*R. v. T.F.* *2008 NWTTC 11*

*Y-1-YO-2007-213*

**IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- and -**

**T.F.**

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**REASONS FOR SENTENCE**

**of the**

**HONOURABLE JUDGE ROBERT D. GORIN**

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| ***Heard at:*** | ***Wha Ti, Northwest Territories*** |
| Date of Decision: | July 23, 2008 |
| Counsel for the Crown: | R. Sheppard |
| | J. Noseworthy |
| Counsel for the Accused: | D. Rideout |
| | J. Bran |

(Charged under s. 271 of the *Criminal Code*)

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## INTRODUCTION

[1] T.F., a young person, has pleaded guilty to and been found guilty of a single count of sexual assault contrary to section 271 of the *Criminal Code*. The single count covers two occasions when T.F. had forced intercourse with his 13-year-old victim. T.F. was 14 during the dates charged. He is now 15. He has no criminal record.

[2] It is my task to impose a fit and proper sentence having regard to all of the applicable provisions of the *Youth Criminal Justice Act ("YCJA")*. Under the circumstances, the issue which I believe I must first determine is whether s. 39(1) of the *YCJA* permits a custodial sentence to be imposed.

## SECTION 39(1) *YCJA*

### Analysis

[3] Crown counsel argues that ss. 39(1)(a) and (d) of the *YCJA* allow custody to be imposed in the present circumstances. Counsel for T.F. argues that they do not. Counsel are in agreement, as is this court, that subsections (b) and (c) are inapplicable.

[4] Subsections 39(1)(a) and (d) of the *YCJA* provide:

> (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;
> ……..
> (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.

**"Violent Offence"**

[5] The term "violent offence" is not defined in either the *YCJA* or the *Criminal Code*. In *R. v. C.D.; R. v. C.D.K.,* [2005] 3 S.C.R. 668, the Supreme Court of Canada defined the meaning of the term "violent offence" found in s. 39(1)(a). The Court held that for the purposes of s. 39(1)(a) of the *YCJA*, the term "violent offence" must be defined as an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm: see *C.D.,* para. 87.

[6] Therefore, in order for s. 39(1)(a) to apply, I must find that "bodily harm" was caused, threatened or attempted. The evidence I have before me does not establish that physical injury was caused, threatened or attempted. However, "bodily harm" is not limited to physical injury.

[7] In *C.D.* the Supreme Court of Canada rejected a force-based definition of violent offence in favour of the harm-based definition previously set out: see *C.D.,* para. 65. In doing so the court considered that ss. 98(4)(a)(i) and 104(3)(a)(i) of the *YCJA* provide that, for the purposes of determining an application for the continuation of custody, the

youth justice court must take into consideration any factor that is relevant to the case of the young person, including evidence of a pattern of persistent “violent behavior”. The number of offences committed by the young person that caused physical or psychological harm to any other person is identified as a particular indicator of such behavior: see *C.D.,* para. 66.

[8] The majority in *C.D.* stated:

> ……..Since the *YCJA* already considers offences involving physical or psychological harm as examples of “violent” behavior”, on the basis of contextual integrity it follows that these offences should also be considered “violent” offences for the purposes of s. 39(1)(a). This result will indeed occur if a definition of “violent offence” based on the concept of bodily harm is used, as such a definition would include both physical and psychological harm: see *McCraw*, at p. 81. However, if a forced-based definition is used, only those harm-causing offences that involve the use, attempted use or threatened use of force will be caught.
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> See: *C.D.,* para. 66 (emphasis mine).

[9] The term “bodily harm” used by the Supreme Court of Canada in *C.D.* includes both physical and psychological harm. In *C.D.*, the majority, in defining the related term “serious violent offence”, referred to its previous judgment *R. v. McCraw*, [1991] 3 S.C.R 72, in which the term “serious bodily harm”, previously used in s. 264.1(1)(a) of the Code, was considered. At para. 20, the majority in *C.D.* noted:

> …….Although the concept of "bodily harm" is not defined in the *YCJA*, s. 2(2) of this *Act* states that "[u]nless otherwise provided, words and expressions used in this *Act* have the same meaning as in the *Criminal Code*." Section 2 of the *Criminal Code* defines "bodily harm" as "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". In *R. v. McCraw*, [1991] 3 S.C.R. 72, Cory J., writing for a unanimous Court, relied on this definition of "bodily harm", as well as the dictionary definition of "serious", to interpret the meaning of "serious bodily harm" for purposes of s. 264.1(1)(*a*) of the *Criminal Code* as it was worded before February 15, 1995. Specifically, Cory J. held 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"…….

[10] In order for s. 39(1)(a) of the *YCJA* to apply, “bodily harm” must be caused, attempted or threatened. However, it is not necessary that “serious bodily harm” be caused, attempted or threatened. It is apparent that the majority in *C.D.* has adopted the definition of “bodily harm” found in s. 2 of the *Criminal Code*: “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.” For an offence to be a “violent offence” within the meaning of s. 39(1)(a) of the *YCJA*, it is not required that the hurt or injury “interferes in a substantial way with the health or well-being” of the victim.

[11] Counsel for T.F. points out that in *R. v. McDonnell*, [1997] 1 S.C.R. 948, the Supreme Court of Canada held that it is not permissible to presume psychological harm in cases of sexual assault. Rather, as is the case with all aggravating factors, the onus is on the Crown to prove beyond a reasonable doubt that the victim suffered psychological harm as a result of the sexual assault. McDonnell was sentenced for two sexual assaults. Some of the important facts in *McDonnell* are similar to those now before me. Although McDonnell was an adult who was much older than T.F., his victims were 14 and 16 years of age. The earlier of the two sexual assaults, in which case the victim was 16 years of age, involved forced sexual intercourse.

[12] While the majority in *McDonnell,* at para. 34*,* noted that it is established that "…psychological harm from a sexual assault may be considered bodily harm", it also stated, at paras. 36 & 37:

> ……. *McCraw*, supra, established that a threat to commit sexual assault amounted to a threat to commit assault causing bodily harm because of the high likelihood of psychological harm resulting from a sexual assault, a likelihood recognized by the Court of Appeal in the present case. Such a likelihood does not, however, establish a legal presumption of harm in cases involving an actual assault as opposed to a threat. If harm is an element of the offence, the Crown must prove its existence beyond a reasonable doubt.
>
> To the extent the Court of Appeal held that the Crown need not prove psychological harm in some instances, but rather such harm may be presumed it was in error. As stated above, if the Crown wishes to rely upon the existence of psychological harm, in my view the Crown should charge under the section set out in the *Code* that contemplates harm, section 272(c), and prove the offence. If an element of the offence, bodily (psychological) harm is presumed, the Crown is improperly relieved of part of the burden of proof, which is contrary to the presumption of innocence. Accepting that harm may be an aggravating factor under s. 271, *R. v. Gardiner*, [1982] 2 S.C.R. 368, held that each aggravating factor in a sentencing hearing must be proved beyond a reasonable doubt. Such an approach is confirmed by Parliament in the new s. 724(3)(e) of the *Criminal Code* (as amended by S.C. 1995, c.22 s. 6). If psychological harm may be presumed, the burden of proving harm as an aggravating factor is improperly lifted from the Crown and shifted to the accused to disprove harm.

[13] I conclude that where a young person is found guilty of sexual assault, in order for s. 39(1)(a) of the *YCJA* to apply, the bodily harm alleged by the Crown must be proved beyond a reasonable doubt. If the Crown wishes to rely on psychological harm it must prove beyond a reasonable doubt that psychological harm occurred and that the psychological harm was more than merely transitory or trifling in nature.

[14] The Crown suggests that s. 39(1)(a) of the *YCJA* applies in all cases of sexual assault. Alternatively it suggests that the subsection applies in all cases of sexual assault on a child. I reject both suggestions. Sexual assault is the intentional application of force of a sexual nature on another person without that person's consent. Consequently, s. 271 of the *Criminal Code* prohibits a broad range of misconduct. Both the seriousness and the impact of sexual assaults on victims can vary greatly. Based on the wide ambit of s. 271 as well as the case law I have previously referred to, I conclude that in order for s. 39(1)(a) of the *YCJA* to apply, the Crown must specifically prove that "bodily harm", within the meaning of s. 2 of the *Criminal Code* was caused, attempted or threatened. Proving that a sexual assault on an adult or child has occurred does not by itself relieve the Crown of this obligation.

***Has Psychological Harm been established?***

[15] Physical harm may be established without expert evidence. Similarly, psychological harm may also be established without expert evidence. In both cases, the court may find bodily harm as a result of agreed facts, the evidence of the victim and/or other lay-witnesses, or other non-expert evidence.

[16] On the facts admitted by T.F., the victim's reaction to both offences was as follows:

- October 31, 2007: In a statement to the police T.F. stated that his 13-year-old victim was upset after the incident of forced sexual intercourse.

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ovember 8, 2007: A person who saw this second occasion of forced sexual intercourse in progress first thought that T.F. and the victim were hugging but noticed that T.F.'s pants were down and that the victim was being held and that she had a sad face at the time. When the victim came out of the bushes she was observed to be upset and said that she was scared.

[17] The foregoing information was the only indication of the impact which the sexual assaults had on the victim, which was put before the court prior to the guilty plea being accepted and T.F. being found guilty as charged.

[18] The pre-sentence report states that the victim was contacted on April 2, 2008, by the author of the pre-sentence report. She advised the author that she was doing okay and that she tries not to think of the assault.

[19] The only further information having to do with the consequences experienced by the victim are set out in her victim impact statement, written on January 18th of this year. The victim impact statement was unsealed and copies of it were provided to both counsel immediately after T.F.'s guilty plea was accepted. Neither defence counsel nor crown counsel took issue with any portion of the victim impact statement when I asked them if they had any difficulty with its content.

[20] Although, the victim impact statement was unsealed and reviewed after I found T.F. guilty, I am confident that I can consider it in determining whether or not bodily harm has been established beyond a reasonable doubt. The rules of evidence are somewhat relaxed during sentencing hearings.

[21] In the victim impact statement, the victim states that following the incident, she "felt lots of feeling." She stated that following the first incident she felt very upset. She said that she was crying. She also felt confused, about why T.F. had sexually assaulted her. She felt scared and nervous that he might do it again.

[22] She said that following the second incident, she felt pain all over her body. She said that she felt pain because she felt foolish to let him do what he did. She said that because her friends knew what was going on, she had pain all over her body. She felt pain as a result of her friends asking her questions about what happened.

[23] I conclude that it has been established beyond a reasonable doubt that the victim has suffered psychological harm which was, at the very least, more than merely trifling. She experienced strong negative emotions. Following the first incident she felt very upset. This is understandable given the nature of the highly invasive assault which she suffered.

[24] Following the second incident she felt pain all over her body. To some degree the pain was caused by the fact that her friends knew what had happened and that her friends asked her questions about what had happened on the first occasion. Precisely what caused her pain is not completely clear. However, it is indisputable that the second occasion of forced sexual intercourse was a direct contributing cause of this further psychological harm.

**CONCLUSION**

[25] I have concluded that it has been established beyond a reasonable doubt that "bodily harm" was caused to T.F.'s victim as a result of the two occasions of forced sexual intercourse encompassed in the single count of which he has been found guilty. It therefore follows that the court has the power to impose custody pursuant to s. 39(1)(a) of the *YCJA*. I therefore need not consider whether or not s. 39(1)(d) of the *YCJA* is applicable.

**SENTENCE**

[26] Subsection 39(2) of the *YCJA* states:

> (2) If any of the 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.

[27] I have considered all of the applicable sections of the *YCJA.* I am taking into account that the foremost sentencing principle I am required to address is T.F.'s rehabilitation and reintegration into society.

[28] The ultimate purpose of sentencing a young person is set out in 38(1) of the *YCJA*. The subsection states:

> 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.

[29] I must also address proportionality. As stated in s. 38(2)(c) of the *YCJA*:

> (c) The sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

[30] I take into account the purpose of sentencing, the sentencing principles and the factors to be considered set out in s. 38 of the *Act*. I take into account the fact that T.F. is now 15 years old and was 14 on the dates he sexually assaulted his victim. I take into account that he has no prior criminal record. I also take into account he is aboriginal and resides in a very traditional community. However, I must also take into account the harm done to his victim as well as the fact that the harm done was reasonably foreseeable. Under all of the circumstances I conclude that anything short of custody is not capable of achieving the purpose of sentencing set out in s. 38(1) of the *YCJA*.

[31] There must be meaningful consequences proportionate to the gravity of the offence having regard to T.F.'s age. The punishment must reflect the seriousness of the offence committed by T.F. T.F. raped his 13-year-old victim on two separate occasions. As a consequence, he has caused her foreseeable and significant psychological harm. I believe that if I were to impose anything less than custody, I would not be adequately addressing the need for proportionality or meaningful consequences. I think that I would be sending T.F. the wrong message.

[32] There will be 240 days of custody and supervision in the community. 160 days of secure custody will be followed by 80 days of supervision in the community.

[33] The custody and supervision order will be followed by a period of probation of 12 months duration. The probation order will contain the following conditions in addition to the statutory terms:

- He is to report to his youth worker immediately upon his completion of the 240 days of custody and supervision. He is to report thereafter as directed by his youth worker.

- He is to participate in any and all counseling directed by his youth worker. Such counseling is to include but is not limited to counseling on sexually appropriate behavior.

- He is to have absolutely no contact whatsoever, either directly or indirectly with his victim. The only exception will be where such contact is necessary for educational purposes in school or in school sanctioned activities.

[34] There will be a DNA authorization. T.F. has been convicted of an offence which is listed in section 487.04 of the *Criminal Code* as a "primary designated offence" in subsection (a.1) of that definition. The limited exception set out in 487.051(2) of the *Code* is not satisfied.

[35] There will also be a mandatory firearms prohibition order pursuant to section 109 of the *Criminal Code* and Section 51 of the *YCJA*. It will be for the minimum duration allowed for in subsection (2) of 51. Therefore, there will be an order prohibiting T.F. from possessing any firearm cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for a period of time beginning today and ending 2 years after he has completed the custodial portion of his sentence.

[36] I thank both counsel for their capable assistance in this matter.

Robert D. Gorin
J.T.C.

Dated this 23rd day of July, 2008 in the
Hamlet of Wha Ti in the Northwest Territories

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