paras. 115 and 116 of this decision.

Purpose

38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

Sentencing principles

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

> (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
>
> (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
>
> (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
>
> (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
>
> (e) subject to paragraph (c), the sentence must
>
> > (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
> >
> > (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
> >
> > (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and
>
> (f) subject to paragraph (c), the sentence may have the following objectives:
>
> > (i) to denounce unlawful conduct, and
> >
> > (ii) to deter the young person from committing offences.

Factors to be considered

(3) In determining a youth sentence, the youth justice court shall take into account

(a) the degree of participation by the young person in the commission of the offence;

(b) the harm done to victims and whether it was intentional or reasonably foreseeable;

(c) any reparation made by the young person to the victim or the community;

(d) the time spent in detention by the young person as a result of the offence;

(e) the previous findings of guilt of the young person; and

(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

[95] The pre-requisites for imposition of a custodial sentence are set out in s. 39 as follows:

39 (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

(a) the young person has committed a violent offence;

(b) the young person has failed to comply with non-custodial sentences;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

> **Alternatives to custody**
>
> (2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.
>
> **Factors to be considered**
>
> (3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
>
> (a) the alternatives to custody that are available;
>
> (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
>
> (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

[96] The definition of "violent offence" in s. 2 reads:

> *violent offence* means
>
> > (a) an offence committed by a young person that includes as an element the causing of bodily harm;
> >
> > (b) an attempt or a threat to commit an offence referred to in paragraph (a); or
> >
> > (c) an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

[97] "Bodily harm" is not defined in the *YCJA*; rather, the definition is imported from s. 2 of the *Criminal Code* (see s. 2(2) of the *YCJA*). Bodily harm is "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

Case law

[98] In ***R.*** v. ***K.O.,*** 2012 NLCA 55, the offender was convicted after trial of sexual assault. This was his first conviction for a criminal offence. A sentence of two years' probation was upheld on appeal in circumstances in which the 15-year-old youth had forced sexual intercourse upon a 12-year-old female acquaintance. K.O. was found to have threatened the complainant's nine-year-old brother, although when exactly he did so was not able to be determined. Crown counsel had sought a sentence of nine to twelve months.

[99] K.O. was noted to have not shown any insight into the offence and continued after conviction to deny it ever happened. He failed to take any responsibility for his actions and did not appear to care by stating that he would repeat the same behaviour.

[100] K.O. was noted to be in the borderline to low range intellectually.

[101] He was also noted to present with a number of personal strengths, including an openness to counselling and a motivation to take part in a process for change.

[102] In paras. 33-37, the Court quotes extensively from the reasoning of Bastarache J. in ***R.*** v. ***C.D.***; ***R.*** v. ***C.D.K.***, 2005 SCC 78 ("***C.D.***").

[103] Noted in particular is Bastarache J.'s reference to the Preamble and Article 37(b) of the United Nations Convention on the Rights of the Child, which provides that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time.

[104] With respect to the application of s. 38 of the *YCJA*, Bastarache J. stated:

> [37] Turning next to s. 38(2) of the *YCJA*, it sets out the principles that a youth justice court is to follow in determining a youth sentence. Two principles in particular reveal the Act's focus on restricting the use of custody for young offenders. First, the sentencing principle set out in s. 38(2)(d) provides that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons". Second, the sentencing principle set out in s. 38(2)(e)(i) provides that "the sentence must ... be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1)".

[105] In considering s. 39 of the *YCJA*, Bastarache J. further stated:

> [39] The goal of restricting the use of custody for young offenders is also reflected in the scheme of the Act, and, in particular, in s. 39. For instance, as noted above, subs. (1) of this section provides for only four "gateways" to custody. If an offence committed by a young person does not fit through one of these gateways, then a youth justice court cannot impose a period of custody. However, even if one of the gateways to custody in subs. (1) does apply, subs. (2) prohibits a youth justice court from imposing a custodial sentence under s. 42 (youth sentences) unless the court has determined that there is no reasonable alternative, or combination of alternatives, to custody that is in accordance with the purpose and principles set out in s. 38. Furthermore, subs. (3) sets out a number of factors that a court must consider in determining whether there is a reasonable alternative to custody, such as the alternatives to custody that are available and that have been used in respect of young persons for similar offences committed in similar circumstances, and subs. (9) requires a court that imposes a custodial sentence "[to] state the reasons why ... a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1)".
>
> 40 The remaining subsections of s. 39 also support the goal of restricting the use of custody for young offenders….

[106] In ***C.D.,*** Bastarache J. also made reference to the comments of the Justice Minister of Canada when the *YCJA* was introduced for its second reading in Parliament, noting her comments that:

> The proposed youth criminal justice act is intended to reduce the unacceptably high level of youth incarceration that has occurred under the Young Offenders Act. The preamble to the new legislation states clearly that the youth justice system should reserve its most serious interventions for the most serious crimes and thereby reduce its overreliance on incarceration.
>
> In contrast to the YOA, the new legislation provides that custody is to be reserved primarily for violent offenders and serious repeat offenders. The new youth justice legislation recognizes that non-custodial sentences can often provide more meaningful consequences and to be more effective in rehabilitating young persons.

[107] In para. 39, the Court in ***K.O.*** stated that:

> In fact, the whole tenor of section 39 is to preclude custodial sentences unless one of the specific circumstances exists and, even then, a custodial sentence is not to be employed "unless the court has considered all alternatives to custody … that are reasonable in the circumstances". Thus section 39 only comes into play if, on consideration of the general principles expressed and referred to in section 38, the youth justice court judge concludes that a custodial sentence should be considered in the circumstances.

[108] In ***K.O.*** the Crown and defence agreed that the offence of sexual assault was a violent offence. Therefore, there was no argument in that regard. I do note that in paras. 43 and 44, the Court stated that:

> Counsel for K.O. acknowledges that any sexual intercourse without consent, by its nature involves some degree of violence. I would agree in the context of actual consent but where, as here, because of M.P.'s age she is legally incapable of consenting, violence cannot be presumed from that incapacity at law. **Both its existence and its extent must be established by the evidence**.
>
> While there was no specific evidence of physical harm to the victim, the victim impact statement…provides evidence of psychological harm that could support a conclusion that the offence fell within the meaning of "violent offence" as that term is used in paragraph (a) of subsection 39(1). [**emphasis added**]

[109] In both ***C.D.*** and ***R.*** v. ***Steele***, 2014 SCC 61, the Supreme Court considered the meaning of the term "violence" and determined that a harm-based approach is to be utilized when determining whether an act is a violent one. It is clear in the jurisprudence that the harm need not be physical and that the definition also encompasses psychological harm (see ***R.*** v. ***R.G.P.***, 2010 ABPC 286).

[110] Although a violent offence makes custody an available option under the *YCJA*, it does not necessarily flow, however, from a determination that an act constituting an offence is violent, that custody should therefore be imposed.

[111] In para. 51, the Court in ***K.O.*** concluded that in the circumstances, the Crown submission that a custodial disposition was warranted because the sexual assault was a "violent offence" should be rejected. The Court noted the following in so concluding:

- the lack of direct evidence of the application of physical force or confinement by K.O.;
- the inconsistencies in the evidence of the complainant that rendered it unreliable for the purposes of establishing beyond a reasonable doubt a level of violence that would warrant the imposition of a custodial sentence on a youthful first offender; and
- the youthful ages of the offender and the victim, being 15 and 12 respectively.

[112] The Court concluded in para. 64 that:

> A review of the evidence demonstrates that the conclusion reached by the youth justice court judge does not reflect error in his appreciation of the evidence or a failure to consider relevant factors identified by the pre-sentence report or the forensic psychological assessment. In the circumstances, his conclusion that supervised probation was the remedy appropriate to meet the requirements of the *YCJA* has not been shown by the Crown to be an error resulting in an unfit sentence.

[113] I note that in ***K.O.***, in para. 31, the Court specifically referred to the youth and adult sentencing regimes in regard to deterrence:

> The adult sentencing regime of the Criminal Code specifically provides for achieving deterrence, specific and general. The youth criminal justice system does not. (See *R. v. B.W.P.*; *R. v. B.V.N.*, [2006] 1 S.C.R.941 at paras. 39 to 41). Clearly, in respect of youth criminal activity, the objectives of Parliament are to prevent youth crime by addressing the underlying circumstances leading to the offending behaviour of a youth instead of by imposition of penalties to achieve general or specific deterrence, and to promote rehabilitation of youthful offenders, while ensuring meaningful consequences for the offending behaviour. An assessment of the entire statute will demonstrate that "meaningful consequences" are intended to be achieved by other than a custodial sentence.

[114] In fact, both specific deterrence and denunciation are now considerations in the *YCJA* as per s. 38(2)(f), which came into force October 23, 2012 as part of the *Safe Streets and Communities Act*, S.C. 2012, c. 1, ("*SSCA*"). This said, by virtue of s. 195 of the *SSCA,* s. 38(2)(f) does not apply to offences, whether charged or not, which occurred prior to the *SSCA* coming into force. Section 195 reads:

> **195.** Any person who, before the coming into force of this section, while he or she was a young person, committed an offence in respect of which no proceedings were commenced before that coming into force shall be dealt with under the *Youth Criminal Justice Act* as amended by this Part as if the offence occurred after that coming into force, except that
>
> (*a*) the definition *violent offence* in subsection 2(1) of the *Youth Criminal Justice Act*, as enacted by subsection 167(3), does not apply in respect of the offence;
>
> (*b*) paragraph 3(1)(*a*) of that Act, as enacted by subsection 168(1), does not apply in respect of the offence;
>
> (*c*) paragraph 38(2)(*f*) of that Act, as enacted by section 172, does not apply in respect of the offence;
>
> (*d*) paragraph 39(1)(*c*) of that Act, as enacted by section 173, does not apply in respect of the offence; and

> (*e*) section 75 of that Act, as enacted by section 185, does not apply in respect of the offence.

[115] The difficulty the case before me is that the date range for the offences encompasses a period of time that is before the October 23, 2012 date that the *SSCA* came into force. In theory, specific deterrence and denunciation cannot be considerations in sentencing K.S. for any of his criminal actions that occurred prior to October 23, 2012, while they would be valid considerations in sentencing K.S. for any of his criminal actions that occurred after that date. Since the offences for which K.S. has been found guilty are not clearly within one time period or the other, I consider that it would be incorrect in law to consider the principles of specific deterrence and denunciation in sentencing K.S. Even if I am wrong on this point, in all the circumstances, it would not have altered the sentence I am imposing.

[116] I note the comments in paras. 46 and 47 of ***R.*** v. ***White***, 2016 ABQB 24, a decision of Graesser J. regarding the retroactive application of the *Truth in Sentencing Act*, S.C. 2009, c. 29, as it applied to assigning credit for time in custody on remand:

> I do not accept that the onus is on Mr. White to prove the offence date for the purposes of the applicability of the Truth in Sentencing Act. The Crown is obliged to prove the offence date as part of the essential elements of the offences charged. The Crown proved beyond a reasonable doubt that the offences occurred between the dates charged on the amended indictments. That included a period of time during which the Truth in Sentencing Act was not in force.
>
> …
>
> My conclusion is that the Crown is stuck with the evidence it put forward. That evidence established a range of dates. The accused is entitled to the benefit of any doubt relating to the offence dates, such that for the purposes of sentencing and retroactivity of legislative provisions, the offence dates here should be treated as the earliest dates in the indictment, unless the Crown has proven offence dates to the contrary.

> The evidence provided by the Crown gave no greater precision than the dates in the indictment.

[117] Graesser J. allowed more than the 1.5:1 credit available under the *Truth in Sentencing Act*. I would apply the same logic to this case.

[118] A more recent case considering the violent nature of sexual offences in the context of the *YCJA* is ***R.*** v. ***D.B.***, 2016 ABPC 23. In ***D.B.***, the court sentenced a 19-year-old offender for three incidents of sexual assault against his sister. The offender was 14 at the time of the commission of these offences and the victim was between 12 and 13 years old. These were incidents of sexual touching, including one incident of digital penetration. The offences occurred between November 1, 2010 and May 9, 2011.

[119] Tousignant J. found that the three incidents were violent offences within the definition of the *YCJA*, thus triggering the gateway to custody in s. 39(1)(a). In doing so, he noted that there were some evidentiary difficulties given the absence of a Victim Impact Statement from the victim or the victim's parents (para. 44).

[120] He noted the evidence before him that the victim suffered negative emotions as a result of the assaults and the reference in the PSR to the "profound effects" the assault had on her, including a distrust of men and the breakdown of family relationships, still present after four years had passed.

[121] Tousignant J. referenced the decision of the Alberta Court of Appeal in ***R.*** v. ***Arcand***, 2010 ABCA 363 at para. 177, for the observation that psychological and emotional harm includes "fear…inability to trust, inability to form personal or intimate

relationships in adulthood", in concluding that the evidence before him indicated that the harm was more than trifling and transient. (paras. 46 and 47).

[122] After reviewing in paras. 71 – 73 the availability of reasonable alternatives to custody, Tousignant J. noted in para. 74 that:

> Courts generally reject non-custodial sentences in such cases as failing to meet the accountability requirement of the *YCJA*.

[123] After reviewing in considerable detail the applicable principles as they applied to the case before him, and the aggravating and mitigating factors, Tousignant J. concluded in para. 116 that a custodial disposition was required to provide a meaningful consequence that would promote the offender's rehabilitation.

[124] Tousignant J. found, however, that a Deferred Custody and Supervision Order ("DCSO") was available as there had been no application for a designation of the offence as a "Serious Violent Offence" pursuant to s. 42(9). After an extensive review of sentencing decisions, Tousignant stated in para. 112 that:

> The degree of sexual contact in this case was significant and the aggravating factors serious. A section 39 analysis leads me to conclude that this offence qualifies as a violent offence under s. 39(1)(a) meaning that the gateway to custody is open. While alternatives to custody must always be considered, courts considering similar sexual assault cases have consistently found custodial sentences necessary to fulfill the accountability principle of the YCJA.

[125] The offender was sentenced to a six month DCSO and nine months of probation.

[126] At the time of the ***D.B.*** decision, a DCSO was available for D.B. because there had been no application to have the offences designated as serious violent offences. Prior to October 23, 2012, a DCSO was not available when an application was

successfully made to have an offence deemed a "serious violent offence". This has been changed by the *SSCA.* Pursuant to s. 42(5), as amended, a DCSO is now not available for an offence in which the young person caused or attempted to cause serious bodily harm. This section has retrospective application in the case before me.

[127] The test does not really change, however, since a "serious violent offence" was previously defined as "an offence in the commission of which a young person causes or attempts to cause serious bodily harm".

[128] "Serious bodily harm" was interpreted in ***R.*** v. ***McCraw****,* [1991] 3 S.C.R. 72 as "any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant".

Application to K.S.

[129] The offences contrary to s. 264.1(1), in which K.S. threatened to kill his sisters are clearly violent offences within the definition of s. 39(1)(a) of the *YCJA*. Custody is therefore available for these offences.

[130] In saying this, I am aware that s. 195(1)(a) of the *SCCA* states that the definition of "violent offence" in s. 2(1) of the *YCJA* does not apply in respect of offences committed prior to October 23, 2012. Again, the offences for which K.S. has been found guilty cover a date range both prior to and after October 23, 2012. However, I am satisfied that there is no substantial difference between the meaning of "violent offence" as stated in ***C.D.*** and as subsequently defined in s. 2(1) of the *YCJA*, and therefore I

find that these were violent offences whether they occurred before or after October 23, 2012.

[131] More problematic are the offences contrary to s. 151 as I have even less evidence before me that bodily harm was caused than was before Tousignant J. in ***D.B.*** I have already commented in paras. 86-90 in regard to the impact that K.S.' offences have had on the victims.

[132] I note also the comments of Chisholm J. in ***R.*** v. ***R.J.D.B.***, 2015 YKTC 16, in para. 7 that psychological harm can be presumed in the case before him. The case involved a 15-year-old offender who asked his nine-year-old niece to have sex with him. He then lay on top of her as she lay on her stomach, with her pants down and placed his penis between her buttocks, with no actual penetration occurring.

[133] However, Chisholm J. also noted that he had information before him that the victim had been traumatized by the commission of the offence as she had a mistrust of boys, blamed herself and was engaging in self-harm. She was noted to be justifiably scared and angry.

[134] I have less information before me than that. I note that in the affidavit of the victims' father, filed in an application for the evidence of the complainants (as they were at that time) to be heard by CCTV at trial, he stated that S. and Z. were having difficulty talking about what had occurred, both to a police officer with their mother present and to either of their parents.

[135] All this said, in the circumstances, notwithstanding the somewhat limited evidence before me as to the harm caused to the victims, I find that the s. 151 offences are violent offences within the meaning of s. 39(1)(a). As per my reasoning in para. 130, I find this to be the case whether the offences occurred before or after October 23, 2012.

[136] In doing so I rely on the positions of counsel, noting that defense counsel was not contesting this determination, as well as the nature of the offences considered in the context of the relationship of the victims to K.S., the "edginess" of the victims which caused their mother to try to protect them from discussing anything with the author of the PSR, the difficulty the victims had discussing these matters with their parents, the breakdown of the family relationship and my observations of the victims as they testified. I do not rely on the presumption of bodily harm, as to do so would then place an onus on an accused to rebut the presumption. The onus remains with the Crown to prove that an offence is one of violence.

[137] As such, I also find that a custodial disposition is available for the s. 151 offences.

[138] In the event that I am wrong on this point, it would not have altered the sentence that I am imposing in any event in any significant way with respect to its impact on K.S.

[139] As stated earlier, the fact that custody is available does not mean that custody should be imposed. Section 39(3) states that:

> **Factors to be considered**
>
> (3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
>
> (a) the alternatives to custody that are available;
>
> (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
>
> (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

Reasonable alternative to custody

[140] Counsel for K.S. asserts that there is a reasonable alternative to custody in the form of a two-year probation order. He points to the period of time K.S. spent at the YOF, including his time on judicial interim release, which he submits is close to the equivalent of 150 days of a form of custodial disposition under the *YCJA*.

[141] He also submits that the primary focus in this case should be the rehabilitation of K.S. He questions the necessity of custody in this case in light of the objectives, purposes and principles of the *YCJA*.

Likelihood of compliance with a non-custodial sentence

[142] Based upon the information I have to date, including that in the Progress Report provided May 4, 2016, I am satisfied that it is likely K.S. would be in general compliance with the requirements of a non-custodial disposition such as a probation order. He has a positive record of compliance extending back over a considerable period of time.

Alternatives to custody used in respect of young persons for similar offences committed in similar circumstances

[143] My review of case law and the authorities indicates that, although non-custodial sentences such as probation are at times imposed for similar offences committed by similar offenders, courts have often rejected such non-custodial sentences as not meeting the accountability requirements of the *YCJA* (***D.B.*** at para. 74).

Sentencing Purpose and Principles – S. 38

[144] Accountability through the imposition of meaningful consequences is a foundational purpose of the *YCJA*. It is integrally linked with the promotion of the rehabilitation of the offender and his or her re-integration into society.

[145] While cognizant of all that is stated in s. 38, I make the following particular observations.

[146] Proportionality between the seriousness of the offence and the degree of responsibility of the offender is significant in this case. These offences are serious and K.S. should be entirely accountable within the principles of accountability as applied to youthful offenders. These offences occurred over a substantial period of time of four to five years and included acts that went beyond simple exploratory touching and were serious acts of a highly intrusive nature.

[147] K.S. is the oldest brother and, while not in a position of trust from a purely legal perspective, his position as the oldest child in the family certainly put him in a position that I would categorize as being of a “trust-like” nature.

[148] K.S.' actions involved threats of violence in order to secure the silence of the victims.

[149] I agree with Crown counsel that there is little in the way of mitigation, other than the absence of a criminal history. Certainly K.S.' time in custody and on bail at the YOF are factors that can be taken into account as somewhat mitigating, although not in respect to the commission of the offences themselves.

[150] All available sanctions other than custody that are reasonable in the circumstances should be considered in determining a fit sentence. While s. 38(2)(e)(i) requires the least restrictive sentence possible that achieves the purposes of s. 38(1), a sentence that promotes rehabilitation and reintegration of K.S. must also promote a sense of responsibility in him and an acknowledgment of the harm he has caused S. and Z. through his actions. This, of course, is more difficult as K.S. continues to deny having committed these offences. It is thus hard to measure what form of sentence will have the desired impact on K.S. in this regard. It is clear, of course, that K.S. is not to be punished for not accepting responsibility for the offences for which he was convicted. This is not an aggravating factor for the purposes of sentencing. It simply poses some difficulties in determining what type of sentence will best serve the purposes set out in s. 38(1). Certainly, as indicated in the Note, the risk that K.S. poses for future re-offending is difficult to assess in the absence of the kind of sexual offending assessment, counselling and programming that would otherwise be available and probative.

[151] The least-restrictive sentence possible does not mean a non-custodial disposition. However, within the types of custodial dispositions available, should I find

such a disposition is required, I am required to consider which of these is the least restrictive sentence that meets the purposes of s. 38(1).

[152] In the case of K.S., taking into account the aggravating and mitigating circumstances and in consideration of the Preamble, the Declaration of Principle, the Purpose and Principles and the direction given in s. 39 (Committal to Custody), I find that a custodial disposition is required.

[153] The term of the custodial disposition will be six months, concurrent on all four counts. I take into account the time K.S. spent in custody on remand and at the YOF while released on bail in determining that a longer custodial disposition is not required.

[154] I have determined that the appropriate custodial disposition is by way of a DCSO rather than a period of incarceration in a custodial facility, (which I now understand would be served at the WCC), or a period of open custody. The new information that a custodial sentence would be served at WCC rather than at the YOF has not impacted my decision.

[155] I find that a DCSO best promotes the rehabilitation and reintegration of K.S. and holds him accountable for the offences he has committed.

[156] In ***C.D.,*** the Court noted at para. 3 that:

> Deferred custody is a type of custodial sentence that allows the youth to serve what would otherwise be a custodial sentence in the community but subject to strict conditions and with the possibility of immediate apprehension and placement in a custody facility if the youth is believed to 'have breached or to be about to breach' any of the conditions.

[157] By way of legislative background on the availability of a DCSO under the *YCJA*, prior to s. 42(9) being repealed by the *SSCA*, it read:

> On application of the Attorney General after a young person is found guilty of an offence, and after giving both parties an opportunity to be heard, the youth justice court may give a judicial determination that the offence is a serious violent offence and endorse the information or indictment accordingly.

[158] Section 42(2)(p), as it read both then and now, stipulated as follows in regard to a sentencing Court's ability to impose a DCSO:

> Subject to subsection (5), make a deferred custody and supervision order that is for a specified period not exceeding six months, subject to the conditions set out in subsection 105(2), and to any conditions set out in subsection 105(3) that the court considers appropriate;

[159] Prior to October 23, 2012 and the *SSCA* amendments, subsection 42(5) read that:

> The court may make a deferred custody and supervision order under paragraph (2)(p) if
>
> > (a) the young person is found guilty of an offence that is not a serious violent offence; and
> >
> > (b) it is consistent with the purpose and principles set out in section 38 and the restrictions on custody set out in section 39.

[160] Currently s. 42(5) reads:

> The court may make a deferred custody and supervision order under paragraph (2)(p) if
>
> > (a) the young person is found guilty of an offence other than one in which a young person causes or attempts to cause serious bodily harm; and
> >
> > (b) it is consistent with the purposes and principles set out in section 38 and the restrictions on custody set out in section 39.

[161] Again, the date range of the offences encompasses both prior to and after the amendment to s. 42(5) coming into force on October 23, 2012.

[162] As there was no application and therefore no finding under s. 42(9) that the offences, insofar as they were committed prior to October 23, 2012, were serious violent offences, a deferred custody and supervision sentence remains available (***D.B.***, at para. 62).

[163] For the offences, insofar as they were committed after October 23, 2012, a DCSO is available unless I find that K.S. caused or attempted to cause serious bodily harm to the victim. This is subject, of course, to the outcome of any argument that addresses the issue of which reading of s. 42(5) should apply.

[164] Again, as per the basis of my reasoning in respect of the application of the principles of denunciation and specific deterrence, I decline to partition out the offences into two categories, those that occurred before October 23, 2012 and those that occurred after October 23, 2012. The availability of a DCSO is governed by different principles in respect of the two time frames.

[165] The Crown would have had difficulty, I expect, in attempting to have brought an application under the now repealed s. 42(9) for a designation of the offence as a "serious violent offence". At best, the Crown could argue that the current requirement that the offences caused serious bodily harm should apply retroactively to cover the time period prior to s. 42(9).

[166] I appreciate the logic of that argument, were it to have been made before me, as otherwise the Crown would be left in the difficult position of having no legal basis on which to oppose the imposition of a DCSO. While the Crown could amend the Information to condense the range in which the offences were committed, certainly that also could be viewed as somewhat problematic.

[167] (While preparing these written Reasons for Sentence after rendering my decision orally, I noted that s. 195 of the *SSCA* in fact results in s. 42(5) of the *YCJA* having retrospective application. As such, s. 42(5) as amended applies to the entire date range covered by the Information in this case. To the extent that I stated otherwise in my oral decision – as noted in paras. 161 to 166 in these Reasons for Sentence, I was inaccurate. However, given my finding as noted in para. 168, this inaccuracy had no impact on the sentence I imposed).

[168] I find that this is not an issue which I am required to resolve, however, as I find that the offences did not cause "serious bodily harm" to the victims or were attempts to do so.

[169] "Serious bodily harm" is to be distinguished from the definition of "violence" in that the bodily harm must not only have occurred, it must also be serious. It is not enough that K.S. attempted or threatened to or did cause bodily harm to S. and Z, which is all that is required for the offence to meet the definition of a violent offence. In accordance with the principles of statutory interpretation, the addition of the word "serious" means that the legislators intended that the bodily harm must have a higher or more significant level of severity.

[170] The onus of proof remains upon the Crown to prove that the bodily harm was serious or that there was an intent to commit an offence that caused serious bodily harm to the victims.

[171] In ***R.*** v. ***K.S.V.***, 2015 SKPC 35, Anand J. concurred with the submission of Crown and defence counsel that the definition of "serious bodily harm" adopted by the Supreme Court of Canada in ***C.D.*** should be applied to s. 42(5) of the *YCJA*. The Supreme Court in ***C.D.*** referred favourably to the decision of ***R.*** v. ***McCraw***, [1991] 3 S.C.R. 72 and in particular to the comments of Cory J. that:

> "serious bodily harm" is "any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant". I see no reason why this definition of "serious bodily harm" should not be used for the purposes of the *YCJA* and, in particular, for the purpose of the definition of "serious violent offence" that is found in s. 2(1) of the Act.

[172] "Serious bodily harm" is not defined in the *YCJA* or the *Criminal Code*. I note that, while Anand J. agreed in para. 27 that the definition of serious bodily harm as articulated by Cory J. is correct, he stated, however, that all the jurisprudence related to what constituted a serious violent offence under the *YCJA* prior to the 2012 amendments is not necessarily relevant and applicable.

[173] In my view, there is insufficient evidence or information before me to conclude that the victims suffered serious bodily harm as a result of the offences committed by K.S., or that he attempted to cause the victims to suffer serious bodily harm. In saying this, I am aware that the harm required to be proved is not restricted to physical harm but includes psychological and/or emotional harm.

[174] I have already reviewed the evidence and information before me on the issue of whether "bodily harm" was caused by the offences committed by K.S. I found that the victims suffered "bodily harm" but I also expressed concerns that the evidence was sparse and limited in this regard. As such, the higher threshold of "serious bodily harm" cannot be said to have been met.

[175] In this regard, while I understand the benefits of protecting young children from the ongoing impacts of the sexual abuse they have suffered, and take no issue with the absence of any Victim Impact Statements, it would be of assistance to the court to have reliable information from collateral sources, such as parents or caregivers or, in some circumstances, counsellors, about the harm suffered by victims in order to be able to come to an informed decision about the extent of the harm caused to the victims.

[176] I consider that it would be wrong to engage in speculation and operate on the basis of a presumption of harm in such cases. As stated earlier, there remains a burden on the Crown to establish the requisite level of harm.

[177] In addition, I find that a DCSO is in accord with ss. 38 and 39 of the *YCJA*.

[178] The terms of the Order will be those set out in s. 105(2).

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Report to the provincial director immediately on release, and then be under the supervision of the provincial director or a person designated by the youth justice court;

4. Inform the provincial director immediately on being arrested or questioned by the police;

5. Report to the police, or any named individual, as instructed by the provincial director;

6. Advise the provincial director of your address of residence on release and, after release, report immediately to the clerk of the youth justice court or the provincial director any change

    (i) in that address,

    (ii) in your normal occupation, including employment, vocational or educational training and volunteer work,

    (iii) in your family or financial situation, and

    (iv) that may reasonably be expected to affect your ability to comply with the conditions of this order;

7. Not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited devise or explosive substance, except as authorized by this order;

8. Comply with any reasonable instructions that the provincial director considers necessary in respect of any condition of the conditional supervision in order to prevent a breach of that condition or to protect society;

[179] I will also impose the following terms from s. 105(3):

9. Make reasonable efforts to obtain and maintain suitable employment;

10. Reside in a place that the provincial director may specify;

11. Remain within the territorial jurisdiction of the court;

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

13. Attend at the Youth Achievement Centre or the Youth High Risk Treatment Program or Offender Supervision Services Sex Offender Treatment Program if so directed by the provincial director;

14. No contact directly or indirectly or to be alone in the presence of any person you know to be or who reasonably appears to be under the age of 16 years, except with the prior written permission of the provincial director or except in the actual presence of a responsible adult approved in advance by the provincial director;

15. Have no contact directly or indirectly or communication in any way with S.S. and Z.S. except with the prior written permission of the provincial director in consultation with Victim Services; and

16. Not attend any known place of residence of S.S. or Z.S. except with the prior written permission of the provincial director in consultation with Victim Services;

[180] K.S. will be placed on probation for a period of two years. 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;

4. Report to your Youth Probation Officer immediately upon the conclusion of your Deferred Custody and Supervision Order and thereafter, when and in the manner directed by your Youth Probation Officer;

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

6. Attend and actively participate in all assessment and counselling programs as directed by your Youth Probation Officer, and complete them to the satisfaction of your Youth Probation Officer, for any issues identified by your Youth Probation Officer, including sex offender assessment, counselling and programming, and provide consents to release information to your Youth Probation Officer regarding

your participation in any program you have been directed to do pursuant to this condition;

7. Have no contact directly or indirectly or communication in any way with S. and Z. except with the prior written permission of your Youth Probation Officer in consultation with Victim Services;

8. Not attend any known place of residence of S. and Z. except with the prior written permission of your Youth Probation Officer in consultation with Victim Services;

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

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

11. No contact directly or indirectly or to be alone in the presence of any person you know to be or who reasonably appears to be under the age of 16 years, except with the prior written permission of your Youth Probation Officer or except in the actual presence of a responsible adult approved in advance by your Youth Probation Officer.

[181] K.S. will provide a sample of his DNA pursuant to s.487.051. I note that counsel does not oppose the order being made. I have reviewed s. 487.051(2) and there is no evidence or information before me that would lead me to find that the impact of this

order upon K.S.' privacy and security of his person would be grossly disproportionate to the public interest in the protection of the public and the administration of justice.

Section 113 Application

[182] Pursuant to s. 52 of the *YCJA,* the convictions under s. 151 carry a mandatory minimum firearms prohibition of two years.

[183] Counsel for K.S., who I note was not counsel before me today or at the trial, filed an application pursuant to s. 113(1) for an order that would allow K.S. to possess a firearm notwithstanding the mandatory minimum prohibition. Crown counsel opposes the defence application.

[184] This application was heard on February 29, 2016. Additional information was provided via a further Progress Report dated May 4, 2016

[185] After discussion between myself and counsel in regard to the evidence before me, it was agreed that the s. 113 application should be adjourned *sine die*. The application may be renewed at a future date should K.S. seek to do so.

[186] Therefore K.S. shall be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited

[187] ammunition or explosive substance for a period of two years.

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COZENS T.C.J.