

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

L.M.

**REASONS FOR SENTENCE
of the
HONOURABLE JUDGE ROBERT D. GORIN**

Corrected Judgment: A corrigendum was issued on December 14, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

Restriction on Publication

Identification Ban – see *Criminal Code*, s.486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

Publication Ban: Information contained herein is prohibited from publication pursuant to ss.110 and 111 of the *Youth Criminal Justice Act*

Note: This judgement is intended to comply with the identification and publication bans.

Heard at: Yellowknife, Northwest Territories

Date of Decision: December 27, 2018

Counsel for the Crown: Annie Piché and Brendan Green

Counsel for the Accused: Peter Harte and Alanhea Vogt

[Sections 236(b), 272(c), 348(1)(a), 145(5.1), 145(3), and 88 of the *Criminal Code*]

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REASONS FOR SENTENCE

1. Introduction

[1] L.M. comes before the court today to be sentenced on a number of offences he has committed between October of 2015 and November 2017. Those offences include a count of manslaughter contrary to s. 236 of the *Criminal Code*, of which he was found guilty after trial, and a related count of sexual assault causing bodily harm contrary to s. 272(1)(c), to which he pleaded guilty. Both offences arose from the same set of circumstances on October 3rd, 2015, when he was 13 years old.

[2] He has also pleaded guilty to four further offences that he committed since that time. Those offences include: breaking and entering with intent to commit an indictable offence contrary to s. 348(1)(a) of the Code; breaching an undertaking given to a peace officer contrary to s. 145(5.1); breaching an undertaking given to a judge contrary to s. 145(3); and possession of ammunition for a purpose dangerous to the public peace contrary to s. 88.

2. Analysis

[3] The facts of the manslaughter count and the count of sexual assault causing bodily harm are extremely serious. I have already dealt with them in detail in the judgment, in which I found L. guilty of the manslaughter count and accepted his guilty plea to the sexual assault. I do not propose to set them out in the same detail as I have in the judgment where I gave my reasons for convicting him. However, for the purpose of providing my reasons for the sentence I am imposing, I think it useful to provide a synopsis of the events.

[4] L. and his friend D.S., who was 15 at the time, consumed alcohol with the victim E.B., a 12-year-old girl. The three were walking outside in the evening while the weather was moderately cold. The alcohol the three consumed was L.'s. He encouraged E. to drink and effectively had control of his bottle throughout the time she was drinking from it. He continued to supply her with alcohol while she was showing the effects of gross intoxication. When she passed out, D. suggested that they get help for her. L. responded by saying that it was D.'s only chance. L. then took the opportunity to rape E. and in so doing, caused a laceration to her vagina.

[5] After L. had finished raping E., he encouraged his friend D. to do the same. D. did not have actual intercourse with E. but pretended to do so while L. was watching. D. then once again suggested that they get help for E. L. responded by saying that she would be fine. The two left her where she was.

[6] E. was found dead the next morning by D. when he checked up on her. She had died from alcohol poisoning.

[7] I found that L.'s conduct in illegally providing the 12-year-old E. alcohol contrary to the *Liquor Act*, in the manner he carried out, constituted a marked

departure from the standard of conduct of a reasonable 13-year-old and that it would be foreseeable to a reasonable 13-year-old that the conduct could result in E. suffering non-trivial bodily harm and that therefore illegal act manslaughter was made out. I further found that this conduct also constituted a *marked and* substantial departure from the same standard and that criminally negligent manslaughter was also made out in respect of the same conduct. Additionally, I held that in supplying the already heavily intoxicated E. with alcohol as he did, he knowingly ran the risk that she would suffer bodily harm that was more than transitory and trifling.

[8] Finally, I found that L.'s conduct in leaving her as she was, without getting her help to deal with the dangerous situation to which he had contributed, lessened the real chance of survival that she otherwise would have had. I found that once again, his conduct constituted a marked and substantial departure from the standard of a reasonable 13-year-old, that bodily harm was foreseeable to a reasonable 13-year-old. I therefore concluded that criminally negligent manslaughter was made out on this basis as well. I once again also found that subjective recklessness was present; that by leaving her as she was without getting help for her, L. knowingly ran the risk that E. would suffer non-trivial bodily harm.

[9] I think it important to note that in making the foregoing findings, I was not finding, as urged by defence counsel, that the applicable standard for the objective *mens rea* required by manslaughter was that of a reasonable person of the same age as L. Crown counsel took the position that the applicable standard was that of a reasonable adult as set out in *R. v. Creighton*, [1993] 3 S.C.R. 3, a case which was dealing with an adult offender rather than a young person. I am unaware of any appellate case-law that clearly deals with the issue. While I certainly find the position of L.'s counsel attractive, I was of the view that I did not need to make the determination since even if the standard he proposed were applied, the objective *mens rea* of the offence was made out as I have summarized in the preceding paragraphs.

[10] The facts of the other offences L. has since committed were read in by the Crown and admitted by him on September 14th of this year, the same date that I heard the sentencing submissions of counsel.

[11] In June of 2017, L. along with several other youths broke into the hamlet office in Fort Liard. \$3,000 worth of items was taken. The vast majority of the items were recovered and returned. L. did not commit any of the thefts. However he was one of the youths that entered the band hall. While inside, he intentionally set off a fire alarm that was ultimately responded to by the police.

[12] L. was arrested and placed on an undertaking given to a peace officer, which included a curfew. On July the 18th, 2017, at 2:00 a.m., he was observed to be outside of his home in breach of the curfew.

[13] Following this incident, L. was released on an undertaking given to a Justice with a similar curfew condition. On August 13th, 2017, he was observed to be riding his bicycle, once again after the time when his curfew required him to be inside his residence.

[14] Finally, on November 30th, 2017, L. while at school invited another student to come over to where he was in the classroom and check out what he was doing. L. had put some gunpowder on a sheet of paper which he lit on fire. The flame reached a cartridge that also had some gunpowder in it, which caused a loud bang with the cartridge hitting the wall.

[15] The only victim impact statements provided were in relation to the crimes committed in October of 2015, the manslaughter and sexual assault causing bodily harm. They are comprised of statements from family members, friends and teachers. I have read and listened to the victim impact statements very closely. They powerfully express the very deep grief and pain that L.'s actions have caused all of his victims as well as their negative impact on the entire Hamlet of Fort Liard.

[16] I will not go through all of the victim impact statements in detail. However I will note that based on the victim impact statement of E.'s teacher, it is clear that she and E.'s friends and classmates were traumatized by the incident. Some of them turned to drugs and alcohol to cope. It also appears that many now feel less safe and trusting. One of the victims noted that she is now far more wary of who she has around her as friends. The incident has resulted in a heightened sense of insecurity and vigilance with many young people and parents who live in the community.

[17] E.'s sister states that she did her best to help their mother by putting on as brave a face as possible following the incident. However, she misses her sister very deeply and feels the deep regrets and guilt that family members often feel following the loss of a loved one.

[18] E.'s mother has repeatedly asked herself what she did to deserve the pain E.'s death caused her. She has repeatedly asked herself why it happened to E. and why it happened to herself. A friend of the family describes E.'s mother as having a hole in her heart following the incident. Her emotional wellbeing, stability and behavior were all negatively impacted in a number of ways. These consequences are understandable given the enormity of her loss and the shock of E. losing her life the way she did.

[19] E.'s mother states that she is now filled with anxiety. Her ability to concentrate has been adversely affected. She is receiving counselling when she needs it and has been accessing this support since 2016.

[20] I will not review the entirety of what has happened to E.'s mother since E.'s death. However, I think that the following example illustrates the many ways a tragedy such as E.'s death and the crime that caused it can affect family members and loved ones. E.'s mother used to love autumn since she grew up loving to hunt and having family outings. However, because E. was killed in early October, the change in seasons now brings back to her the time when the RCMP came to her door and told her that her daughter had died. She says that there are occasions when a memory of the day of E.'s death that she did not previously have will return to her suddenly. The emotional impact of the tragedy then hits her yet again.

[21] As a result of E.'s death, E.'s mother suffers from post-traumatic stress disorder, anxiety, depression and insomnia. She still finds day to day tasks such as cooking difficult. E.'s birthday and Christmas time are particularly hard for her. She reports that when she is able to move forward with her recovery, the fact that she has been able to do so will cause her to feel guilty.

[22] L.'s criminal acts on October 3rd of 2015 were extremely serious. They resulted in the rape and death of a 12-year-old girl. They have severely

affected E.'s family members, friends, fellow students, teachers, and the community as a whole. All of the victims continue to miss her every day.

[23] On any applicable standard, L.'s conduct was extremely unreasonable as well as reprehensible. He provided a 12-year-old with liquor, encouraged her to drink more when she was already heavily intoxicated, and when she passed out, took advantage of the situation by raping her rather than following D.'s suggestion that they get help for her. He encouraged D. to rape her as well. After D. had finished simulating intercourse with E., L. and D. left her in her unconscious state alone, outside, in the cold, and in the dark. It may be that L.'s own intoxication contributed to his criminal behavior. However, his intoxication is in no way an excuse for what he did.

[24] L.'s moral blameworthiness was high. He violated the trust of E., who had been his friend. He got her drunk and when she passed out he selfishly used her and left her to fend for herself. Throughout this time he knowingly risked her physical well-being. Manslaughter encompasses a particularly broad range of criminal behavior and moral culpability. I find that on the whole, the facts of the manslaughter offence committed by L. fall toward the more serious end of the continuum.

[25] The facts of the sexual assault were also very serious. As pointed out by Cory J. in *R. v. McCraw*, [1991] 3 SCR 72, at para. 9 "... rape under any circumstance must constitute a profound interference with physical integrity" and at para. 34 "... It is hard to imagine a greater affront to human dignity."

[26] It is difficult if not impossible to separate the sexual assault from the manslaughter when analyzing each offence. However, even if, for the sake of analysis, one were to assume that E. had not died, the facts of the sexual assault would still be appalling. L.'s victim was very young, and in an extremely vulnerable position. As I noted when reviewing the aggravating factors of the manslaughter offence, L. enlisted another person to act as a look out. He raped her while she was unconscious and in so doing caused her an injury that, had she lived, would have taken weeks to heal. After he had finished, he encouraged his accomplice to also rape E., and once it appeared that he had finished, L. left her outside to take her chances.

[27] However, while L. pleaded not guilty to the manslaughter count, he pleaded guilty to the count of sexual assault causing bodily harm. He has also pleaded guilty to all of the other remaining counts, on which I am sentencing him. The guilty pleas have to be considered as mitigating factors on the offences to which they pertain. L. was truly remorseful when he apologized to his victims in court on the last sentencing date. His high level of remorse is also apparent from what I have read in the presentence report.

[28] Additionally, he had no prior convictions at the time he committed all of the offences. He suffered a truly horrible childhood, during which he was repeatedly apprehended by social services and placed in foster care. He grew up witnessing repeated family violence and substance abuse.

[29] The *Gladue* and *Ipeelee* factors set out in the presentence report that has been filed are extensive. Both of L.'s parents attended residential school. His parents admit that L. suffered from verbal abuse and neglect while he was being raised. He grew up with a large amount of alcohol consumption and violence in his home. His family often moved back and forth between Fort Nelson and Fort Liard while he was growing up. He and his siblings were constantly being removed from his home by social services and being placed with different relatives, in particular his grandparents and his aunt and uncle, who at one point wanted to adopt L. in order to provide him with support and structure. However, L.'s mother would not allow the adoption.

[30] L. and his 7 siblings were often separated. After being apart for an extended period, they were reunited in 2017 at which time they were all in a four-bedroom residence along with L.'s parents. Unfortunately, his parents and two older siblings continued to abuse alcohol. His parents would leave the home, sometimes for weeks at a time. As a result, L. would have to stay home and care for his younger siblings and cook for them.

[31] L.'s father acknowledges that L. was exposed to a great deal of alcohol fueled violence in the home. On one occasion L. observed his mother trying to stab his father with a knife. L.'s placements with his aunt and uncle resulted in L. and his father having a less than ideal relationship. His father acknowledges that even though L.'s placement was his fault, he resented it and took it out on L. His

father advises that when he was intoxicated, he would tell L. that he was not liked as much as his brothers and sisters.

[32] L. does not appear to suffer from any cognitive impairment and has been determined not to suffer from FASD. In fact, his principal describes L. as being smart. However, the instability in L.'s home environment caused him to miss a lot of school. His aunt and uncle note that when he was 12 years old his behavior and attitude began to change. He became unpredictable. Although he knew how to be respectful when it benefited him, he became disruptive, unpredictable and non-compliant while at school. He would not recognize authority and would do what he pleased even when his teachers intervened. In short, he became unmanageable.

[33] None of these behavioral problems are is particularly surprising given L.'s very difficult history. I have no difficulty concluding that his background contributed substantially to his criminality during the time frame in which all of the offences occurred.

[34] L.'s education is of paramount importance if he is to become reintegrated with his community. I note that he has been doing much better in his educational endeavors since being placed in pre-trial detention. L. himself states that he is not as distracted as he was when attending school in Fort Liard. He is able to concentrate on his school work, complete his assignments, and understand what is presented.

[35] Although L. claims that the first time he consumed alcohol was on the evening of October 2, 2015, when he was 13, he also states that he first smoked marijuana when he was approximately 6. He says that he started stealing marijuana from his father and that his consumption increased until he began buying it on his own once he was 13. He began smoking tobacco when he was 9 and had become a more regular user by the time he was 12 and 13 years old. At 15 years of age, prior being remanded into custody, he had been using crack cocaine and powder cocaine for 6 months and had also taken a number of other street drugs. At the time of the presentence report he was still experiencing cravings for cocaine.

[36] It is far more difficult to stay out of trouble when one has had a troubled upbringing such as that experienced by L. As pointed out by his counsel, the

Gladue factors that he has experienced are extensive, and I have no doubt that they materially contributed to his criminal behavior. I must consider them as significantly mitigating.

[37] Because L. was a young person at the time of these offences, the maximum period of custody and supervision that I can impose on the count of sexual assault causing bodily harm is 2 years.¹ The maximum period of custody and supervision I can impose on the manslaughter count is 3 years.² And the maximum combined – that is consecutive – period of custody and supervision is also three years.³

[38] I am unable to impose custody on the remaining crimes he committed given their non-violent and more minor nature and also given that L. has no prior record.⁴

[39] The entire duration of all sentences, orders of probation and related orders, imposed in this case cannot exceed three years.⁵ For the benefit of the public who are present here today, notwithstanding the seriousness of the sexual assault and manslaughter offences L. committed, the law does not allow him to be tried as an adult since he was only thirteen years old at the time.⁶

[40] I will also point out that the sentencing goals I have to address are quite different from those that would apply in the case of an adult. This is especially so, given L.'s very young age at the time he committed the offences I have just referred to.

[41] In adult court, the primary sentencing goals would clearly have been denunciation and specific and general deterrence. In youth court, the primary sentencing goals are the protection of the public through the rehabilitation and reintegration of young persons into their community. I must do this by imposing just sanctions that are proportional to the gravity of the offence and thereby bring home to the young person the seriousness of his criminal misconduct. I am able to consider denunciation and deterring L. from reoffending in the future as factors. However, they do not take the precedence they would in adult court. Moreover, I

¹ s. 42(n) YCJA

² s. 42(o) YCJA

³ s. 42(n) YCJA

⁴ s. 39 YCJA

⁵ s. 42(15) YCJA

⁶ s. 64 YCJA

cannot consider general deterrence - deterring others from similar conduct - whatsoever.

[42] I must also consider L.'s pre-trial detention. He has now been detained for a total of approximately 389 days. At L.'s last appearance on September 14th of this year, counsel suggested that I give him roughly one day of credit for each day of pre-trial detention and impose a total of 25 months of custody and supervision, minus the almost 10 months of pre-trial detention he had already undergone. Counsel were jointly suggesting that L. should therefore receive a 15 month custody and supervision order on the mandated two-thirds/one-third allotment between actual custody and supervision in the community. They also suggested 12 months of probation to follow.

[43] I have concerns with allowing only an allotment of one day of credit for each day of pre-trial detention since doing so does not adequately take into account the fact that 10 months of pre-trial detention is the equivalent of the custodial portion of a 15-month custody and supervision order. Moreover, the so-called "truth in sentencing" provisions set out in subsections (3) to (3.4) of s. 719 of the *Criminal Code* do not apply in the case of a young person. It would therefore be possible to take into account both the fact that L's pretrial detention would equal the custodial portion of a custody and supervision order 50% longer and the uncertainty and resulting apprehension that an offender in pre-trial detention often experiences before sentencing.

[44] However, counsel were in agreement that I do so, since their joint submission was for a total sentence that was close to the overall maximum period of 3 years set out in s. 42(15) of the *Youth Criminal Justice Act*, but was necessary, in their view, to rehabilitate and reintegrate him into the community.

[45] I have some concerns that what is proposed constitutes an end-run around the maximums set out in s. 42(15) the *YCJA*. I am also mindful of the fact that s. 29(1) of the *YCJA* states that "A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection mental health or other social measures". As well, s. 39(5) states that "A youth justice court shall not use [*a sentence of*] custody as a substitute for appropriate child protection, mental health or other social measures."

However, Crown counsel notes that in the case of *R. v. I.Z.N.*, 2018 BCCA 141, Madame Justice Newbury speaking for a unanimous court adopted the reasoning set out by the Ontario Court of Appeal in *R. v. M.B.*, 2016 ONCA 760, effectively holding that a judge may decline to give a young person enhanced credit in order to meet the objectives of the *YCJA*.

[46] To my knowledge, the issue has not yet been argued before any court in the Northwest Territories. However, in this case because of the fact that the credit counsel propose for L.'s pre-trial detention is part and parcel of the overall joint submission they have provided, I will accede to their request and endeavor to effectively impose what they were proposing on the date of their submissions three months ago. Given the overall joint position of counsel and the importance of such submissions in the administration of justice, I feel it should be followed. While the joint submission as it concerns the manslaughter offence may be less compelling, given that a trial was necessary, L. has pleaded guilty to all five of the other offences I am dealing with.

[47] Given the limit on the duration of the total sentence set out in s. 42(15) of the *YCJA* that I have previously referred to, in order to impose the joint submission, I must limit the credit for pre-trial detention as they have suggested. It should be noted, however, that in respect of the general issue of whether or not pre-trial detention can be limited or disregarded in order to achieve the sentencing goals of the *YCJA*, this case should be considered as having no precedential value.

[48] I will assume that what counsel were jointly proposing on September 14th of this year, was what they were anticipating I would impose on that same day. I had adjourned the matter over to December 19th because I needed time to consider the submissions of counsel and adequately prepare. I also determined that sentencing should occur in Fort Liard, the community in which the offences all occurred. Due to a number of factors, that date was the first day that sentencing could occur. As well, on the December 19th date, the court was not able to travel to Fort Liard due to adverse weather conditions and the matter was adjourned a further 8 days to today's date. L. should not be penalized due to either delay. He should not spend more time in custody than he would have had he been sentenced on September 14th.

[49] Because counsel were proposing a 15-month custody and supervision order to take effect on September 14th, I need to take into account the further 105 days of pre-trial detention he has undergone since that date. However, in order to limit his actual custody to the 10 months that was being proposed on September 14th, I am giving him 1.5 days credit for each day of presentence detention since that date. He will therefore receive a further 157 days credit to be deducted from the roughly 15 month – or 450 day custody and supervision order. Therefore, the order I am imposing today will be for a total period of 303 days. The actual breakdown is 210 days of custody and supervision on the offence of sexual assault causing bodily harm and 303 days of custody and supervision on the manslaughter with the both terms to be served concurrently. The total will be 202 days of custody and 101 days of supervision in the community.

[50] The only area where counsel were not in agreement was on the type of custody to be imposed. Defence counsel argues that it should be open custody in order to better facilitate L.'s educational endeavors. Crown counsel states that the custody should be secure due to the number of breaches that occurred while L. was on process.

[51] The custody I am imposing is secure custody. I agree with the Crown that the breaches that occurred while he was at liberty are concerning. However, I also recognize that they occurred well over a year ago. Moreover, I agree with L.'s counsel that his education is very important to his rehabilitation and reintegration into society. That said, I note that as of the date that the presentence report was completed, it appeared that L. was doing well while in a secure setting. Since things are going well, I do not want to change his circumstances more than necessary. I note that during the course of the custodial portion of his sentence, there will be options that both he and corrections can access in converting his secure custody to open. However, I have concluded that for the time being, secure custody is more appropriate than open custody.

[52] L., the *Youth Criminal Justice Act* requires that I state the following to you.

You are ordered to serve 202 days in custody to be followed by 101 days under supervision in the community subject to conditions.

If you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and required to serve the rest of the second period in custody as well.

You should also be aware that, under other provisions of the Youth Criminal Justice Act, a court could require you to serve the second period in custody as well.

The periods in custody and under supervision in the community may be changed if you are or become subject to another sentence.

[53] The sentence I have just imposed will be followed by a probation order of 12 months which I am imposing on all of L.'s remaining counts. He will have to report to his youth worker immediately once the supervisory portion of his custody and supervision order has been completed. He will have to report to her when and as directed. He will also have to participate in alcohol and general substance abuse counselling as directed by and to the satisfaction of his youth worker.

[54] There will be a DNA order on both the conviction for manslaughter and the conviction for sexual assault causing bodily harm. Finally, pursuant to s. 51 of the YCJA I am imposing a three-year firearms prohibition on both of those offences as well as the offence contrary to s. 88 of the *Criminal Code*, pursuant to s. 51 of the YCJA.

[55] I have adopted the joint submission because in my view it adequately protects the public by holding L. accountable and promoting his rehabilitation and reintegration into the community.

[56] Notwithstanding the comments I previously made concerning L.'s high level of moral blameworthiness, that level is certainly far less than what would have been the case had he been an adult. Not only was he a young person, he was only 13 years old. In my view, the sentence also respects and responds to his needs as an aboriginal young person.

[57] In conclusion, I wish to say to the victim's that although your statements have been very useful in helping me to understand the impact that E.'s death and the way it happened have had on you, at the end of the day can only imagine the heartbreak and trauma that you experienced and how much you miss E. to this day.

[58] L., I will say to you that although you committed very serious crimes on October 3 of 2015, I do not think you are a bad person. You experienced a lot when you grew up. Your parents were often not there for you and that may well be due to what they experienced when they grew up. You were very young when you committed all of these crimes. You are still very young. You can change and lead a good productive life. Right now you are doing well with your education. You are on the right path. You need to stay on it.

[59] I thank all counsel for their assistance.

“Robert D. Gorin, T.C.J.”

Robert D. Gorin, T.C.J.

Dated at Yellowknife, Northwest
Territories, this 27th day of
December, 2018

Corrigendum of the Reasons for Decision
of
The Honourable Judge Robert Gorin

1. An error occurred in Paragraph 41, page 9: The first name of the minor was indicated.

Paragraph 41 on page 9 has been corrected to read:

[41] In adult court, the primary sentencing goals would clearly have been denunciation and specific and general deterrence. In youth court, the primary sentencing goals are the protection of the public through the rehabilitation and reintegration of young persons into their community. I must do this by imposing just sanctions that are proportional to the gravity of the offence and thereby bring home to the young person the seriousness of his criminal misconduct. I am able to consider denunciation and deterring **L.** from reoffending in the future as factors.
[...]

2. Two file numbers referenced on the cover page, first page and backer were incorrect:

Y-1-YO-2017-000067 and Y-1-YO-2017-000058

Both file numbers have been corrected to read:

Y-2-YO-2017-000067 and **Y-2-YO-2017-000058**

3. The citation has been amended to read:

Citation: *R. v. L.M.* 2018 NWTTC 13.cor1

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