Date: October 1, 2021
File: Y-1-YO-2020-000028
Y-2-YO-2018-000004
Y-2-YO-2019-000065

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

Z.L.

REASONS FOR SENTENCE
of the
HONOURABLE JUDGE DONOVAN MOLLOY

Restriction on Publication

Identification Ban – See the *Youth Criminal Justice Act*, sections 110(1) and 111(1).

No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act*. No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person.

NOTE: This judgment is intended to comply with the identification ban.

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	October 1, 2021
Counsel for the Crown:	Morgan Fane
Counsel for the Accused:	Peter Harte

[Sections 271 x 3 of the *Criminal Code*]
[Sentencing]

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A. INTRODUCTION

[1] Z.L. is a 20 year old Indigenous male from a remote community with less than 1,000 residents. Z.L. has significant cognitive impairments and has been identified as potentially needing the appointment of a Public Guardian.

[2] In 2013, at 13 years of age, Z.L. committed a major sexual assault on a child. On March 21, 2014, after entering a guilty plea, he was placed on an 18 month period of probation with conditions that included treatment and counselling. According to the Defence, very little has been done since that time to address what was then identified as necessary to rehabilitate Z.L., especially by way of treatment for sex offenders.

[3] Z.L. appeared before me on March 1, 2021 and pled guilty, as a young person within the meaning of the *Youth Criminal Justice Act* (*YCJA*), to sexually assaulting three other children from his community. These sexual assaults are extremely serious and involve predatory behaviour by Z.L.

[4] The Crown seeks a custodial disposition, while the Defence seeks a further period of probation, with conditions that include residential treatment for Z.L. Ultimately I must decide what is a fit sentence based on the circumstances of the offence and Z.L.'s circumstances. Arriving at this decision is complicated by the

passage of time since these proceedings began. The delay is in part associated with the COVID-19 pandemic. It results in a situation where if Z.L. is sentenced to custody he will, by virtue of his age and the operation of section 89 of the *YCJA*, serve that sentence in a Territorial correctional facility with adult offenders.

B. CIRCUMSTANCES OF THE OFFENCES

[5] The facts of the offences are reproduced from the Agreed Statement of Facts[1] submitted to the Court:

> **Y-2-YO-2018-000004**
>
> 1. ZL, then 13, sexually assaulted Male Child No.1 (MC1) in August or September, 2014 in an NWT Community;
> 2. ZL anally penetrated MC1 with his penis. MC1 asked him to stop, he did not;
> 3. MC1 then left. MC1 was six years old.
>
> **Y-2-YO-2019-000065**
>
> 4. ZL, then between 13 and 14, sexually assaulted Male Child No.2 (MC2), then between 8 and 9, twice between August, 2014 and July, 2015 in an NWT Community;
> 5. Both sexual assaults involved ZL anally penetrating MC2 with his penis;
> 6. The first sexual assault occurred in the day or days prior to the sexual assault of MC1 described above;
> 7. MC2 was playing with ZL in ZL's room in the afternoon;
> 8. ZL pulled his pants down at which point MC2 told ZL to leave, ZL said no;
> 9. ZL anally penetrated MC2 with his penis on ZL's bed;
> 10. ZL and MC2 went to MC1's grandmother's house and the three returned to ZL's house;
> 11. MC2 observed ZL anally penetrate MC1 with his penis (the sexual assault described above);

[1] Details have been edited to facilitate the efficacy of the publication ban.

12. The second sexual assault arose sometime after ZL sexually assaulted MC1;

13. MC2 was at ZL's house watching movies;

14. ZL told MC2 to pull his pants down, MC2 said no;

15. ZL pulled MC2's pants down, and then his own, and anally penetrated MC2 with his penis while they were on a bed in ZL's house.

Y-2-YO-2019-000053

16. ZL, then 15, sexually assaulted Female Child No. 1 (FC1), then 10, between September and December, 2016;

17. Around 4:00pm in the afternoon FC1 went to ZL's residence to play with her friend, ZL's younger sister;

18. Upon knocking on the door, ZL answered, told FC1 that his sister was in the residence asleep in her room, and walked FC1 to his sister's room;

19. On arriving at the room FC1 realized it was empty. ZL blocked the door of the bedroom with his body to prevent FC1 from leaving;

20. FC1 started crying and yelling. ZL told her to calm down, pushed her back onto the bed, and got on top of her. Both FC1 and ZL were and remained clothed;

21. FC1 struggled with ZL for one minute then kicked him off of her and ran out of the room;

22. ZL blocked FC1 from leaving at the front door of the residence, told her he was sorry, tried to hug her, and told her not to tell anyone;

23. FC1 left the residence and did not tell anyone what occurred until October, 2019;

24. FC1 did not tell anyone because she blamed herself at the time and because she was scared;

25. FC1 kept thinking about the event from its occurrence until reporting it to RCMP October 9, 2019. When she thought about it in that time period she would feel sick and would cry;

26. ZL was arrested by RCMP October 22, 2019 and gave a statement in which he admitted the event;

27. ZL initially denied knowing what the investigating officer was talking about; however, he started to cry when confronted with FC1's version of events;

28. ZL admitted he wanted to "do what women and men do", clarifying when asked that he meant have sex.

C. THE OFFENDER'S CIRCUMSTANCES

[6] While Defence counsel maintains that Z.L. did not receive necessary treatment, there are many assessments of Z.L. from diverse professional backgrounds and perspectives. Some of this information is found in previous pre-sentence reports.[2] Some of the information is found in documents from a residential facility that Z.L. attended in connection with his original sexual assault conviction.

[7] In short, having reviewed the various assessments and opinions, and for the purposes of sentencing Z.L., I am satisfied that cognitively, he is a low functioning individual. Z.L. struggles with understanding cause/effect relationships, has little impulse control and at present, presents a real risk of future sexual violence, especially to children.

[8] Z.L.'s upbringing was very unstable. Prolonged alcohol abuse and violence were realities for Z.L. and his siblings. Z.L., his parents and grandparents are/were impacted by colonialism, residential schooling and other detriments in the context of *Gladue* factors.

[9] Z.L.'s parents, according to some of the reports, did not appear to recognize the seriousness of Z.L.'s sexual offending. Z.L. also appears to have had very few rules or structure as a child, spending significant time hanging around with older males and not attending school or participating in any other organized activities. The negative influences of these older 'peers' on Z.L. is another consistent theme throughout the various reports.

D. PARTIES' POSITIONS

[10] The Crown, stressing accountability, recommended a 12 month custody and supervision order. Eight months of that order would be spent in custody. That order would be followed by a 2 year period of probation. In support of its position the Crown relied upon: *R. v. F.(T.)*, 2008 NWTTC 11; *R. v. K. (J.)*, 2011 NWTTC 11;

[2] Z.L. also has convictions, as a youth, pursuant to sections 348, 145 x2 and 266 of the *Criminal Code*. These were recorded against him after the commission of the present offences.

and, *R. v. B.T.L.*, 2020 BCPC 185. Being decisions from this jurisdiction, *F.(T.)* and *K.(J.)* are particularly relevant by virtue of section 38(2) of the *YCJA*:

> *38(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:*
>
> *(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances.*

[11] In *F.(T.)* the 14 year old Indigenous first offender entered a guilty plea to a count of sexual assault encompassing two different occasions when he forced sexual intercourse on a 13 year old victim. In imposing 160 days in secure custody followed by 80 days of supervision in the community, Gorin J. held that nothing short of a custodial disposition would serve to hold F.T. accountable:

> *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.*
>
> *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.*

[12] In *K.(J.)* the 16 year old Indigenous first offender entered a guilty plea to a sexual assault that involved having intercourse with his unconscious 16 year old cousin. In imposing a sentence of 120 days open custody to be followed by 60 days of supervision, Gorin C.J. again stressed the importance of accountability in the context of the serious harm occasioned by the accused's offence:

> *It follows that in the case of the offence committed by J.K., the breaches of the victim's physical integrity, privacy and human dignity were substantial. The seriousness of the crime is exacerbated by the familial relationship between the J.K. and his victim as well as the fact that the crime was committed when she was unconscious and vulnerable.*
>
> *I have considered all of the provisions of s. 38 and s. 3. I feel that custody is necessary in order to hold J.K. accountable for his offence. I find further that regardless of the prevalence of similar crimes in Fort Simpson and the Northwest Territories in general, the circumstances of the offence committed by J.K. are such that his crime is among the "clearest of cases" in which custody is necessary. In particular, I conclude that custody is necessary having regard to the seriousness of the offense and J.K.'s degree of responsibility for that offence. I think that in this case, a properly crafted custodial order combined with a probation order would be a just sanction that would promote his rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. In arriving at the conclusion that custody is necessary, I have considered all of the non-custodial alternatives suggested by J.K.'s counsel. Moreover, as in the case of T.F., I find that if I were to impose anything less than custody I would not be sending J.K. the right message. In arriving at this conclusion I have borne in mind J.K.'s aboriginal background.*

[13] The Defence recommends a probation order, for a term of three years, with strict supervisory conditions and residential treatment. Defence counsel exhibited significant persistence and effort in securing the various reports and evaluations of Z.L. from corrections and social services authorities. By means of a form of documentary archeology, Defence counsel has attempted to establish that from 2013 forward, various governmental authorities knew that Z.L. needed intensive supervision and sex offender treatment. Further, given the absence of any significant records of Z.L. having received any sex offender treatment, Defence counsel maintains that in regard to the current offences, Z.L.’s moral blameworthiness is significantly diminished.

E. YOUNG PERSONS AND THE PURPOSE, PRINCIPLES AND OBJECTIVES OF SENTENCING

[14] The *YCJA* is a complex statute that requires a great deal of scrutiny and cross-referencing to apply it in cases like Z.L.’s. The emphases are different when sentencing young persons as compared to adult offenders. Lesser levels of maturity and understanding require youth justice courts to stress rehabilitation while also

trying to hold youths accountable. In *R. v. McClements*, 2017 MBCA 104, the Court described the approach to sentencing youths as follows:

> *The YCJA is a distinct regime to deal with offenders who commit crimes between the ages of 12 and 18 years of age (young persons). The regime applies to all offences. Fundamental to the regime is the presumption of diminished moral blameworthiness for young persons, which recognizes that "because of their age, young [persons] have heightened vulnerability, less maturity and a reduced capacity for moral judgment" (see R. v. B. (D.), 2008 SCC 25 (S.C.C.) at para 41). The focus of sentencing under the YCJA is "about balancing [the] conflicting principles to arrive at a sentence tailored to the individual circumstances." See R v. Okemow, 2017 MBCA 59 (Man. C.A.) at para 47.*

[15] This does not mean however that the entire focus is on a youth's rehabilitation. Particularly, as the severity of offences increase, and the seriousness of the harm done rises, the sentence imposed must hold the young person accountable. Accountability in this sense is described by the Ontario Court of Appeal in *R. v. O.(A.)*, 2007 ONCA 144 as:

> *In our view, for a sentence to hold a young offender accountable in the sense of being meaningful it must reflect, as does a retributive sentence, "the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct". [Underlining omitted.] We see no other rational way for measuring accountability.*

[16] A youth justice court cannot commit young persons to custody unless they are eligible to receive a custodial disposition pursuant to section 39 of the *YCJA*. In this case, based on the evidence before the Court, including evidence of harm to the victims, the parties agree that Z.L. is eligible for a custodial disposition pursuant to either section 39(1)(a) or 39(1)(d) of the *YCJA*. I agree with that position.

[17] In addressing some of the other ways that sentencing under the *YCJA* differs from sentencing pursuant to the *Criminal Code*, Gorman J., in *R. v. K.O.* (2011), 314 Nfld. & P.E.I.R. 133, noted:

> *The YCJA requires that the Court in imposing sentence consider reasonable alternatives to the imposition of a custodial sentence (see R. v. A.H., 2011 NLCA 25 and R. v. E.W.A., 2009 NLCA 47). In R. v. D.W., 2011 NLCA 21, the Court of Appeal indicated that "sentencing under the [YCJA] focuses on the individual young person and how best to achieve*

> *the stated objectives of the Act in the particular circumstances." In R. v. C.D., (2005), 2005 SCC 78 (CanLII), 203 C.C.C. (3d) 449, the Supreme Court of Canada indicated, at paragraph 34, that while the YCJA "may be generally concerned with the protection of the public, it also has some specific goals, including restricting the use of custody for young offenders. This particular goal is evidenced in the preamble of the Act, as well as in s. 38(2)." The Court also indicated, at paragraph 50 of C.D., that "the object and scheme of the YCJA, as well as Parliament's intention in enacting it, all indicate that the YCJA was designed, in part, to reduce over-reliance on custodial sentences for young offenders." In K.S., the Court of Appeal concluded that courts "must continue to struggle with the reconciliation of conflicting principles under the YCJA by resorting to the individualized process of sentencing confirmed by the Supreme Court of Canada in P.(B.W.). The burden is on the Crown to establish the exceptional circumstance of no reasonable alternative to custody." In R. v. C.T. (2005), 2006 MBCA 15 (CanLII), 205 C.C.C. (3d) 203, the Manitoba Court of Appeal concluded that the sentencing principle of denunciation plays no role in the sentencing of young offenders. In R. v. B.W.P.; R. v. B.V.N., 2006 SCC 27 (CanLII), [2006] 1 S.C.R. 941, the Supreme Court of Canada concluded that the sentencing principles of general and specific deterrence do not apply to sentencing pursuant to the YCJA.*[3]

[18] By virtue of section 38(2)(d) of the *YCJA*, as Z.L. is an Indigenous youth, I must also pay particular attention to his circumstances in terms of considering all available sanctions other than custody that are reasonable in the circumstances.

F. VICTIM IMPACT

[19] MC1, MC1's mother, MC2's mother and MC2's grandmother filed victim impact statements. The profound negative impacts upon the children Z.L. violated will persist for years. MC2 attended residential treatment to seek help to deal with his victimization by Z.L.

[20] As members of a small remote community, where the ties to ones neighbours are close, the parents of these victimized children no doubt felt that keeping their children safe did not require that they be kept under constant scrutiny. They likely no longer hold those views given that offences like these can undermine the entirety of a small community's sense of trust.

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[3] This decision also dealt with the sentencing of a youth for a sexual assault involving penetrative intercourse. The 2 year period of probation imposed by Gorman J. was upheld by the Court of Appeal in *R. v. K.O.*, 2012 NLCA 55.

[21] The recognition of the harms suffered by children as victims of sexual violence is discussed in *R. v. Scott* (2014), 359 Nfld. & P.E.I.R. 179:

> *A victim impact statement was not filed by LM. However, the lack of a victim impact statement is not evidence of a lack of victim impact. The impact that sexual offences have upon children is well known. Thus, in R. v. J.P., 2013 ONCA 505, at paragraph 15, the Ontario Court of Appeal suggested that sentences "related to the sexual abuse of children are rising as courts become more familiar with the horrific consequences for the victims." Similarly, in R. v. Rich, 2014 BCCA 24, at paragraph 18, the British Columbia Court of Appeal indicated that it agreed "with the Crown's observation that 'as society becomes more aware of the impact of sexual abuse on children, there has been an escalation in the severity of sentences imposed where children are the victims of sexual offences.'"*
>
> *In R. v. Mackie, 2014 ABCA 221, the Alberta Court of Appeal, at paragraph 17, indicated that we "have come to understand the full magnitude of the impact such crimes have on children":*
>
> > *We know better now than we did then. We have come to understand the full magnitude of the impact such crimes have on children and that some have even resorted to suicide to find relief from online tormentors. In fact, one of the victims here reported having thoughts of suicide to escape the appellant. This and the other victim impact statements provided in this case are poignant reminders of the trauma and suffering caused by these crimes.*
>
> *Finally, in R. v. Clifford [2014] EWCA Crim 2245, at paragraph 22, the Court of Appeal for England and Wales noted that sexual offending "will by its very nature cause harm at the time the offence is committed, but it is well recognised that for many victims significant harm persists for a considerable period afterwards."*

G. TIMELINESS

[22] The *YCJA* stresses timeliness of consequences in addition to the rehabilitation of young persons. In *R. v. K.J.M.*, 2019 SCC 55, the Court noted the need for timeliness in youth matters is both well established in the jurisprudence and codified in section 3(1)(b)(iv) and (v) of the *YCJA*. For youth, the imposition of consequences is likely to be more effective the closer in time that those consequences follow the behaviours being addressed.

[23] The Information involving MC1 was sworn on January 19, 2018. A trial commenced on August 15, 2018 but ended in a mistrial.[4] Another trial was set for February 18, 2019 but did not proceed on that date and ultimately, the trial was set over to August 12, 2019. On that date, Z.L. entered a guilty plea, a pre-sentence report was ordered and sentencing was set over to November 6, 2019. It appears sentencing did not proceed at least in part because the parties were aware that the charges involving MC2 were pending.

[24] MC2 did not disclose what Z.L. did to him until 2019. The Information involving MC2 was sworn on December 9, 2019. From that point forward, it appears that the matters involving MC1 and MC2 were called on a number of the same dates, with Z.L. entering a guilty plea to the matters involving MC2 on March 10, 2020.

[25] FC1 also did not disclose what Z.L. did to her until 2019. The Information involving FC1 was sworn on January 2, 2020 with Z.L. also entering a guilty plea on March 10, 2020.

[26] After March 10, 2020, the matter was called again on May 18 and October 5, 2020, with sentencing to proceed on November 23, 2020. On that date, at the request of Z.L., sentencing was set over to March 1, 2021, with the hearing proceeding before me on that date. It appears that the majority of these adjournments were granted to allow the Defence to try and obtain information from correctional and social services authorities in regards to their previous involvement with Z.L.

[27] On May 12, 2021, as was done in *R. v. J.J.*, 2021 ONCJ 112, the Court inquired as to the position of the parties with respect to evidence regarding the conditions pursuant to which Z.L. would be held if he was sentenced to a custodial disposition to be served with adult offenders. Specifically, evidence regarding if/how conditions would differ from the conditions he would encounter in a youth facility, including not just his physical security but also any differences in rehabilitative programs.

[28] On July 19, 2021, with the consent of the Defence, the Crown filed a supplemental submission that included correspondence from Corrections officials regarding Z.L.'s security and programming if he were to serve a custodial sentence in an adult prison.

[29] Some of the above delays were impacted by the timing of the various disclosures and the choice of the Defence to forgo proceeding to sentence on the matters involving MC1 until it felt able to also address the matters involving MC2

[4] The fact that the child victim had to appear at this trial lessens the mitigating impact of Z.L.'s subsequent guilty plea in respect of that matter.

and FC1. There is nothing wrong with that decision and indeed some might argue it was the more prudent course of action in all of the circumstances. I simply note that proceeding in that fashion led to additional delays.

[30] While delay associated with the impact of the COVID-19 pandemic was referenced during the sentencing hearing, I find this delay to be limited to making it more challenging for the Defence to get timely responses from the correctional and social services authorities. The availability of the Court to deal with Z.L's matters was not significantly impacted by alterations to the Court's schedule associated with the declaration of a public health emergency in the Northwest Territories.

[31] Besides the obvious lack of timeliness between Z.L.'s conduct and his sentencing, the other primary impact of the delay here is occasioned by Z.L. having attained 20 years of age during the course of these proceedings. As previously noted, this means that any custodial disposition under the YCJA would be served by Z.L. in an adult correctional facility. This would be of concern even if Z.L. did not suffer from a myriad of cognitive deficits. His cognitive functioning is considerably less than his chronological age. While in part related to his cognitive functioning, his FASD diagnosis presents additional concerns with placing Z.L. in a prison with adults.

[32] On the other hand, the offences here are heinous. Z.L. manipulated and abused three children despite having been previously convicted and sentenced in regards to a similar sexual offence on another child. In other circumstances, I would be less reluctant in concluding that the only sentence that could hold the youth accountable would be one that included a significant term in custody. What I might impose on a different youth is not decisive however due to sentencing under the *YCJA* being a highly individualized process. I also must impose a sentence that considers all of Z.L.'s circumstances, including his Indigenous status.

[33] In addition to the concerns regarding timeliness and placing him in an adult facility, the Defence, as part of Z.L.'s circumstances, placed a great deal of emphasis on what it states is an omission on the part of corrections and social services authorities to ensure that he received necessary treatment and intervention after Z.L.'s first sexual assault conviction.

H. ALLEGED TREATMENT DEFICIENCIES

[34] On March 21, 2014, after entering a guilty plea to a similar sexual offence, Z.L. was placed on an 18 month period of probation with conditions regarding treatment and counselling. At some point after the disclosure by the victim of Z.L.'s first sexual offence, Dehcho Health and Social Services arranged for Z.L. to attend

at a Wood's Homes facility in Alberta. Z.L. was admitted to that facility in November of 2013 and discharged in August of 2014. The report based upon his stay was prepared on November 27, 2014.[5]

[35] According to the Wood's Home report, part of the purpose of Z.L.'s referral to them was to identify *behavioral support needs and a sexualized behaviour risk assessment to explore more in depth his sexually intrusive behaviour to assist him with future behavioural management in the home and the school*. In summary, in terms of general needs, the report indicated a need for ongoing intensive supervision of Z.L. by persons capable of understanding the seriousness of Z.L.'s sexual behaviour and of monitoring all contact between Z.L. and "vulnerable" persons (presumably to ensure no other children or other vulnerable persons were victimized by Z.L.). Importantly, the report also indicated that Z.L.'s parents needed substantial parenting supports to *build their capacity to manage Z.L.'s behavioural, emotional and cognitive challenges*.

[36] Z.L.'s stay at Wood's Homes also provided an opportunity for them to prepare a separate sexual risk report. That report, dated August 11, 2014, identified Z.L. as a moderate risk to reoffend sexually if he received intensive supervision and limitations were imposed to reduce opportunities for him to reoffend. Specifically, it recommended against allowing him any unsupervised access to children under 12 years of age. Support and training was also recommended for Z.L.'s parents.

[37] In 2015 the Stanton Territorial Health Authority FASD Diagnostic Clinic referred Z.L. to a psychologist for an assessment. In terms of intellectual and other cognitive capabilities, Z.L. was generally assessed as low to very low functioning using a number of relevant tests and measures. Z.L. was also noted to require *a very high level of structure, support and supervision within the home, school and community settings*.

[38] In 2017, the Department of Health and Social Services referred Z.L. to the Ranch Ehrlo Society. Z.L. resided in one of their facilities between April and June of 2017. This appears to be the only evidence of Z.L. receiving treatment. The report from July of 2017 notes that among the Department's concerns (in referring Z.L. to their program) were Z.L.'s sexually intrusive behaviours, criminal behaviours and moderate gang involvement. That report noted Z.L.'s cognitive impairments and also recommended that he reside in a structured environment with caregivers familiar with his psychiatric profile and equipped to deal with the challenges his behaviour presents.

[5] The timing suggests that the Youth Court Judge who sentenced Z.L. in March of 2014 would not have had the benefit of this particular report.

[39] The pre-sentence report that was before the Court on March 21, 2014 mentioned a potential treatment program in Calgary for male sex offenders and noted that Z.L.'s social worker believed he needed to be placed in an appropriate treatment program. That report also states that Z.L. knew what he was doing to his first victim was wrong but he persisted anyway because he was curious. Additionally, Z.L. acknowledged he knew it would get him in trouble with the police.

[40] It is not surprising to see as much assessment material as there exists in relation to Z.L. Unfortunately, it is also not surprising to see so little appearing to have been done to address Z.L.'s treatment needs and to provide other necessary supports. Similar concerns were noted in the sentencing of a 25 year old Indigenous offender with a history of sexually assaulting women and girls in a remote territorial community: see *R. v. Katigakyok*, 2019 NWTTC 12. More recently, in an unreported decision, I endorsed a joint submission of probation (with residential treatment) for an Indigenous female youth on a robbery of a convenience store using a knife. That joint submission and its endorsement was based in large part on the failure of governmental authorities to arrange for treatment for her despite it having been identified years earlier as being necessary.

[41] Besides failing youthful offenders, the reality is the failure to meaningfully rehabilitate and treat young persons contributes to an ongoing unacceptably high risk of them reoffending. When those new offences involve the violation of the sexual integrity of other victims, the cycle of abuse is perpetuated. These youthful Indigenous offenders now have an increased likelihood of being subjected to future dangerous or long-term offender designations. In Z.L.'s case, we now have three additional victims of sexual abuse who may have been spared such awful trauma if the recommendations of qualified professionals had been adequately acted upon. This does not mean that Z.L. is absolved of responsibility but it must be considered in deciding upon an appropriate sentence for him.

I. ANALYSIS

[42] Z.L. has a prior conviction for sexual assault. The offences before the Court now are also extremely serious. The two male children that he sodomized were considerably younger than him and he ignored their protests while committing those offences.

[43] The female child he sexually assaulted was also much younger than him. This offence in particular highlights Z.L.'s moral culpability. He seized on an unanticipated opportunity to perpetuate a ruse to corner the victim in a bedroom and when she escaped that room he blocked the residence's exit, telling her not to tell anyone about what he did to her. As noted above, he knows what he did to his first

victim, and now three additional victims, is wrong and will get him into trouble with the police.

[44] It is difficult to reconstruct the history of Z.L.'s dealings with governmental authorities and his history of interventions/treatment from the partial records Defence counsel was able to secure. I agree with the Crown's submissions that the culpability of the 'system', if any, cannot be the focal point of this sentencing decision, and that the Court has incomplete records at best. I cannot however ignore what appears to be an absence of proportional interventions by social services and corrections authorities based on the information available to them after his first offence.

[45] Objectively, it ought to have been apparent to social services and corrections authorities that if Z.L. was permitted to return to his home community, with unsupervised access to young children, without significant parental controls and without significant treatment tailored to his risks as a sex offender, he would likely sexually victimize other young children from his community.

[46] As noted above, his case is not unique. Given that all of the examples involve Indigenous youth, some of whom subsequently victimized other children in largely indigenous communities, that degree of neglect could potentially be construed by some as a more insidious form of colonialism. Any system that takes children from their parents and communities for treatment without meaningfully addressing their rehabilitative needs consigns those children to a path that will likely see them add to statistics that evidence the overrepresentation of adult Indigenous persons in our prison systems. The perversity of such results are amplified when those lapses appear to have contributed to the sexual victimization of other children.

[47] While any rehabilitation deficits do not excuse Z.L.'s actions or absolve him of moral blameworthiness, they do play a role in considering his individual circumstances. The presence of significant *Gladue* factors also go to lessening Z.L.'s moral blameworthiness.

[48] In *R. v. L.M.*, 2018 NWTTC 13, in sentencing a 13 year old Indigenous youth for offences that included manslaughter and sexual assault, Gorin J. recognized the connection between that youth's difficult background and his offending, stating that, *I have no difficulty concluding that his background contributed substantially to his criminality during the time frame in which all of the offences occurred*. I take the same approach here in that I conclude that Z.L.'s background generally and the apparent omissions regarding his treatment after his first offence, contributed to him sexually assaulting MC1, MC2 and FC1.

[49] The lack of timeliness and the requirement now that Z.L. serve any custodial disposition in an adult facility also complicate arriving at an appropriate disposition for Z.L. The correspondence from Corrections advises that Z.L., like all adult inmates, would be assessed on admission to a correctional facility. There are smaller units he might be placed in if he is determined to have difficulties functioning in a facilities' general population.

[50] Further, while Z.L. would have access to all of the generalized programming and rehabilitative services available to adult inmates, he might be considered for individualized programming if cognitive deficits impede his ability to participate in the regular structured programming. Within 15 days of admission Corrections subject all inmates to a risk/needs assessment and establish case plans for them.

[51] How systems work in reality sometimes differ from what is described on paper, especially in any governmental context. Like the Court in *J.J.*, I am of the view that despite any statutory requirement that Z.L. serve any custodial sentence in an adult facility, he is legally entitled to all of the benefits of the *YCJA* and the correctional system must ensure that he is dealt with in that manner. The degree to which the correctional system appears to have failed Z.L. to date does not inspire confidence that they will implement adequate measures to promote his rehabilitation and reduce the likelihood of his re-offending sexually.

[52] Ultimately, I must decide whether a custodial disposition is required in this case. Sections 38(2)(d) of the *YCJA* requires that the Court consider all available sanctions other than custody that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal young persons.

[53] Section 38(4) of the *YCJA* allows for simply imposing another probationary term for these offences even though Z.L. was only placed on probation in regards to his first sexual assault conviction. Is that option or some other combination of non-custodial options a reasonable alternative to a custodial disposition for these offences?

[54] Section 38(1) of the *YCJA* stresses accountability for young persons through the imposition of just sanctions:

> *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.*

[55] Z.L. was much younger when he committed these offences, there are significant *Gladue* factors, he has cognitive deficits and there appears to have been a deficient response by the various governmental authorities to providing treatment and a structured environment after his first conviction. Those factors limit or lessen Z.L.'s moral blameworthiness but they cannot and do not extinguish it. After his first sexual offence Z.L. acknowledged knowing that what he did was wrong and that such conduct would get him into trouble. His knowledge in that regard is confirmed by his attempt to compel FC1 not to tell anyone what he did to her. Availing of a ruse to get FC1 alone in a bedroom is also aggravating.

[56] Similarly to the decision in *K.(J.),* I find that considering Z.L.'s prior related conviction and the very serious offences committed by Z.L. violating the sexual integrity and dignity of the victims, a custodial disposition is required to hold Z.L. accountable for these offences. Anything short of custodial disposition would not send Z.L. the necessary message and would not result in accountability as outlined by the Ontario Court of Appeal in *O.(A.)*.

[57] It is unfortunate that circumstances impeded a timelier resolution of this matter, and more unfortunate that Z.L. will have to serve that disposition in an adult facility, but as noted in *J.J.*, such collateral consequences do not justify imposing a sentence that is inadequate to achieve the purposes of the *YJCA*:

> *Although the Court has concerns about what it has been told about the adult facility, I am reminded by R. v. Pham that the sentence must still be an appropriate one. As the Supreme Court also said in R. v. Pham, "[t]he flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will".*
>
> *And, "[t]he further the varied sentence is from the range of otherwise appropriate sentences, the less likely it is that it will remain proportionate to the gravity of the offence and the responsibility of the offender" (and/or in the case of the YCJA, the less likely it will promote the purpose of sentencing set out in section 38). See R. v. Pham 15 and 18.*

[58] In terms of the duration of the custodial disposition, a period of 8 months in custody followed by a 4 month period of supervision in the community is an appropriate sentence. In arriving at that decision I take into account other precedents from this jurisdiction involving similar offenders in similar circumstances. More importantly however it is the appropriate sentence taking into account all of the

extensive detail available regarding Z.L.'s individual circumstances and the circumstances of these very serious offences.

[59] That is not necessarily the end of the matter however as like the Court in *J.J.*, there are grounds to be concerned as to whether Z.L. will receive all of the benefits of the *YCJA*, especially while serving the custodial portion of his sentence. Due to those concerns, there shall be a review of Z.L.'s sentence. The Court shall fix the review date when it releases this decision to the parties, to proceed before me on a date that is approximately 30 days from today with the parties calling any necessary evidence for the review.

J. SENTENCE

[60] After considering all of the above, I sentence Z.L. as follows:

Custody and Supervision

(a) Z.L. is ordered to serve a custody and supervision order of 12 months, to be served as 8 months in custody, followed by 4 months under supervision in the community subject to conditions;

(b) If Z.L. breaches any of the conditions while under supervision in the community, he may be brought back into custody and required to serve the rest of the second period in custody as well;

(c) Z.L. should also be aware that, under other provisions of the *YCJA*, a court could require him 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;

Probation

(d) Z.L. shall then be placed on probation for a period of 18 months;

Terms and Conditions of the Community Portion of the Custody and Supervision Order and During Probation

(e) The following terms apply both respecting the community portion of the custody and supervision order and during the probation;

(f) Z.L. shall keep the peace and be of good behaviour;

(g) Z.L. shall report to the provincial director and then be under the supervision of the provincial director;

(h) Z.L. shall inform the provincial director immediately upon being arrested or questioned by the police;

(i) Z.L. shall report to the police, or any named individual, as instructed by the provincial director;

(j) Z.L. shall appear before the youth justice court when required by the court to do so;

(k) Z.L. shall reside at an address that the provincial director approves of;

(l) Z.L. shall advise the provincial director, the clerk of this court and any worker assigned to his case of any change of address, or his place of employment, education or training, changes in his family or financial situation and any other change that may reasonably be expected to affect his ability to comply with the conditions of the sentence;

(m) Z.L. shall attend school and/or seek and maintain suitable employment;

(n) Z.L. shall not possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as needed for, and while at school or work;

(o) Z.L. shall attend any counselling, assessment or treatment as directed by the provincial director, and he shall sign any releases so that they may monitor his participation;

(p) Z.L. shall not communicate directly or indirectly with MC1, MC2 or FC1 or attend anywhere they are known to live, work or go to school;

(q) Z.L. shall execute any releases as required by the provincial director so that the provincial director may monitor Z.L.'s compliance with any of these terms;

Weapons Prohibition and DNA Order

(r) Pursuant to section 51 of the *YCJA*, Z.L. shall be prohibited from possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for 2 years from the date of this Order, except as needed for, and while at school or work;

(s) There shall be an order in the proper form for the taking of DNA samples from Z.L. pursuant to section 487.051 of the Criminal Code; and,

Sentence Review

(t) There shall be a review of Z.L.'s sentence. The Court shall fix the review date when it releases this decision to the parties, to proceed before me on a date that is approximately 30 days from now. The parties should call the necessary evidence for the review, some of which I have articulated above.

[61] Finally, I direct those responsible for implementing Z.L.'s sentence, including those responsible for him in the adult facility, to read this decision and all of the documentary exhibits in their entirety. It is the Court's expectation that steps are to be taken to address the concerns with regards to his security and rehabilitation.

Donovan Molloy
T.C.J.

Dated at Yellowknife, Northwest Territories, this 1st day of October, 2021.

R. v. Z.L., 2021 NWTTC 17

Date: October 1, 2021
File: Y-1-YO-2020-000028
Y-2-YO-2018-000004
Y-2-YO-2019-000065

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

Z.L.

REASONS FOR DECISION OF THE HONOURABLE JUDGE DONOVAN MOLLOY

Restriction on Publication

Identification Ban – See the *Youth Criminal Justice Act*, sections 110(1) and 111(1).

No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act*. No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person.

NOTE: This judgment is intended to comply with the identification ban.

[Sections 271 x 3 of the *Criminal Code*]
[Sentencing]