

Citation: *R. v. Harper*, 2009 YKTC 18

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Docket: 06-00149
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Heino Lilles

R e g i n a

v.

Jason Dion Harper

Appearances:
Melissa Atkinson
Nils Clarke

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] Jason Harper is a 35 year old aboriginal man from Pelly Crossing, Yukon who has plead guilty to two charges, namely, offences contrary to s.151(a) and s.145(3) of the *Criminal Code*.

Count #1: On or about the 24th day of September, 2005, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did for a sexual purpose touch J.W., a person under the age of fourteen years directly with a part of his body, to wit: his penis, contrary to s.151(a) of the *Criminal Code*.

[2] Mr. Harper was placed on a recognizance in relation to the above charge. One of the terms of his recognizance was not to consume alcohol. He was found under the influence of alcohol on December 21, 2008 making out the offence contrary to s.145 (3).

[3] Mr. Harper was sentenced for these offences on February 12, 2009. There was some urgency in sentencing him on that date because his brother Jeremy

was present in Whitehorse and was in a position to escort Mr. Harper back to Pelly Crossing. I indicated to counsel that I would file more detailed written reasons for the sentence I imposed at a later date. These are those reasons.

[4] As Mr. Harper is significantly affected by Fetal Alcohol Spectrum Disorder (FASD), this decision will address the appropriate sentencing principles applicable to the facts of the case and to Mr. Harper's cognitive deficiencies.

Facts

[5] It is important to note that the substantive s.151 (a) C.C.C. offence took place on September, 2005. It was not prosecuted until 2 ½ years later, as the information was sworn on February 25, 2008. There were many reasons for that delay, including delays in obtaining a DNA profile from materials recovered from J.W.'s underwear, matching that profile to Mr. Harper's blood sample, as well as delays attributable to both defence and Crown.

[6] The evidence in this case was circumstantial. On September 24, 2005, J.W. was medically examined with respect to a possible sex assault. She was 13 years old. She had been drinking and was very intoxicated and passed out in a residence in Whitehorse. She did not remember what happened to her. She could not identify the house she had been visiting or the people she was with.

[7] Her underwear was sent for forensic analysis. A Forensic Biology Report received on May 13, 2006 stated that J.W.'s underwear contained a mixed stain of semen and human biological material. The DNA profile of the semen matched Mr. Jason Dion Harper, the accused.

[8] Mr. Harper was arrested on May 22, 2006. He provided a blood sample. A report received by the RCMP on October 23, 2006 indicated that the semen found inside J.W.'s underwear was a DNA match to Mr. Harper.

[9] Mr. Harper has no recollection of any contact with J.W. and is unable to account for the presence of his semen on J.W.'s underwear.

[10] Based on the DNA analysis, Mr. Harper entered a guilty plea to the s.151(a) charge.

Criminal Record

[11] Mr. Harper is 35 years old. He has an extensive criminal record of almost 50 convictions beginning when he was 17 years old. Of these, 18 were for breaches of court orders, mostly for breach of probation. The criminal record that was filed shows two indecent act convictions and one previous sexual assault (although the pre-sentence report refers to one indecent act and four convictions for sexual assault). For the purpose of this sentencing, I am relying on the criminal record information found in the pre-sentence report, because, in my experience, the CPIC records are notoriously incomplete.

[12] In 1996 Mr. Harper became involved with the Sex Offender Risk Management Program. His involvement with the program continued until February 2001. The pre sentence report identifies two convictions in 2001 for sexual assaults against a family member. He received a nine month conditional sentence and probation for two years. He resided the majority of this time (March 2002 to December 2004) at the Yukon Adult Resource Centre. He did fairly well while at the facility, but resented the intensive supervision he was under while residing there.

[13] He has been in custody for a total of six months on these charges, including the period of time since December 21, 2008 when he was arrested for breaching his recognizance. While in custody at the Whitehorse Correctional Centre, he was sexually assaulted by two inmates. These two inmates pleaded guilty to assault. After the assault, Mr. Harper was placed into segregation for his own protection.

Family History

[14] Mr. Harper was raised by his grandparents because his mother, Ella Harper, had significant problems with alcohol abuse. As a result of maternal alcohol consumption during pregnancy, Jason Harper is severely affected by FASD. He did well while living with his grandparents, but after his grandfather died and his grandmother moved to an assisted living facility in Whitehorse, he lost the consistency and stability of supportive family members. He began to have more encounters with the criminal justice system.

[15] More recently, Mr. Harper has found appropriate housing with his younger brother, Jeremy, who lives and works in Pelly. He is the First Nation Recreational Director in Pelly, does not allow alcohol in his house, is a role model for Jason and others in his community, and has a good relationship with his brother. His elderly mother, Ella, also lives with him. She no longer drinks alcohol. Jeremy has some insight into Jason's needs and can provide some structure and support to assist with Jason's independent living. But because of his work, Jeremy is unable to provide the level of supervision Jason requires. Jeremy will need additional supervisory assistance if Jason is going to live with him.

Employment

[16] Jason Harper has limited work skills and employment history due to his cognitive disabilities. Yet he wants to work, and has worked as a dishwasher, cutting wood and helping on trap lines. He is good at house cleaning. The Selkirk First Nation has given him jobs from time to time. Work is extremely important for Mr. Harper's self esteem. Ongoing employment is difficult for him as he can not tell the time of day or week. He is unable to handle appointments.

Mr. Harper's FASD

[17] Jason Harper was assessed in December 2006 by Medigene Services Inc. Diagnostic Clinic located in Calgary, Alberta. I have set out below some extracts from that report in order to provide a clearer picture of the extent of his disability. These personal deficiencies will impact on how s. 718 of the *Criminal Code*, which sets out the principles and purposes of sentencing, will be applied to sentencing in this case. In particular, this assessment is essential in evaluating the degree of responsibility of Mr. Harper, the role of deterrence and rehabilitation in sentencing and whether sanctions other than imprisonment are reasonable in the circumstances. Unless the terms and conditions of any community based component of the sentence are consistent with Mr. Harper's cognitive abilities, the court will merely be setting Mr. Harper up for failure.

From the report:

- Evaluation of Jason's brain function reveals significant deficits in three or more domains (cognition, achievement, memory, processing, executive functioning, adaptive behavior, socialization, attention, and self-regulation), which provides significant evidence of diffuse brain dysfunction. In addition to his functional deficits, Jason's neurological evaluation was abnormal, which provides a physical marker of atypical brain development. Jason's functional and physical brain findings are consistent with a diagnosis of static encephalopathy or permanent brain dysfunction.
- Jason has severe underlying brain dysfunction. He has some pockets of skills that appear to be intact, but also has many areas where the "wiring" is faulty and he struggles to use his skills and advance himself. Tapping into Jason's strengths and providing him with concrete systems for approaching tasks to overcome his areas of need is strongly recommended.
- Jason's cognitive ability falls within the "Intellectually Deficient" range (FISQ = 59 *which places him in the .3 percentile*). He experiences equal problems dealing with verbal information as he does with dealing with visual, non-verbal information. Jason's extremely low cognitive ability indicates that Jason is likely unable to function independently in society. He will require all interactions to be significantly modified for him to understand what is expected of him.

- Jason is a completely concrete thinker. He can only deal with the exact literal information provided to him and cannot read into a situation or idea. He has limited capacity for abstract reasoning or thought. It is critical to use as much real-life hands-on learning as possible and to specifically teach Jason what to do in his own environments. Keep concepts or tasks as simple as possible.
- Jason requires significant modification to the language used when teaching him something, giving instructions or explaining expectations. His functional receptive and expressive language skills are more in keeping with those of a 6 – 8 year old.
- To help Jason experience more success, use very simple, short directives when speaking with him. Be very concrete and very specific when asking a question, giving instructions or teaching concepts. The more concrete and shorter the phrase, the more success Jason will experience. The more important the information, the more direct and simplistic the language should be.
- Jason's working memory is severely impaired. He is more successful when required to simply parrot back exactly what is said to him, and his relative strength (Below Average) gives the false impression that he is more capable than he actually is. Jason is unable to retain information in his short-term memory long enough to manipulate it to come up with an answer or to encode it into long-term memory.
- Jason does not have the capacity to live successfully as an independent adult. When making daily living decisions for Jason, it is important to be aware that Jason functions best at a 6 – 8 year old functional level thus, he requires the same level of supervision and protection as a 6 – 8 year old child would. For his own safety, Jason should have constant supervision and support in his home placement.
- There are significant concerns regarding Jason's mental health. He has experienced significant trauma in the past and as he doesn't have the capacity to process past events, he can only remain hurt and scared by them. Continued exposure to traumatic events may result in significant damage to Jason's psychological well-being. Thus, it is strongly recommended that Jason be more protected in society.
- Jason has had significant problems with sexual inappropriateness and has faced multiple charges in the past. Jason is not a sexual predator. His problems are likely due to his impulsiveness and the

fact that he has an immature understanding of social distance, social awareness and personal space. At the same time, Jason struggles to filter his urges and tends to react to base urges. Couple this with a child-like view of boy-girl relationships, and inappropriate relationships are inevitable.

- There are significant concerns for Jason's well-being should he be incarcerated again in the future. His functional presentation (that of a 6 - 8 year old) raises grave concerns for his personal safety (he is victimized) and for his mental health (anxiety disorder). It is strongly recommended that alternative measures be explored for dealing with Jason should he experience further problems with the law.
- It is critical that supportive professionals and agencies are not fooled by Jason's "fun" presentation, as underneath this façade is severe brain dysfunction. Jason requires a very high level of supports in all areas of life to improve his life circumstances and help him create a more productive and happier adult life.

[18] The FASD Diagnostic Clinic also prepared a Psycho-Educational assessment which was attached as an appendix to the FASD Evaluation. The following paragraph is taken from the summary of that report.

- The results of the present assessment suggest that Jason is faced with many challenges. Cognitive testing indicates that his ability falls in the "Intellectually Deficient" range. Jason's language and memory is extremely weak. As a result, he has not developed a functional level of literacy and math skills. Jason will experience difficulty negotiating simple day-to-day tasks such as reading a schedule, filling out a form, or counting change. Given the lack of support received in the past, it is not surprising that he has spent so much time involved with the criminal justice system.

[19] Jason Harper was also evaluated by Dr. Armando Heredia, a psychiatrist resident in Whitehorse. This assessment was prepared in order to evaluate Mr. Harper's mental condition and to provide an opinion on whether at the time of the offence he suffered from a mental disorder so as to exempt him from criminal responsibility. His report concludes with the following recommendations.

Recommendations:

1) Should your Honour agree with the above and should the defendant be found guilty I would recommend that Mr. Jason Harper's disability be taken into account in his sentencing. I would agree with Mr. Harper's FASD recommendation that alternate measures be explored other than incarceration if and when sentenced.

2) I do not believe that Mr. Jason Harper is capable of living independently. I would agree with previous recommendations that he be placed in a supported living arrangement with 24 hour supervision if possible.

3) I would strongly recommend that Mr. Harper abstain from any alcohol or illicit substance use. Mr. Harper's ability to gain knowledge verbally or in written form is severely impaired. Testing also indicates that Mr. Harper's ability to reason either verbally or nonverbally is severely limited. Due to the above I do not believe that Mr. Harper will gain any benefit from individual therapy or from drug or alcohol counseling and therefore should not be part of a probation requirement.

4) I would recommend modified probation orders that would limit his ability to place himself in circumstances where he could re-offend but would not place him in jeopardy of repeated breaches.

5) I would recommend that Mr. Harper have access to a family physician on a regular basis to deal with any medical concerns.

6) Mr. Harper may be able to engage in limited employment. He may benefit from a referral to the Challenge Program for assessment.

7) Mr. Harper may benefit from Guardianship, Assisted Decision Making, Power of Attorney, Public Trustee as appropriate to deal with his medical, legal, financial or personal obligations.

[20] Although Dr. Heredia's assessment was filed with the court, counsel did not make submissions as to whether Mr. Harper was exempt from criminal responsibility. Rather, counsel proceeded directly to sentencing, based on the finding of Dr. Heredia that Mr. Harper is not suffering from a mental disorder. He states:

"Based on my clinical interview and available information it is my opinion that Mr. Jason Harper is not currently suffering from a mental disorder and

that more than likely he was not suffering from a mental disorder at the time of the index offence.

In my opinion Mr. Jason Harper was not suffering from a mental disorder that would allow for a criminal defense of not criminally responsible by reason of mental disorder”

[21] It appears from these comments that Dr. Heredia may have based his conclusion on the assumption that FASD is not a mental disorder within the meaning of s. 672.11 and s. 16 of the *Criminal Code*. With all due respect, he is in error in coming to this conclusion. Dr. Heredia erred by applying a medical definition. The terms “disease of the mind” and “mental disorder” are legal concepts, and it is up to the trial judge, not a medical practitioner, to determine, as a question of law, what mental conditions are to be included within these terms (see *R. v Rabey* (1977), 37 C.C.C. (2d) 461 (Ont. C.A.), affd. [1980] 2 S.C.R. 513). Moreover, in *R. v. Rouse* (1996), 112 C.C.C. (3d) 406 (Ont. Ct. Gen. Div.), the court made a specific finding that “mental disorder” includes mental retardation.

[22] More specifically, FASD has been recognized as a mental disorder for the purposes of s. 672 of the *Criminal Code* in a number of jurisdictions, including Saskatchewan, British Columbia, Newfoundland, Alberta and Manitoba. FASD has been relied upon as a mental disorder in the Yukon in several cases: see e.g. *R. v. T.J.*, [1999] Y.J. No. 57 (T.C.) and *R. v. D.J.*, 2000 YKSC 513.

[23] As the issues of “fitness to stand trial” and “not criminally responsible” were not raised by counsel prior to the sentencing of Mr. Harper, I am without jurisdiction to deal with them now. Nevertheless, I have addressed the legal principle here so that counsel will ensure that future assessments of FASD affected individuals recognize the legal definition of mental disorder.

National Conference: Access to Justice for Individuals with FASD

[24] A national conference addressing the barriers to accessing justice facing individuals suffering from FASD was held in Whitehorse, Yukon on September

17, 2008. It brought together decision makers from government, justice, health and other non-governmental organizations. The final report is available at [www.justice.gov.yk.ca/pdf/Path to Justice Conference Final Report](http://www.justice.gov.yk.ca/pdf/Path_to_Justice_Conference_Final_Report)

[25] The following information has been extracted from the report.

1. FASD is one of the leading causes of mental retardation, developmental and cognitive disabilities in Canada. It is entirely preventable. Approximately 0.9/100 people from the general population have FASD. Rates of FASD are higher in areas where alcohol abuse and poverty are widespread.

2. The person with FASD is entirely blameless – an innocent victim of maternal alcohol use during pregnancy. FASD can affect every part of the developing brain. This can result in problems with learning, memory, storage and retrieval of information, adaptive behavior, attention, impulse control, speech and language abilities, motor development, reasoning, and problem solving. Approximately half of individuals with FASD meet standard criteria for mental retardation (IQ less than 70). The brain abnormalities associated with FASD are different for every person with this disability.

3. Improving access to justice for individuals with FASD requires a better understanding of this disability and a concerted effort to keep FASD individuals out of the justice system. The justice system should not be used as a substitute for social services and supports for these most vulnerable citizens.

4. FASD-affected individuals can appear in the justice system as victims, witnesses and offenders. Most are involved in the child welfare system at an early age and for prolonged periods.

5. FASD-affected individuals do not do well in school or in society generally. By the time they reach adulthood they have often exhausted and alienated their family members. Out on their own, a multitude of factors combine to result in social isolation, poor job performance, poverty, mental and physical health problems, homelessness, victimization and involvement in the criminal justice system.

6. Given the stringent criteria associated with defences of “Not Criminally Responsible due to Mental Disorder” and “Unfit to Stand Trial” in the *Criminal Code*, most individuals with FASD do not meet the thresholds. Instead, they are processed as fully responsible individuals with handicaps

that are sometimes viewed by sentencing judges as mitigating, on other occasions as aggravating.

7. The recommendations brought forward during the conference were based on those themes that were highlighted several times throughout the conference, as well as results from the research conducted by the Canadian Institute for Law and the Family. Four main recommendations emerged from the discussions: (1) Education and Awareness; (2) Identification; (3) Information Sharing and Establishing Linkages; and (4) Specialized Programming or Initiatives.

[26] Specialized programming or initiatives requires co-ordination of government and community resources. For most FASD-affected individuals, community supervision at a level well beyond the capacity of the Yukon Probations will be required. In the case of many severely affected individuals, supervised residential housing will also be necessary. In this case, Mr. Harper is fortunate to have a brother, Jeremy, who is prepared to provide a sober residence for him in Pelly Crossing. Mr. Harper will require additional community supervision as Jeremy is employed full time.

[27] The pre-sentence report indicates that the community of Pelly has been working with FASD researchers from the United States for two years. They have been providing education and training to members of the community in order to develop a capacity for supervising FASD-affected individuals in the community. One of those experts is prepared to work with Mr. Harper to help develop a plan for him in the community. Pelly also has a life skills support person in the community who works part time with FASD-affected individuals. Bill Stewart, a psychologist, is on contract to the Selkirk First Nation and would also be available to assist Mr. Harper.

Sentencing

[28] The *Criminal Code* provides general guidance for sentencing of offenders.

Purpose.

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of

a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Objectives — Offences against Children.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Fundamental Principle.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other Sentencing Principles.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[29] The purposes and principles of sentencing as set out in the *Criminal Code* assume that accused individuals are fully competent. The *Criminal Code*, in s.672, does recognize a very limited exception to criminal responsibility in the case of extreme cognitive impairments that prevent the accused from understanding the proceedings or to appreciate the consequences or wrongfulness of his or her actions. These exceptions are premised on the assumption that most mental disorders can be treated so that a person will eventually be found fit to stand trial or to present no substantial danger to the public and be released. These exceptions were developed by judges several hundred years ago in the M'Naughten case when nothing was known about the complexity of the permanent brain damage that is Fetal Alcohol Spectrum Disorder (FASD).

[30] The cognitive deficits associated with FASD also challenge the basic assumptions of sentencing in the criminal justice system. The purposes and principles of sentencing found in the *Criminal Code* assume that offenders are capable of making choices, understand the consequences of their actions, and when punitive sanctions are applied, are capable of learning from their mistakes so as not to repeat them. General deterrence, meaning that the punishment given to one person for breaking the law will operate to deter other persons, presupposes the ability of those other persons to process and translate information as well as to remember it. Similarly, rehabilitation, as it is conventionally understood, is largely a cognitive process premised on the ability to understand, to learn, to remember and to make choices. None of these assumptions fit well with what is known about FASD, a permanent form of brain damage that can affect all parts of the brain, and, as in the case of Mr. Harper, can leave him functioning at the level of an eight year old child.

[31] While the offence of sexual interference is clearly a serious one, the gravity of Mr. Harper's offence is not the only consideration when a court fashions a sentence. The fundamental principle contained in s. 718.1 of the *Code* also requires that the sentence be proportionate to the "degree of responsibility of the offender". What does this mean for an offender who, like Mr. Harper, suffers from an organic brain disorder that affects not only his ability to control his actions, but also his understanding of the consequences that flow from them?

[32] Section 718.1 of the *Code* was enacted in 1996, following recommendations of a 1987 Canadian Sentencing Commission. According to the Commission's report, the principle contained in 718.1 is axiomatic, hence its codification as the "fundamental principle". It requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[33] While the retributive concept of “proportionality” or “just deserts” has been a central tenet of justice systems dating back to Biblical times or earlier, it has evolved from a simplistic “eye for an eye” calculation into today’s more nuanced consideration of both the offence and the offender.

[34] The *Code*’s two-pronged proportionality consideration, which takes into account both the harm or potential harm occasioned by an offence and also the moral blameworthiness of the offender, is critical to the Canadian understanding of fundamental justice. It is moral blameworthiness that justifies the stigma and punishment of a criminal sanction and that animates the determination of a “just” sentence (*R. v. C.A.M.* [1996] 1 S.C.R 500, at para. 79). The importance of s. 718.1 is underscored by its recognized constitutional dimension, as a sentence that is excessive and disproportionate, either in relation to the gravity of the offence or to the moral blameworthiness of the offender, runs the risk of violating the section 12 *Charter* right to be free from cruel and unusual punishment (*C.A.M.*, *supra*, para. 41).

[35] The two branches of the proportionality principle set out in s. 718.1 are not always easily reconciled. As noted by the Ontario Court of Appeal in *R. v. Hamilton* (2004), 72 O.R. (3d) 1, there are times when “the gravity of the offence points strongly in one sentencing direction and the culpability of the individual offender points strongly in a very different sentencing direction” (para. 93). When this is the case, the court’s task is especially onerous. In some circumstances it is impossible to completely balance the two, and in order to craft a truly just sentence, “one side of the proportionality inquiry will figure more prominently in the ultimate disposition than the other” (para. 94).

Conclusion

[36] This is precisely the challenge that faces the court in sentencing Mr. Harper. The gravity of the offence, here sexual touching of a person under the age of 14, is serious. Mr. Harper, however, has a severe level of cognitive

impairment associated with his FASD diagnosis, and this affects his ability to appreciate the harm he causes with his actions. As noted in his FASD

Evaluation:

... Jason is not a sexual predator. His problems are likely due to his impulsiveness and the fact that he has an immature understanding of social distance, social awareness and the personal space [sic]. At the same time, Jason struggles to filter his urges and tends to react to base urges. Couple this with a childlike view of boy-girl relationships and inappropriate relationships are inevitable.

[37] FASD has specifically been recognized as a factor that affects an offender's degree of responsibility so as to reduce the severity of a just sentence. Indeed, it may well be the "main criminogenic factor" in an offender's life (*R. v. Gray*, 2002 BCPC 58, at para. 53).

[38] Where FASD is diagnosed, failing to take it into account during sentencing works an injustice to both the offender and society at large. The offender is failed because he is being held to a standard that he cannot possibly attain, given his impairments. As noted by Judge Barry Stuart in *R. v. Sam*, [1993] Y. J. No. 112 (T.C.), FASD takes away someone's "ability ... to act within the norms expected by society" (para. 17), and it is manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a "normal" offender cannot serve the same ends when imposed on an offender with FASD; it will not contribute to respect for the law, and neither will it contribute to the maintenance of a just, peaceful and safe society.

[39] The calculus of sentencing the average offender simply does not apply to an offender with FASD. Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD.

[40] Ruddy T.C.J. considered the impact of FASD on sentencing in *R. v. D.J.M.*, [2005] Y.J. No. 18, stating:

However, research shows that the part of the brain most damaged in people with FAS is the prefrontal cortex which controls executive functions. Executive functions include inhibition, problem solving, sexual urges, planning, time perception, internal ordering, working memory, self-monitoring, verbal self-regulation, regulation of emotion and motivation. The effects of alcohol exposure on behaviours related to executive functions result in socially inappropriate behaviour as if inebriated, inability to figure out solutions spontaneously, inability to control sexual impulses especially in social situations, inability to apply consequences from past actions, storing and/or retrieving information, and moody rollercoaster emotions. People with FAS need external assistance and constant reminders, frequent cues and consistent monitors. Without the external assistance, people with FAS cannot manage safely in the community.

[41] In sentencing, Judge Ruddy considered the following as a mitigating factor:

Mr. Malcolm's severe cognitive disabilities. I note that s. 718.1 requires that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. In my view, Mr. Malcolm's cognitive disabilities and their impact on the executive functions of his brain does affect the degree of his moral culpability and must be considered.

[42] Despite the objective seriousness of his offence, taking into account Mr. Harper's reduced personal responsibility due to his serious cognitive disabilities, I conclude that a just sentence should result in a substantial reduction in the sanction imposed by this court.

[43] There are additional sentencing principles that call for a reduction of Mr. Harper's sentence. The role of specific deterrence in sentencing FASD-affected offenders decreases in proportion to the severity of the offender's cognitive

deficits. Specific deterrence presupposes that an offender can make the connection between the sanction imposed by the court and the wrongful act, remember that connection, and then generalize the probability of punishment to other unlawful acts. The assessment report by Medigene Services suggests that Mr. Harper's cognitive deficits are severe enough to limit or even preclude the brain functions inherent in the operation of specific deterrence.

[44] When we make decisions, we use strategies derived from previous experience and apply that experience in a flexible way to different situations. Our past experiences guide our thinking and provide a basis for our choices. Decision making is governed by the ability to generalize. Mr. Harper, by way of contrast, cannot generalize or read into a situation or idea.

[45] Memory is the ability to store information for later use and the capacity to retain and recall that past experience as required. A functional memory is essential for critical thinking in all areas of life: understanding truth, making decisions, motivating oneself to make changes, delaying gratification, and problem solving. Mr. Harper's memory is so impaired that he is unable to retain information in his short term memory long enough to encode it into long term memory. As a result, he has significant problems with cause and effect relationships. He is a person who may repeatedly touch a hot stove because he does not remember that it burned him when he touched it the last time.

[46] I have concluded that specific deterrence should not be a factor in sentencing Mr. Harper.

[47] Denunciation is an important factor in sentencing serious cases. It sends a message that certain kinds of conduct are considered by society to be abhorrent. Sexual contact with a 13-year old girl by a 35-year old man constitutes abhorrent conduct. General deterrence is also a part of s. 718, and it generally indicates to other would-be offenders that committing the same offence will lead to serious

consequences. Should denunciation and general deterrence be a major factor in sentencing an individual with the cognitive disabilities exhibited by Mr. Harper? In this case should we use Mr. Harper as a whipping boy by imposing a gaol sentence of greater length on him in order to deter others who should and are capable of knowing better? I think not. Mr. Harper is an innocent victim of the FASD visited on him by maternal alcohol consumption during pregnancy. As stated in *R. v. Abou*, [1995] B.C.J. No. 1096 (Prov. Ct.), “it is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person”. To do so would invite a Charter remedy pursuant to s. 12 of the *Canadian Charter of Rights and Freedoms* that forbids cruel and unusual punishment.

[48] What sentencing principles are relevant? As suggested by Larry Chartrand and Ella Forbes-Chillibeck after a review of relevant case law in their 2003 article “The Sentencing of Offenders with Fetal Alcohol Syndrome” (2003) 11 *Health Law Journal* 35, I am of the opinion that separation (where necessary for the protection of society) and rehabilitation should be the primary focus of judges involved in sentencing FASD-affected offenders. Separation does not equate with jail, however. Separation can and should be achieved in a secure community setting in most instances. We do not jail children under the age of 12 in Canada and when they are under the age of 18 years, they are detained separately from adults. FASD-affected individuals who function at the level of children should only be placed in jail as a last resort and then in a facility separate from adults in order to avoid the victimization experienced by Mr. Harper when he was in custody. Similarly, rehabilitation for Mr. Harper must accommodate his cognitive disabilities and can not be achieved through typical offender programming. It must involve individualized supports and a focus on improving his life skills through repetitive tasks done under supervision. Mr. Harper is capable of learning and developing, but he needs to be guided and supported in a manner that takes into account his limitations.

[49] This Court is obligated as a matter of law to take Mr. Harper's disabilities into account in sentencing when those disabilities impact on the principles and purposes of sentencing as set out in s. 718 of the Criminal Code. Failure to do so runs the risk of violating the Territory's human rights legislation and s. 15 of the Charter. When a government and its correctional authorities fail to accommodate a FASD-affected individual with therapeutic probationary programs, it runs a similar risk.

[50] Some people with FASD are unable to grasp the concept of time, because it is an abstract concept. The assessment indicates that Mr. Harper is unable to tell time, whether by the hour or date. Although he may be able to read the time or date from a digital watch, he will not understand it. This deficiency has negative implications for Mr. Harper holding a job that requires timely attendance. It also means that the court and his probation officer should have realistic expectations of him with respect to timely attendance at meetings and court. Punishment for noncompliance would probably be inappropriate. As a result, his probation order should be drafted carefully so as not to require him to do what is beyond his capabilities. Instead of setting out a long list of mandatory requirements, it should establish a shorter set of guidelines.

[51] The evidence in this case suggests that Mr. Harper was seriously intoxicated when he committed the offence, and had no recollection of it. Section 33.1 of the *Criminal Code* would preclude voluntary intoxication as a defence for a charge pursuant to s. 151 of the Code. I am not considering voluntary intoxication in this case as a defence but merely as a mitigating factor. There are many reported cases where voluntary intoxication has been considered an aggravating factor in sentencing. In cases involving young accused persons or individuals who do not have a lot of experience using alcohol, it can be a mitigating factor. It can be considered mitigating where an individual has a severe alcohol addiction and is attempting to deal with his addiction.

[52] In my experience, there is a very high correlation between FASD-affected individuals who are charged with criminal offences and alcohol abuse. In these cases, pre-sentence reports often indicate that alcohol involvement began at early teen or preteen years. A number of recent clinical and epidemiological studies indicate that prenatal exposure to ethanol is strongly associated with the risk of alcohol abuse in adolescence and adulthood. In effect, gestational exposure in humans is perhaps the best predictor of later ethanol abuse during adolescence. Moreover, binge drinking during pregnancy may be a risk factor for specific psychiatric disorders and traits in early adulthood. (see: Streissguth *et al.*, “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome and Fetal Alcohol Effects”, University of Washington School of Medicine, Seattle, Washington, August, 1996; Barr *et al.* (2006), “Binge Drinking During Pregnancy as a Predictor of Psychiatric Disorders on the Structured Clinical Interview for DSM-IV in Young Adult Offspring”, *Am. J. Psychiatry*, 163:1061-1065; Youngentob *et al.* (2007), “The Effect of Gestational Exposure on Voluntary Ethanol Intake in Early Postnatal and Adult Rats”, *Behavioral Neuroscience* 2007, Vol. 121, No. 6. 1306-1315; Baer *et al.* (2003), “A 21-Year Longitudinal Analysis of the Effects of Prenatal Alcohol Exposure on Young Adult Drinking”, *Arch Gen Psychiatry*, Vol. 60, 377-385). In other words, FASD-affected individuals, because of their exposure to ethanol in utero, are more susceptible to becoming addicted to alcohol, particularly when alcohol consumption begins at an early age.

[53] Unfortunately, alcohol addiction counseling and programming are largely ineffective for FASD-affected individuals because those programs are cognitively based. That is why Dr. Heredia recommended against alcohol treatment for Mr. Harper. Instead he recommended that Mr. Harper abstain from alcohol use altogether.

[54] Many FASD-affected individuals have difficult childhoods due to their mothers' alcohol abuse. As in Mr. Harper's case, their parents are not good role

models, they are often raised by other members of the family or are taken into care by Family and Children's Services. It is apparent that FASD-affected individuals are often at a significant disadvantage compared to their unaffected counterparts: they may lack appropriate care as infants and children, they are more susceptible to alcohol abuse and addiction, and they are unable to benefit from alcohol counseling programs. I conclude that Mr. Harper's intoxication at the time of the offence should not be considered an aggravating factor in sentencing. At worst, it is a neutral factor. There are good reasons to consider it a mitigating factor considering Mr. Harper's background.

[55] Although he had no recollection of the event, Mr. Harper entered a guilty plea after receiving the DNA results. I consider his plea to be a mitigating factor. In addition, as Mr. Harper is an aboriginal person, s. 718.2 (e) of the *Criminal Code* requires me to consider all available sanctions other than imprisonment. Dr. Heredia recommended that alternate measures other than incarceration be considered for Mr. Harper.

[56] FASD-affected individuals are often victimized physically, sexually and emotionally as children and as adults. Mr. Harper was sexually assaulted by two adults while detained in custody on these matters. I consider Mr. Harper's victimization while in pretrial detention to be a mitigating factor in sentencing.

[57] It is an aggravating factor that this was a sexual offence involving a 13 year old intoxicated victim. It is evident that J.W. and her family suffered significant emotional pain once they realized what had happened to her.

Sentencing

[58] Counsel agreed that Mr. Harper was in pre-trial custody on these matters for a total of 6 months. As he was in segregation for most of this time period, he is entitled to double credit for a total of 12 months pretrial custody.

[59] With respect to the s. 151(a) charge, an appropriate sentence in all of the circumstances is 6 months custody. I credit him 6 months pretrial custody. His sentence is 1 day in jail deemed served today. In addition, he will be placed on probation for a period of 24 months, on terms that I will set out later.

[60] With respect to the s.145 (3) charge, an appropriate sentence in all of the circumstances is 2 weeks in custody, consecutive. I credit him with 2 weeks pretrial custody. His sentence is 1 day in jail, deemed served today.

[61] The sentences imposed are substantially less than what could have been expected if the accused was not suffering from FASD. Mr. Harper's diminished responsibility for the acts in question and the limited role of deterrence in sentencing him call for a substantial reduction in the severity of the sanction.

[62] In the course of preparing these written reasons, I had the opportunity to again review the extensive materials filed by counsel and to consider them more carefully. Although in the end result, it would make no practical difference to Mr. Harper's sentence, I now agree with Dr. Heredia's recommendation which was not to impose a gaol sentence. I now believe that a suspended sentence followed by a lengthy probation order would have been a more appropriate sentence.

[63] The terms of the two year probation order attached to the s. 151 offence are set out below. They are drafted in a manner that recognizes Mr. Harper's cognitive disabilities as described in the assessment report from Medigene Services, Dr. Heredia's report, and recommendations found in the pre-sentence report. They are premised on the assumption that additional resources will be made available to supervise Mr. Harper in the community.

1. You must keep the peace and be of good behavior. Do not do anything that will get you in trouble with the police.

2. You must come to court when the judge or your probation officer tells you to.
3. You must tell your probation officer if you go to live somewhere else, change your name or change jobs.
4. You must meet with your probation officer in person or by telephone when he tells you. If you are going to be late or cannot make the meeting, you must telephone your probation officer and ask for another meeting time.
5. You will do the best you can to:
 - a) stay away from people who are drinking;
 - b) not drink any alcohol, meaning, beer, wine or liquor;
 - c) stay away from the liquor store, off sales, and bars;
 - d) meet with counselors when your probation officer tell you to
 - e) find work
 - f) not talk to or hang out with people your probation officer says you should stay away from
 - g) not be alone with females under the age of 16 or any females who are drunk.
 - h) Stay away from and do not talk to J. W.
6. You will live in your brother's house in Pelly and stay there unless your probation officer tells you that you can live somewhere else. Your brother is the boss of that house. When he tells you what to do around the house, you will do the best you can to do what he says, for example, doing chores, cutting wood, cleaning your room and the house and coming home at night at a time that he tells you.
7. It is important for your probation officer to talk to your doctor and your counselors. You will sign a paper that will allow your doctor and counselors to tell your probation officer how you are doing.
8. You will attend court in Pelly on March 3, 2009 at 10:00 am for a review of your performance under this probation order. You will also participate in any planning session conducted in court. This court respectfully requests the Probation Officer to invite individuals who can contribute to the planning process to attend court at this date. The planning session may include but not be limited to support and supervision for Mr. Harper in the community, job opportunities, skills development, recreational activities and possible contributions by family members and the Pelly First Nation. Possible sources of funding to provide several additional hours of supervision each day by FASSY should be explored.

[64] Mr. Harper's counsel has asked me to impose a publication ban in relation to any information or evidence that could identify his client. His concern is that labeling him as suffering from FASD and as a sexual offender could have a negative impact, such as limiting his job opportunities or increasing the likelihood of Mr. Harper becoming a victim.

[65] The starting point in any adult court proceeding is a presumption of openness. In certain situations, the disclosure of the identity of persons involved in court matters can be restricted by statute. For example, in the Youth Criminal Justice Act, the identities of young offenders, complainants and witnesses are protected and in the *Criminal Code*, the identity of complainants and witnesses in sexual offences are also protected.

[66] There is a further judicial discretion to restrict publication, but it is linked "to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk": see *Re Vancouver Sun*, 2004 SCC 43. Further, any such risk must be real, substantial and well grounded in the evidence. The following case suggests that the judicial discretion to restrict publication is a narrow one. It involved a female youth suffering from Fetal Alcohol Syndrome who was tried and sentenced as an adult. She was of aboriginal descent. She was victimized as a child. She had no previous criminal record. The application to restrict publication was denied. See *R. v. Bird*, 2008 ABQB 327.

[67] The onus is on the applicant to satisfy the court that a publication ban should be made. It should not be a matter of speculation by the judge. The evidentiary threshold has not been met in this case. I decline to make the non-publication order requested, and direct that the interim order I made at the beginning of this hearing be vacated.

LILLES TCJ