Citation: *R.* v. *Shorty*, 2005 YKTC 72 Date: 20051011
Docket: T.C. 03-03533
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.
ROBERT SHORTY

Appearances:
Michael Cozens Counsel for Crown
Gordon Coffin Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Robert Shorty has entered a plea of guilty in relation to an historical offence of indecent assault contrary to s. 149 of the *Criminal Code.* The offence itself involved two victims ranging in age from eight to ten, who were subjected to repeated sexual acts and violence of over roughly a one-year period. The acts complained of include fondling of genitalia, forced fellatio, vaginal and anal intercourse, threats, beating with a hairbrush and broomstick, urinating on the victims, using adhesive on the genitalia of the victims and inciting his younger brother to perform sexual acts upon the victims.

[2] At the time of the offence, Mr. Shorty was 12 and 13 years-of-age and would have been subject to the *Juvenile Delinquents Act* which was then in force.

[3] At the sentencing hearing, both Crown and defence took the position that custody was not an available sentencing option. The position was based on the *R.* v. *A.B.M*. decision, [1993] B.C.J. No. 2642, out of the B.C. Provincial Court, which was followed by B.C. Provincial Court Judge Maltby, sitting as a Deputy Judge of this court in the *R.* v. *L.C*. case, [2001] Y.J. No. 42.

[4] The sentencing was adjourned for full argument on the issue. At the next appearance, defence counsel raised an additional issue of whether s. 20(3) of the *Juvenile Delinquents Act* precludes me from sentencing Mr. Shorty at all. I will address these two issues in reverse order.

1. **Section 20(3) of the *Juvenile Delinquents Act***

[5] Section 20 of the *Juvenile Delinquents Act* sets out the sentencing options available under the Act. Section 20(3) reads in part as follows:

> Where a child has been adjudged to be a juvenile delinquent and whether or not such child has been dealt with in any of the ways provided for in subsection (1), the court may at any time, before such juvenile delinquent has reached the age of twenty-one years and unless the court has otherwise ordered, cause by notice, summons or warrant, the delinquent to be brought before the court, and the court may take then take any action provided for in subsection (1)….

[6] The defence suggests that, on a plain language reading of this section, no sanctions may be imposed pursuant to s. 20(1) of the *Juvenile Delinquents Act* after a delinquent has reached the age of 21. The Crown argues that s. 20(3) is a review provision, allowing an offender who had previously been adjudged to be delinquent to be brought back before the court.

[7] In support of its argument, defence cited three cases: *R.* v. *D*., [1980] A.J. No. 618; *R.* v. *S*., [1980] 53 C.C.C. (2d) 453; and *R.* v. *Mero*, [1976] 30 C.C.C. (2d) 497.

[8] In *R.* v. *D., supra*, the Alberta Court of Queen's Bench, in addressing an appeal against a s. 9 order, referred to the options available under s. 20 and stated:

> By subsection (3) of the same section, these powers are exercisable until the age of 21. (p.2)

[9] The defence concedes that this reference is *obiter dictum*.

[10] In *R.* v. *S., supra,* the B.C. Supreme Court addressed the validity of a section in the *B.C. Corrections Act* which limited the period of confinement to an industrial school to two years.

[11] In referring to s. 20 of the J.D.A, Toy J. stated:

> It is my view that on a complete interpretation of s. 20 of the Juvenile Delinquents Act a juvenile court judge has been given a wide discretion after having made a finding of delinquency to make any appropriate disposition within s. 20(1)(d), (e), (f), (h) or (i) for any period of time, provided that the period expires before the juvenile delinquent's 21st birthday. (p.12)

[12] I would note, however, then, in the *R.* v. *S., supra,* case, the court was specifically concerned with the issue of length of confinement to an industrial school. The delinquent in question was 16 years-of-age, thus, the issue of whether any sanctions may be imposed on an offender over the age of 21 was not addressed.

[13] *R. v. Mero, supra*, a decision of the Ontario Court of Appeal, involved an appeal of a decision of the Ontario Provincial Court transferring a juvenile delinquent to adult court pursuant to s. 9, on the basis that he needed strict control and supervision. MacKinnon J.A. stated the following:

> Contrary to the opinion of the detective sergeant, the Provincial Court Judge could put the appellant on probation, the probation to continue after his 16th birthday. It would not be necessary to send him to the Adult Court for probation. The real control over such probation, which the Provincial Court Judge seems to have overlooked, is found under s. 20(3). There the Court is given the power, at any time before the juvenile delinquent has reached 21, to take the action prescribed in s. 20(1), or, most importantly, to make an order under s. 9 directing that the delinquent be proceeded against by indictment in the ordinary courts. (p.6)

Again, this is not a case in which the offender was over the age of 21.

[14] Furthermore, MacKinnon J.A. goes on to say:

> As stated, the appellant could have been put on probation with the necessary element control in view of the possible **subsequent** invocation of ss. 20(3), 20(1) and 9(1). (p. 6, emphasis added)

[15] Clearly, MacKinnon J.A. was envisioning the use of s. 20(3) as a mechanism to bring the appellant back before the Court should he be non-compliant with his probation, as opposed to being concerned about a limitation period on imposing

sanctions under s. 20(1). Such a reading of s. 20(3) is entirely consistent with the interpretation put forward by the Crown in the case at bar.

[16] Accordingly, I do not find any of the cases submitted by the defence to be particularly persuasive on the issue of whether s. 20(3) operates as a limitation on the imposition of sanctions after the age of 21. This, however, does not dispose of the issue. Section 20(3) is entirely capable of the interpretation put forward by the defence on a plain reading. Regard must therefore be had to the rules of statutory interpretation.

[17] As a general rule, statutes are to be interpreted based on the ordinary meaning of the words contained therein. However, courts are entitled to depart from the ordinary meaning to the extent necessary to avoid an absurdity. This absurdity rule was first enunciated by Lord Wensleydale in *Grey* v. *Pearson* (1857), 10 E.R. 1216 (H.L.):

> [T]he grammatical and ordinary sense of the words to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther. (p. 1234)

[18] Dreidger on the *Construction of Statutes* defines the modern view of the absurdity rule as follows:

> The modern view of the "golden rule" may be summarized by the following propositions:
>
> (1) It is presumed that legislation is not intended to produce absurd consequences.
>
> (2) Absurdity is not limited to logical contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense and other public standards.

> Also, absurdity is not limited to what is shocking and unthinkable; it may include any consequences that are judged to be undesirable because they contradict values or principles that are considered important by the courts.
>
> (3) Where the words of a legislative text allow for more than one interpretation, avoiding absurd consequences is a good reason to prefer one interpretation over the other. Even where the words are clear, the ordinary meaning may be rejected if it would lead to an absurdity.
>
> (4) The more compelling the reasons for avoiding an absurdity, the greater the departure from ordinary meaning that may be tolerated. However the interpretation that is adopted should be plausible. (p.85-6)

[19] Dreidger goes on to define a number of different categories of absurdity, two of these are particularly relevant to the case at bar:

> 1. ***Contradictions and Anomalies.*** From the earliest recognition of the golden rule, contradiction and internal inconsistency have been treated as forms of absurdity. Legislative schemes are supposed to be elegant and coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme are likely to be labelled absurd. (p.88-9)

And:

> 2. **Consequences that are self-evidently irrational or unjust**. There is a large residual category of absurdity consisting of consequences that violate the court's conception of what is fair, good or sensible. (p.92)

[20] When reviewing the *Juvenile Delinquents Act* in its entirety, it is clear that it was intended to apply to offenders committing offences while a child, as defined by the *Act*, but not being prosecuted until some later date. Section 4 of the *Act* confers exclusive jurisdiction on the juvenile court to deal with cases of delinquency, and expressly

includes jurisdiction over those who have "passed the age limit mentioned in the definition of 'child' in subsection 2(1)."

[21] Similarly, s. 5(2) defines the time for commencement of proceedings by incorporating the provisions of the *Criminal Code.* The *Criminal Code* in force at the time of the offence at bar includes, in s. 721(2), a six month limitation on instituting summary conviction proceedings similar to that contained in the current s. 786(2), but there is no limitation period set out in relation to indictable offences such as s. 149.

[22] These sections clearly contemplate proceedings against individuals over the age of 21, but who committed their offence while still a child. To read s. 20(3) as prescribing a limitation period is in complete contradiction to ss. 4 and 5(2).

[23] The defence argues that such an interpretation would not preclude the commencement of proceedings or a finding of guilt. It would only operate to preclude the imposition of any sanctions following a finding or plea of guilt. This would mean that delinquents able to escape detection until after their 21st birthday would have absolutely no fear of reprisals regardless of the nature of the offence committed. Such a result would be, in my view, entirely ludicrous and contrary to the purpose of the *Juvenile Delinquents Act.* For this reason, it is my determination that it is appropriate to apply the absurdity rule and prefer the interpretation of s. 20(3) as a review provision rather than a limitation period. Accordingly, s. 20(3) does not bar me from imposing sanctions on Mr. Shorty in relation to the s. 149 offence.

2. **Is custody an available sentencing option?**

[24] Having determined that Mr. Shorty can indeed be sentenced, I must now address the issue of what sentences are available, in particular, whether custody is an available option.

[25] By virtue of s. 160 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, the sentencing provisions of the YCJA apply. Section 160 states, in part, that:

> 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 the coming into force of this section shall be dealt with under this Act as if the offence occurred after the coming into force of this section….

[26] Recent cases have interpreted the transitional provisions of the YCJA as overriding the general principle that a person must be tried in accordance with their legal status at the time of the offence. For instance, *R.* v. *E.J.A*., [2004] Y.J. No. 98, addressed the issue of whether an individual charged in 2004 with an assault on another male, which occurred between 1971 and 1974 when he was 16 to 18 years of age and not a child under the *Juvenile Delinquents Act*, should be tried in adult or in youth court. In finding that he should be tried in Youth Court, Lilles J. stated the following:

> The wording of s. 160 of the Youth Criminal Justice Act is plain and unambiguous. The operating phrase is 'shall be dealt with under this Act as if the offence occurred after the coming into force of this section'. The word 'shall' imports mandatory language, in contrast with the use of 'may' in s. 79(4) of the Young Offenders Act. The section taken in its entirety cannot be read other than obliging the courts to apply the Youth Criminal Justice Act to all accused who commit offences prior to the coming into force of the section. It does not distinguish between alleged offences committed prior to April 2, 1984 (while the Juvenile Delinquents Act was in effect), between April 1, 1984 and April 1, 1985 (the transitional period under the Young Offender's Act) and between April 1, 1985 and

> April 1, 2003 (the period when the Young Offenders Act was fully in force). The Youth Criminal Justice Act clearly overrides the principle that a young person is to be tried in accordance with his status at the time of the commission of the offence. (paragraph 19)

[27] Notwithstanding the plain and unambiguous wording of s. 160, the Crown and defence jointly submitted that a custody and supervision order pursuant to s. 40(2)(n) of the YCJA was not an available sentencing option by operation of s. 11(i) of the *Charter*.

[28] Given the seriousness of the factual circumstances and the devastating impact on the two victims, I was not prepared to accept the submission at face value and required the issue to be fully argued. I have now had an opportunity to hear the full submissions of counsel and to review a significant amount of case law in relation to the issue.

[29] In brief, the argument is that had Mr. Shorty been sentenced at the time of the offence he would have been subject to the sanctions set out in s. 20(1) of the *Juvenile Delinquents Act*. Under s. 20(1), the only sanction which provided for confinement was commitment to an industrial school. As industrial schools have been distinguished from imprisonment, commitment to an industrial school would be a lesser punishment than custody under the *Youth Criminal Justice Act*. Pursuant to s. 11(i) of the Charter, Mr. Shorty would be entitled to the lesser punishment, and as industrial schools no longer exist, custody or confinement is not an available sentencing option.

[30] Section 11(i) of the Charter provides that:

> Any person charged with an offence has the right
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[31] In *Re McCutcheon and City of Toronto et al.*, [1983] 41 O.R. (2d) 652, the Ontario High Court of Justice discussed the purpose of s. 11(i) at length:

> The purpose of s. 11(i) of the Charter is to enshrine in the Constitution, the provisions of the Interpretation Acts giving an accused the benefit of a lesser punishment in the event of legislative changes in the course of his prosecution. … Section 11(i) entrenches these provisions and extends them to grant accused persons the benefit of preventing retroactivity of any increases in sanction as well. (p.14)

[32] In *R v. A.B.M.*, [1993] B.C.J. No. 2642, the B.C. Provincial Court considered whether, by virtue of s. 11(i) of the Charter, custody was an available sentencing option for a young offender who had indecently assaulted his two sisters during a four-year period from 1960 to 1964. In finding that the court did not have jurisdiction to impose a sentence of imprisonment, Shupe J. stated the following:

> The Crown argues herein that the deprivation of liberty inherent and committal of offenders to industrial schools is tantamount to imprisonment. Common sense supports that argument. But penal statues must be strictly construed and several cases have ruled such committals not to be confinement in a penal institution. See R. v. L.W. (1980), 53 C.C.C. (2d) 411 at 413.(Man Q.B.); *R.* v. Robert J. Henderson, Vancouver Provincial Court, April 9/81, Coultas, PCJ (Unreported); and inferentially, R. v. A. (1978), 40 C.C.C. (2d) 397 at 406 (Barnett, PCJ). Those cases are persuasive, even though they did not deal with the issue now before me. The R. v. L.N. and R. v. Robert J. Henderson cases ruled that absconding from industrial schools was not an escape from lawful custody, and the R. v. A. case ruled upon the constitutionality of containment program legislation in British Columbia.
>
> More importantly, industrial schools no longer exist in British Columbia and have not since their repeal by section 6 of the Protection of Children Amendment Act, 1969 (B.C.), c. 27. That appears to be why the Crown conceded and Judge Blair PCJ, ruled that there was no possibility of incarceration but rather only probation in the case of R. v. Wayne Nelson Eustache, April 20/93,

> Kamloops Registry No. 2702c (unreported - pg 1, lines 43-46). Even if such industrial schools did still exist, the accused's age would preclude his committal to same.
>
> As was pointed out by the British Columbia Court of Appeal in the case of R. v. P.D.P (1979), 45 C.C.C. (2d)271 at 282, of the range of measures for dealing with the delinquent children, the only one that contemplated confinement of a child, was committal to an industrial school, pursuant to s. 20(1)(i), Juvenile Delinquents Act.
>
> By s. 11(i) of the Charter, where the punishment for an offence has been varied between the time of commission and the time of sentencing, the accused is to be given the benefit of the lesser punishment. He could have been held in custody for up to two years by s. 20(1)(k)(i) [of the] Young Offenders Act, but for the reasons given herein, cannot be convened to an industrial school under the Juvenile Delinquents Act. Hence this Court has no jurisdiction to impose the sentence of imprisonment which the Crown seeks.

[33] In *R.* v. *L.C.,* [2001] Y.J. No. 42, Maltby J., sitting as a deputy judge of this court, adopted the reasoning of Shupe J. in *R.* v. *A.B.M., supra,* in finding that she had no jurisdiction to impose a sentence of imprisonment on a 36-year-old who plead guilty to rape and indecent assault occurring in 1978 and 1980 when he was 14 and 15 years old.

[34] In support of his argument in the case at bar, the Crown has also submitted the B.C. Court of Appeal decision in *R.* v. *S.B*., [1983] B.C.J. No. 2273, adopted by the Ontario Court of Appeal in *R.* v. *D.T*., [1984] O.J. No. 2592, which held that commitment to an industrial school "does not mean that a juvenile is subject to 'punishment' by way of imprisonment."

[35] During the course of argument, I raised a concern about whether industrial schools, having been found not to be 'punishment' by way of 'imprisonment,' could be considered 'punishment' for the purposes of engaging s. 11(i) of the *Charter.*

[36] There are a number of conflicting cases on this particular point. In contrast to the *S.B.* and *D.T.* decisions, Cawsey J. of the Alberta Court of Queen's Bench found in *R. v. D.G*., [1983] A.J. No. 498 (QL), that a probation order under s. 20(1) of *the Juvenile Delinquents Act* was punishment. Conversely, McDonald J., also of the Alberta Court of Queens Bench, held in *R v. T.R.* (*No. 2)* that a juvenile probation order was not punishment.

[37] However, none of these conflicting decisions address the issue of punishment as it is used in s. 11(i) of the *Charter*.

[38] In *Re McCutcheon and the City of Toronto et al*. *supra*, Linden J. noted "the word 'punishment,' as it is used in s. 11(i), is meant to encompass the official imposition of a sanction authorized by law." (p.13). I am also mindful of the comments of the Supreme Court of Canada in *R.* v. *Wust*, [2000] 1 S.C.R. 455, on the unrelated issue of pre-sentence custody:

> To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people as an exercise in semantics that does not acknowledge the reality of pre-sentencing custody….(p.41)

[39] For the purposes of this decision, I am satisfied that the provisions of s. 20(1) of the *Juvenile Delinquents Act* are sanctions or punishments such that s. 11(i) of the Charter is engaged.

[40] In deciding whether to adopt the reasoning in the *A.B.M* and *L.C* cases, consideration must be given to the *Juvenile Delinquents Act* as a whole as apposed to

looking at s. 20(1) in isolation. I note that the *Act* does provide for potential exposure to jail through the transfer provision set out in s. 9(1) which reads:

> Where the Act complained of is under the provisions of the *Criminal Code* or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by incitement in the ordinary courts and in accordance with the provisions of the *Criminal Code* in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it.

[41] In my view, this potential exposure to jail through transfer to ordinary court could be a reasonable basis upon which to depart from the reasoning in the *A.B.M* and *L.C.* cases. Unfortunately, the transfer provisions do not apply in this particular case. While Mr. Shorty is charged with and indictable offence, he was under the age of 14 at the time of commission and as such he would not have been exposed to the potential imposition of a jail term through the transfer provisions.

[42] The issue remains as to whether I am satisfied that commitment to an industrial school would indeed be a lesser punishment than a custody and supervision order pursuant to s. 42(2)(n) of the *Youth Criminal Justice Act*.

[43] On the face of it, there would appear to be little difference in the two dispositions. Both involve confinement. However, as noted in *R.* v. *S.B., supra*:

> It does not follow that confinement constitutes punishment. It is the purpose of the confinement that determines whether or not such confinement can be construed as punishment.

[44] The purpose of the *Juvenile Delinquents Act* was clearly not to punish but rather to treat and rehabilitate. Section 3(2) of the *Act* reads:

> Where a child is adjudged to have committed a delinquency he shall be dealt with, not as offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.

[45] Section 38 of the *Act* indicates, in part, that:

> Every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child and one needing aid, encouragement, help and assistance.

[46] Similarly, industrial schools were intended to treat and rehabilitate. For example, under s. 5 of the *Training-schools Act* in B.C., the purpose of a training school (which was the same as an industrial school) was:

> …to provide treatment, training, reformation and rehabilitation of children lawfully committed to its custody.

Furthermore, there is case law which defines industrial schools as treatment facilities rather than penal institutions. In *R.* v. *L.W.*, [1980] M.J. No. 57, Kroft J. of the Manitoba Court of Queen's Bench noted:

> …once a delinquent child is committed in subsections (h) or (i) of sec. 20(1) of the Juvenile Delinquents Act, he is no longer under arrest, nor is he under sentence, confined in a penal institution. To hold otherwise would be contrary to the whole scheme of the federal and provincial legislation. (paragraph 11)

[47] In *R.* v. *G.P.G.*, [1980] 1 W.W.R. 562 at 566, Hubbard J.A. stated:

> When a child is committed to the charge of a children's aid society or to an industrial school, this is done as part of the treatment and reform of the delinquent. Section 3(2) of the Act directs that a child who is adjudged to have committed a delinquency is to be dealt with, not as an offender, but as one in a condition of delinquency and requiring help and guidance and proper supervision. Committal of a child under s. 20(1)(h) or (i) imports the notion that the committal is part of a plan or scheme for the reformation of the child.

[48] Clearly, the purpose of industrial schools was to provide treatment and rehabilitation. The same cannot be said of a secure or closed custody facility, though rehabilitation may be part of its aims. I would note, however, that the purpose of industrial schools bears a striking similarity to open custody dispositions provided for in the *Young Offenders Act*. In the Supreme Court of Canada decision in *R.* v. *J.J.M,* [1993] 2 S.C.R. 421, Cory J. defined open custody in the following passage:

> The Act empowers the judge, in those situations where it is decided that custody is required, to determine whether it should be open or closed. Section 24.1(1) defines "open custody" as "a community residential centre, group home, child care institution or forest or wilderness camp" or other similar facilities. Certainly, places which come within the definition of "open custody" will restrict the liberty of the young offender. Yet those facilities are not simply to be jails for young people. Rather they are facilities dedicated to the long term welfare and reformation of the young offender. Open custody facilities do not and should not resemble penitentiaries. Indeed the courts have very properly resisted attempts to define as open those facilities which provide nothing but secure confinement. See for example Re D.B. and the Queen and Re L.H.F and the Queen (1986), 27 C.C.C (3d) 468 (N.S.S.C.T.D.)

[49] Section 85 of the *Youth Criminal Justice Act* provides for at least two levels of custody which would be akin to the open and secure custody provisions of the *Young Offenders Act.* Unfortunately, s. 89(1) of the *Youth Criminal Justice Act* provides:

> When a young person is twenty years or older at the time the youth sentence is imposed on him or her under paragraph 42(2)(n), (o), (q) or(r), the young person shall, despite section 85, be committed to a provincial correctional facility for adults to serve the youth sentence.

[50] Thus, even if an open custody type of disposition could be seen as an equivalent to committal to an industrial school under the *Juvenile Delinquents Act,* imposition of open custody is precluded in this case by s. 89(1) of the *Youth Criminal Justice Act*.

The *Juvenile Delinquents Act* does not contain a provision equivalent to s. 89(1). Indeed, to the contrary, s. 26(1) of the *Juvenile Delinquents Act* provides that:

> No juvenile delinquent shall, under any circumstances, upon or after conviction, be sentenced to or incarcerated in any penitentiary, or county or other gaol, or police station, or any other place in which adults are or may be imprisoned.

[51] Furthermore, I must accept that incarceration in an adult facility such as Whitehorse Correctional Centre is clearly a harsher punishment than committal to an industrial school.

[52] By virtue of s. 11(i) of the *Charter*, Mr. Shorty is entitled of the benefit of the lesser punishment. As such, I have come to the inescapable conclusion that I have no option but to adopt the reasoning in the *A.B.M* and *L.C.* decisions. It is a conclusion that I come to with a great deal of frustration and discomfort. While both Judge Shupe and Judge Maltby were of the view that imprisonment was not appropriate in any event in their respective cases, I am not of a similar view as it pertains to Mr. Shorty. If I could impose jail, I would, but I must resign myself to the fact that I simply do not have the jurisdiction to do so.

[53] In terms of available options, discussion was had regarding an intensive support and supervision program pursuant to s. 42(2)(l) of the *Youth Criminal Justice Act* or attendance at a non-residential program pursuant to s. 42(2)(m). Both require programs approved by the provincial director. A representative of the director provided information to the effect that programs have been developed under both subsections and have been approved by the director. Unfortunately, the current programs are only available to youth aged 12 to 17, and are not equipped to deal with adults. While I am

of the view that something akin to each could be crafted to accommodate an adult, they would not be programs approved by the provincial director as required by the *Act*.

[54] As suggested by both counsel, this leaves me with probation as the only real sentencing option. However, on the facts of this case, I am of the view that the probation order should be on strict conditions for the maximum term allowable.

[55] There are a number of aggravating factors in the circumstances of this case. Beyond the very disturbing sexual acts which formed the basis of the charge, the offence is further aggravated by the use of threats and physical violence, by the even more disturbing elements of urinating on the victims and using adhesive on their genitalia, and by coercing another young child to perform sexual acts on the victims.

[56] The impact of this offence on the two victims cannot be overstated. Indeed, both filed victim impact statements which were read into the record and which clearly and eloquently describe the devastating impact that this has had on each of them and their families. There is little that I can do now to repair the harm that they have suffered, and I can only hope that finally bringing these proceedings to a close here today will provide them with some small measure of comfort.

[57] I have also had the benefit of a thorough pre-sentence report setting out Mr. Shorty's background. He is 36 years old, born and raised in the Ross River area. He has a grade nine education plus two years of upgrading at Yukon College. His work history includes various fields but primarily labour type positions.

[58] Of note, he has amassed a significant criminal record in the years following the s. 149 offence. The record includes numerous offences of violence, including a conviction for sexual assault in 2002 and numerous breaches of court orders.

[59] While at the time of the commission of the s. 149 offence, Mr. Shorty was a youth with no criminal record and must be sentenced as such, his subsequent record is relevant to the proceedings in determining his character and whether rehabilitation has occurred and he has been deterred. Clearly, that is not case given his criminal record. I also have before me a guilty plea to a breach of probation for failing to attend sex offender treatment as directed.

[60] The pre-sentence report does indicate, however, that Mr. Shorty did make some progress in treatment and has expressed an interest in completing the program. He would definitely benefit from such treatment and the insight that it could provide into his sexually offending behaviour. I note that while he has accepted responsibility for the offence, he nonetheless minimizes his own behaviour as can be seen in his comments to Mr. Hyde in the pre-sentence report:

> I did mess around with those girls, but I didn't do all what they say, there were others involved, why are they only talking about me? (page 5)

[61] Also of concern to me is the fact that Mr. Shorty has a substantial problem with alcohol. While there is no suggestion that alcohol was involved in the offence before me, Mr. Shorty's alcohol abuse has interfered in his performance in sex offender treatment and needs to be addressed if he is to be successful in treatment. His counsel advises me that he is motivated to accept and engage in counselling and treatment,

both for substance abuse and his sexual offending behaviour, though he has expressed concerns about an abstention clause given his alcoholism.

[62] Dealing first with the breach, as per the joint submission of counsel, I am prepared to resolve it by application of credit for the 37 days served in remand. Accordingly, Mr. Shorty is hereby sentenced to one day deemed served and the record should reflect two-to-one credit for remand for a total of 74 days.

[63] With respect to the s. 149, I am imposing the maximum sentence available to me by law, a probation order of two years. It will be on the following conditions:

a) Keep the peace and be of good behaviour.

b) Appear before the court when required to do so by the court.

c) Notify the court or the probation officer in advance of any change in name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

d) Report to a probation officer immediately and thereafter as and when directed and in the manner directed by the probation officer.

e) Reside as directed by the probation officer, including residing in a supervised facility such as the ARC and abide the by the rules of the residence.

f) Abstain absolutely from the possession, purchase and consumption of alcohol and non-prescription drugs and submit to a breathalyzer or urinalysis upon demand of a peace officer or probation officer

> who has reason to believe that you have failed to comply with this condition.

While I recognize Mr. Shorty's concern with this condition, substance abuse has been linked to his failure to attend and complete treatment in the past. I am satisfied the condition is necessary. I am also satisfied that the probation officers here in the Yukon are sensitive to the slips associated with addressing substance abuse issues and will respond accordingly:

> g) Take such alcohol and drug assessment, counselling and treatment including but not limited to residential treatment as and when directed by the probation officer.
>
> h) No contact directly or indirectly, or communication in any way with Marilyn O'Brien, Tyler O'Brien, Yvonne Shorty, Isaiah and Jeremiah Shorty and May and Ivan Bolton.
>
> i) Attend and participate in such assessment counselling and treatment as directed by the probation officer including but not limited to sex offender treatment; and
>
> j) Take such other assessment treatment and counselling as may be directed the your probation officer.

[64] This offence is not a primary or a secondary offence for the purposes of a DNA order. Nor are the provisions of the Sex Offender Registry available. It is a discretionary offence for the purposes of a firearms order but I understand that he is already subject to such a prohibition in relation to his sexual assault conviction.

[65] Counsel, any issues in relation to the conditions?

[66] MR. COZENS: Simply with respect to the abstain and the submit clause, I know that the *R.* v. *Shoker* case, (2004), 92 C.C.C. (3d) 176, out of the B.C. Court of Appeal and then subsequently an oral decision in *R.* v. *Eriksen*, [2005] Y.J. No. 60 (QL), out of the Yukon Court of Appeal, I believe Mr. Coffin was present for that and can speak further, had indicated that the submit clauses are not appropriate in probation orders. I know the *Shoker* decision is on leave to the Supreme Court of Canada but I believe the *Eriksen* decision incorporated it into this jurisdiction.

[67] THE COURT: It binds me now. Based on that decision, I will remove the submit portion of the clause but the abstain absolutely remains.

[68] Mr. Coffin, I believe there were three new offences before the Court.

[69] MR. COFFIN: That is correct. If I could have a moment and speak with my friend and see the information. Yes, with respect to these matters, perhaps --

[70] THE COURT: While we are waiting for that to happen and counsel to decide what they are going to do, Ms. Forde, I am wondering if you could do me a favour? I would like you to convey my thanks to the victims for attending and, in particular, for their patience in waiting while I reviewed the law and determined what I could or could not do. I do regret that I could not come to a different decision and I hope that the delay did not unduly exacerbate things for them, but I would appreciate if you could thank them for me for their patience.

[71] MS. FORDE: I'll certainly do that.

[72] THE COURT: Thank you.

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RUDDY T.C.J.