Date: 2022 08 18
File: T-2-CR-2019-000723

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

AUSTIN TETSO

REASONS FOR DECISION
of the
HONOURABLE DEPUTY JUDGE CHRISTINE GAGNON

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person.

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	August 18, 2022
Counsel for the Crown:	Blair MacPherson
Counsel for the Accused:	Ryan Clements

[Section 151 of the *Criminal Code*]

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A. INTRODUCTION

[1] Austin Tetso is a twenty-one-year-old man of Dene ancestry. He was born in Fort Providence, Northwest Territory, however he grew up in the community of Fort Simpson, where he was placed by Social Services, having been apprehended at the age of 18 months.

[2] On the night of October 12-13, 2019, when he was 18 years old, he invited two girls, T.D.N. and J.D.N., aged 14, to meet up with him at a place where they drank alcohol and smoked marihuana. At one point, he was alone with T. He came up behind her and wrapped his hands around her waist. He grabbed her buttock and squeezed. She tried to get away, he spun her around and hugged her. She said goodnight to him. He said: "Wait, another hug!". He touched her buttock again. She said: "That's enough, it's getting weird", and she left.

[3] On October 17th, the three of them met again, and went into a vacant house, where they drank alcohol and smoked marihuana, both supplied by Austin Tetso.

[4] At one point, he was alone in the bathroom with J. He grabbed her buttock, he put a hand down her pants, touching over the vaginal area. She told him to stop, while he begged her to let him continue. T. walked in, and he stopped.

[5] Later, they were together smoking marihuana, Austin Tetso put his hand down T.'s pants and inserted a finger into her vagina. She pushed him away.

[6] The police had been alerted about people being inside the vacant house. Upon investigation, they had reasonable grounds to believe that Mr. Tetso had committed the offence of sexual interference on T. and J., and they arrested him a few days later. He was released the same day on conditions not to have any contact with the victims; to be inside his place of residence between the hours of 8 pm and 6 am; not to consume alcohol or drugs, not to enter any place where liquor is sold, remain in the Northwest Territories, not to have any contact with any person under the age of 16 unless accompanied by a sober adult.

[7] Both victims have filed Victim Impact Statements.

[8] In her statement, J. wrote in the section relating to emotional impact:

> "It dramatically affected my relationship with my mom, myself, and boyfriend. I developed anxiety and anger, to a point I couldn't attend school. I felt shame and 100% embarrased (sic). I lost my respect for myself; self harm. Bad decisions and getting in trouble with the law. I feel lower then (sic) everyone around me. I've been binge drinking where I black out every time. I'm taking medication to help my raging anger moments".

[9] In a poignant poem which she included in her Victim Impact Statement, she confides that she was never quite the same after the offence, feeling like "a fragile, watery imitation of what once was".

[10] T. wrote in her Victim Impact Statement that:

> "It has affected my relationship with family: not being able to open up. It has affected my relationship with friends, specifically guy friends by being scared to be around them. My ability to work was ruined, and to attend school was confusing; being anxious I would see him in public. I have gained bad anxiety. I over-think quite a bit now. In a way I caved in and my eating levels went wonky. I would self-harm myself on occasion for 3 months. I would blame myself constantly for the situation."

[11] She also wrote that she does not feel safe emotionally and mentally.

[12] Mr. Tetso does not have a criminal record, and he entered guilty pleas to the offence of sexual interference regarding both victims.

[13] For these crimes, the Crown is seeking a term of imprisonment for 18 months, followed by a period of probation, while the Defense asks this court to consider imposing a conditional sentence of imprisonment for 18 months, followed by a period of probation for two years. As the offence of sexual interference is punishable by a mandatory minimum sentence, this option is not available. However, the

Defense is asking this court to follow its decision rendered in *R. v. Gargan*[1] which concluded that the 3-month mandatory minimum sentence violated s. 12 of the *Canadian Charter of Rights and Freedoms* and could not be saved by section 1 of the *Charter*.

[14] The Defense also relies on *R. v. Lloyd*, to submit that it is not necessary to engage in a full hearing of the issue before me, since I have previously decided on this question of law. The Ontario Court of Appeal wrote in its decision *of R. v. Sullivan:*

> Decisions on questions of law from judges of coordinate jurisdiction, while not binding, should be followed in the absence of cogent reasons to depart from them[2].

[15] The Crown says that the decision in *Gargan* is wrong, and that I should not follow it. In the same breath, they acknowledge that the Crown is appealing all decisions declining to apply the mandatory minimum sentence for policy reasons. They did not offer any argument as to why *R. v. Gargan* was wrongly decided.

[16] Until a ruling is issue by the Supreme Court of the NWT, I have no reason to depart from the decision I gave in *R. v. Gargan*, and I agree with the Defense that it is not necessary to engage in a full hearing on that issue.

[17] I also find that because the accused is an Indigenous person, and that section 718.2(e) of the *Criminal Code* requires that all reasonable sanctions other than imprisonment be considered, the issue of the appropriateness of the mandatory minimum punishment is not moot. I am not prepared to state at this point of the proceedings that only a term of imprisonment equal or superior to three months is appropriate under the circumstances.

[18] In order to decide on the constitutionality of a mandatory minimum penalty, I must ask the following questions:

(a) Would the MMP be grossly disproportionate in the case of this accused; and if not,

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[1] 2021 NWTTC 9; the Crown appeal has been heard on May 10, 2022. Decision pending.

[2] 2020 ONCA 333. This was confirmed on appeal by the Supreme Court of Canada in 2022 SCR 19: "Judicial comity as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances: the rationale of the earlier decision has been undermined by subsequent appellate decisions; some binding authority in case law or some relevant statute was not considered; or the earlier decision was not fully considered, for example if it was taken in exigent circumstances. Where a judge is faced with conflicting authority on the constitutionality of legislation, the judge must follow the most recent authority unless one or more of these three criteria are met. These criteria do not detract from the narrow circumstances in which a lower court may depart from binding vertical precedent".

(b) Would the MMP be grossly disproportionate in reasonably foreseeable cases?

and if the answer in either case is "yes", the MMP violates s. 12 of the *Charter*[3]. Then one must inquire whether or not the violation is justified under section 1 of the *Charter*.

[19] In *R. v. Lloyd*, the Supreme Court of Canada concluded that a provincial court judge has the power to consider the constitutional validity of the challenged sentencing provision, and that the effect of a finding by that court that a law does not conform to the Constitution is to permit the judge to refuse to apply it.[4]

[20] While I am of the view that the MMP may not be grossly disproportionate in the case of this accused, in these circumstances, I continue to be of the view that the mandatory minimum punishment for the offence of sexual interference is grossly disproportionate in light of reasonably foreseeable cases, one of them being that which I considered in *R. v. Gargan*, and that it is unconstitutional.

[21] As my colleagues previously stated in the matters of *R. v. Lafferty*[5], *R. v. R.A,*[6] *R. v. Pye*[7]; and the Ontario Supreme Court in *R. v. Drummonde.*[8] and as the Supreme Court of Canada wrote in their decisions of *Nur*[9] and *Lloyd*[10], because the mandatory minimum sentence of imprisonment applies to all offenders having committed any form of sexual assault on a victim aged anywhere between 1 day and 16 years, it is vulnerable to *Charter* scrutiny.

[22] Reasonable hypothetical scenarios in cases such as *R. v. R. A., R. c. Gagnon*[11], *R. v. Hilan*[12], *R. v. Burton*[13] and *R. v. Akplogan*[14], as well as *R. v. Ford*[15] suggested that an appropriate range of sentence for situations involving "minor, momentary touching, would call for a sentence ranging from a suspended sentence to a conditional sentence, or at the most, a custodial sentence measured in days, not months".

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[3] R. v. Nur, 2015 SCC 15, at par. 46; R. v. R.A., op. cit. at par. 34; R. v. Lafferty, 2020 NWTSC 4
[4] 2016 1 R.C.S. 13 at par. 19 (Defense Book of Authorities, at tab 7)
[5] 2020 NWTSC 4
[6] 2019 NWTTC 10
[7] 2019 YKTC 21
[8] 2019 ONSC 1005
[9] 2015 SCC 15
[10] 2016 SCC 13
[11] 2018 QCCQ 9569
[12] 2015 ONCA 455
[13] 2012 ONSC 5920
[14] 2018 QCCQ 3024
[15] 2019 ABCA 87

[23] I endorse the view expressed by Gates, J. in *R. v. Esposito*, that the possible existence of valid effective alternatives to the mandatory minimum sentence is relevant to the analysis under section 1.[16] Such alternatives in the present case would include a suspended sentence, a conditional sentence order, and an intermittent sentence of imprisonment. Gates J. reviewed a number of decisions which, according to him, "confirm that Conditional Sentence Orders were imposed in a number of these types of cases prior to the introduction of mandatory minimum sentences".[17]

[24] I note that the Crown has not presented evidence or arguments to justify the breach of s. 12 of the *Charter.* Although I may not declare section 151 *CC* to be of no force and effect, I may decline to impose the mandatory minimum punishment. I find that the provision is not saved by section 1 of the *Charter*, and accordingly, I decline to impose the mandatory minimum punishment.

B. DETERMINING A FIT SENTENCE

[25] According to the facts which I have reviewed, the victims were under the age of 16, and they are considered as children in the eye of the law, while the accused, who was 18 at the time of the offences, is considered as an adult in the eye of the law. In many respects, however, he was not an adult.

[26] Sentencing is an individualized process, which is guided by the fundamental principle of proportionality. Even as the Supreme Court of Canada tells the lower courts that sentences for offences of sexual violence against children must increase[18], they still reiterate that proportionality remains the primary principle.

[27] There were three incidences of sexual interference, perpetrated on two different occasions. One victim was subjected to sexual violence twice. Each occurrence was brief, and in each case, the victim repelled the violence, or the accused was rapidly interrupted. The touching varied in degrees of intrusiveness, the last incident being the most egregious. The victims were teen-agers. They were vulnerable persons, yet, they were able to defend themselves against the accused, which made the violence stop.

[28] A number of statutorily aggravating factors are present, requiring that emphasis be placed on denunciation and deterrence:

(a) The victims are under the age of 16 (s. 718.01 and 718.2 (ii.1) *CC*);

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[16] op. cit. at par. 106
[17] op. cit. at par. 143
[18] R. v. Friesen, 2020 SCC 9

(b) The victims are vulnerable people as contemplated at s. 718.04 *CC*, being indigenous and female;

(c) The offence had a significant impact on the victims (s. 718.2 (iii.1) *CC*).

[29] There are mitigating factors: the accused entered a guilty plea, which spared the victims from having to testify and brings closure to them; the accused is taking responsibility for his actions, and he appears to be genuinely remorseful; he also does not have a criminal record.

[30] The accused is an aboriginal offender, as contemplated by section 718.2 (e) *CC*, and I must pay particular attention to his personal circumstances.

[31] A pre-sentence report was filed. While not construed as what may be known as a "*Gladue Report*", this report is very thorough, and contains detailed information about the accused's circumstances, including documents referring to the early detection of his cognitive impairments, and how these impairments have affected the accused.

[32] From the PSR, we learn that Social Services apprehended Austin Tetso when he was 18 months old, due to family violence perpetrated in his home. He was placed with a foster family in Fort Simpson, and he was adopted by them when he was four years old. He has had no significant contact with his biological family and relatives from Fort Providence since that time.

[33] He was diagnosed with Fetal Alcohol Spectrum Disorder and Attention Deficit Hyperactivity Disorder at an early age. The author of the pre-sentence report wrote: "Austin presented with many of the primary disabilities that individuals impacted by Fetal Alcohol Spectrum Disorder live with as well as with dysmaturity. His adoptive mother reported that "Austin does not comprehend consequences, and that his mental maturity is not that of an adult due to the impact of Fetal Alcohol Spectrum Disorder."

[34] His family background shows that his sister died suddenly in January 2019, and that he has had difficulty coping with this. He said that he felt anxiety, fear, loneliness and despair. He described his feelings as: "I got lost. I felt lost. That's what happens when your mom tries to do that to you, and I was not ready for it. She took me to the morgue to pick up her body and her body was cold, and I put my sister in the casket. Mom made me help with that."[19] An older brother, born to his

[19] Pre-sentence Report at page 6 (Health and Physical Data)

biological parents, was murdered at about the same time, and this too was difficult for him to cope with.

[35] His biological father, and his paternal grandparents attended residential school. His adopted parents also are residential school survivors. The author of the pre-sentence report adds that both communities of Fort Simpson and Fort Providence "have considerably high numbers of individuals and families that have been impacted by the residential school systems. Generational and intergenerational historical trauma have been contributing factors in the prevalence of violence, sexual violence, and substance abuse within these communities that continue today."

[36] He is described as having "struggled throughout his school years, including the bullying and frustration of his teachers due to his behavioural and academic process.

[37] Through the structure and support of his adopted parents, Austin was able to navigate these challenges and complete his education." Despite his cognitive challenges, he graduated from high school.

[38] He also received "traditional education through the teachings of his adopted father, who taught him how to trap, hunt, fish, build, repair and maintain a cabin."

[39] Since being charged with the offences, he and his spouse have moved to live in Hay River, with her parents. His spouse has recently given birth to a baby boy, and he looks after his son while she works. He currently does not work. They recently accessed their own housing unit. Last year, he travelled to Fort Simpson to help the community cope with a severe flood that occurred in the spring when the ice broke on the rivers Liard and Mackenzie. As I write these words, the whole community of Hay River was ordered to evacuate on May 12th, 2022, due to a major flood. Their current housing status is unknown at this time as a result of this catastrophic event, and they were temporarily displaced.

[40] The case before me presents opposing principles. On one end of the spectrum, the sexual violence was committed against young persons, under the age of 18. There were two victims, and the violence was repeated. Both victims are vulnerable persons, being female and indigenous. The impact of the offences on the victims was significant. This requires the sentence to prioritize the objectives of denunciation and deterrence.

[41] At the other end of the spectrum, the accused is indigenous and youthful, and he does not have a criminal record. He has FASD and ADHD, and he is described as immature.

> While s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality.[20]

[42] In the matter of *R. v. Ramsay*, the Alberta Court of Appeal was of the view that:

> A diagnosis of FASD also affects the principles of denunciation and deterrence (both specific and general). (...) The degree of moral blameworthiness must (...) be commensurate with the magnitude of the cognitive deficits attributable to FASD[21].

[43] These circumstances militate in favour of restraint, based on a lower moral blameworthiness of the accused. Because of his cognitive challenges, he may not have appreciated the wrongfulness of his actions, including the fact that he was giving alcohol and drugs to underage persons. He may not have appreciated the impact of the age difference between him and the victims. He definitely was not alive to the fact that the victims were not consenting to the sexual acts, and he was oblivious to their protests. He said to the author of the pre-sentence report that upon using cannabis, he felt ill, he had a bad headache and he had difficulty breathing due to his asthma. "He recalls that he did not feel right about the situation and attempted to leave, however, he was physically prevented from leaving by being grabbed by his sleeves and pants. Austin commented: "I tried to push them (victims) away. I tried to leave, but they were grabbing my sleeves and pants, like to keep me with them. I thought they liked me. I didn't have a girlfriend before."

[44] In many respects, because of his cognitive limitations, Mr. Tetso is a vulnerable person too. He is described in the Pre-sentence Report as having been bullied as a child, and that "he felt rejected by his peers growing up due to constant bullying throughout his elementary and high school years due to his cognitive impairments and would often comply with his peer's (sic) suggestions as a means of feeling accepted by them." His adoptive mother described him as "a follower, and due to his cognitive impairments, is easily influenced and manipulated by his peers."[22]

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[20] R. v. Friesen, op. cit, at par. 104
[21] 2012 ABCA 257
[22] Pre-sentence Report at p. 5 (Social and Emotional Data)

[45] The Defense presented the additional following arguments in support of reasonable alternatives to imprisonment:

(a) There is no "appropriate place" in Hay River where the accused may serve an intermittent sentence;

(b) Jail may be harmful to the accused due to his special needs;

(c) Jail, even intermittent would likely punish the accused's family, since his common law spouse may have to stop working in order to care for their child. She is the current breadwinner. They would lose their housing. The domino effect would also be that this would have an impact on his rehabilitation; and

(d) The passage of time has been beneficial to the accused: the process of bail supervision has given him a structure, and he has made positive choices and he engages in pro-social conduct;

[46] This matter has taken time to come to completion due to the occurrence of the Covid-19 pandemic, which prompted court closures and adjournments between March 2020 and January 2022. The date of sentence was set to be May 16th, 2022. The matter was adjourned sine die, with a direction that the accused be re-summonsed at a later date, as the community of Hay River was under an evacuation order issued May 12th.

[47] I further note that he has been out on conditions for almost three years, and there is no allegation of breach.

[48] There is a mention in the pre-sentence report that he has been supervised by a probation officer for a period of time which ended in 2021, and the author noted that "he requires structure and support to address his cognitive impairments and to learn social skills to abstain from criminal behaviours."[23]

[49] According to his spouse, and to local RCMP officers who have dealt with him in the past, Mr. Tetso appears to be engaged in a rehabilitation phase. He is described as being focused on his family life and taking care of his infant son.

[23] Pre-sentence Report at p. 8 (Suitability for Probation)

[50] As I wrote in *R. v. Kapolak*[24],

> Considering the circumstances of the offence, and despite the aggravating factors, I find that a term of imprisonment is not the only reasonable sanction. For a first offender, sentencing usually focuses on rehabilitation. There is nothing to say that a community-based sentence would not work for this accused. The risk to reoffend that this accused presents because of the impulsivity associated with his condition, as well as his intellectual limitation, is compensated by the fact that he benefits from family support. He has a home in which supervision may occur, and he has shown that he is able to comply with conditions.
>
> For an offender with challenges to his executive functions, repetition of instructions, structure, and professional follow-up, appear to be key[25]. A carefully crafted conditional sentence order can bring the necessary restrictions to a person's freedom while providing these rehabilitative tools, and thus achieve deterrence. A short sentence of imprisonment, which could be served intermittently, would also achieve this objective. As the Alberta Court of Queen's Bench wrote in the matter of *R. v. Esposito*[26], "while a jail term is most commonly associated with a sentence that emphasizes deterrence and denunciation, it is important to recall that the Supreme Court in *Proulx*, [2000] 1 S.C.R. 61, concluded that a conditional sentence is "also a punitive sanction capable of achieving the objectives of denunciation and deterrence.": at para. 22".

[51] Although the context is different, the observations are relevant and applicable in the situation of Mr. Tetso.

[52] The following circumstances which I considered in the case of *R. v. Kapolak* also apply to Mr. Tetso:

> The most significant aspects here are that the accused is a very young adult, and that he appears to have [no] limited experience with the courts or with jail. For any person in that situation, any length of time spent in jail may be traumatising, whether or not his cognitive abilities are impaired. I consider that the impact of a jail sentence on this accused may be disproportionate to the actual need for deterrence and denunciation.
>
> Also, because this is a first sentence for this offender, there is no objective evidence to suggest that jail is the only way to deter this accused, and that education and counselling would not be an appropriate way to address the root causes of the offending behaviour.

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[24] T-1-CR-2019-001114, Reported at
[25] Neuro-Developmental Assessment Report, at p. 5, last two paragraph
[26] [2020] A.J. No. 303

[53] In fact, there is specific demonstration that through repetition and positive reinforcement, this young man has made significant progresses and has gained in maturity, as can be read in the pre-sentence report.

[54] In his present circumstances, the risk that the accused re-offends is low, because of the strong family support that he enjoys, the fact that he discontinued his use of alcohol and drugs, the fact that he does not have a criminal record, and the insight that he has gained about the impact of his actions on the victims since the commission of the offence.

[55] Taking into account the circumstances of the offence, the aggravating factors, the mitigating factors and the personal circumstances of the accused (which include important *Gladue* factors), the seriousness of the offence, but the low moral blameworthiness of accused due mainly to suffering from Fetal Alcohol Spectrum Disorder, I find that a term of imprisonment is required to denounce the accused's conduct and deter him and others. However, I am also of the view that this sentence would be for less than two years, I am satisfied that the service of the sentence would not endanger the safety of the community, and that the sentence would be consistent with the fundamental principles and purposes of sentencing set out in section 718 to 718.2 of the *Criminal Code*.

[56] Having declared that the mandatory minimum penalty should not be imposed as it violates section 12 of the *Charter*, while not being saved by its section 1, and the offence not being one contemplated at paragraphs (c) to (f) of section 742.1, I find that a conditional sentence of imprisonment is a reasonable alternative to imprisonment pursuant to section 718.2 (e) of the *Criminal Code*, in light of the personal circumstances of the accused. This type of sentence for this offender, in these particular circumstances, is capable of achieving the objective to hold him accountable for his actions; it will assist in his rehabilitation, promote a sense of responsibility, and the overall sentence, due to its length, will achieve the necessary denunciation and deterrence required under the circumstances.

[57] I have considered the recent decision by the Supreme Court of Canada in *R. v. Parranto*, and I take note of their view that starting points must be properly treated as non-binding guidance by sentencing courts. Starting points and sentencing ranges are quantitative tools to assist the sentencing court craft a fit and proportionate sentence. If I am found to have departed from a sentencing range or starting point, I feel that this was necessary in order to achieve proportionality, given the personal circumstances of this accused as a youthful indigenous person, whose moral blameworthiness is affected by Fetal Alcohol Spectrum Disorder.

C. CONCLUSION

[58] In conclusion, I order that Austin Tetso serves a conditional sentence of imprisonment for 18 months, in the community, pursuant to section 742.1 to 742.3 *CC*.

[59] This will be followed by a supervised period of probation for two years.

[60] In addition, the offender shall provide a sample of bodily substance suitable for DNA analysis, pursuant to section 487.051 *CC*. This order is mandated because the offence of sexual interference is a primary designated offence pursuant to section 487.04 *CC*.

[61] I further direct the offender to comply with the Sex Offender Information Registration Act for a period of 10 years.

[62] Although the Crown acknowledged that section 161 *CC* is engaged, they are not seeking that the order be made, and I agree that it is not necessary.

[63] I also turned my mind as to the fitness of making an order pursuant to section 110 of the *Criminal Code*, and given the lack of criminal record, and due to the disposition of the accused, I find that it is not necessary to make this order.

[64] The conditions of the CSO will be listed in the attached Annex A.

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Christine Gagnon
Deputy Judge of the Territorial Court

Dated the 18th day of August, 2022
at Yellowknife, Northwest Territories

R. v. Tetso, 2022 NWTTC 04

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[Section 151 of the *Criminal Code*]