

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. C.S., 2012 NSPC 45

**Date:** June 12, 2012

**Docket:** 2397460, 2397461

2397464, 2397465

**Registry:** Halifax

Her Majesty the Queen

v.

C.S. and K.S., young persons

**DECISION**

**Revised Decision:** This decision replaces the previously released decision as of June 21, 2012.

**Judge:** The Honourable Judge Jamie S. Campbell

**Heard:** March 9, 2012 and May 30, 2012

**Decision:** June 12, 2012

**Charge:** cc 279(1)(a) and cc 267(b)

**Counsel:** Jamie VanWart - Crown Attorney  
Alex Embree - Defence Counsel for C.S.  
Eugene Tan – Defense Counsel for K.S.

**By the Court:**Introduction:

[1] This matter involves the sentencing of two young people, K.S. and C.S., a brother and sister, for kidnapping and assault causing bodily harm.

The circumstances surrounding those crimes involve confinement, degradation, torture and wanton cruelty. Anyone who has seen the photographs of the victim and heard how he was treated could not but be disturbed, shocked and indeed saddened by the entire event.

The Offences:

[2] R.C. is a young man who is well known to people in the Halifax youth court. He has a very extensive criminal record and has spent a considerable period of time in jail. There is no question that he is a young man with serious issues to be resolved. He was released from the Youth Detention Centre in Waterville on 12 November 2011.

[3] Barry Brugger, an adult, asked C.S. to help him arrange to meet R.C., whom she knew. Brugger told C.S. that he wanted to beat up R.C. because he had stolen Brugger's car.

[4] Three days after his release from Waterville R.C. exchanged texts with C.S. arranging for a meeting near the Superstore in Porter's Lake. She lured him there, in part at least, with the promise of sex. One of her texts reads, "I want to fuck you."

[5] C.S. exchanged text messages with her friend Scott Murphy to confirm the arrangements to lure R.C. to a particular location. (Scott Murphy is now serving a penitentiary term as a result of his involvement in this matter.)

[6] That afternoon R.C. took the bus to Porter's Lake with a friend. C.S. sent a message to Murphy saying that she would tell him when she saw the bus. She confirmed when the bus arrived and then confirmed that she was walking with R.C. and telling Murphy exactly where R.C. was. It appears that nothing was left to chance.

[7] That part was all pre-arranged and carefully planned. C.S. received a text message from Scott Murphy. It says: "K when u r walking up the trail makes sure r.'s on the far rite". She replied "Okay" and "Tell jr I am smoking that j when you guys are fighting them".

[8] When R.C., his friend and C.S. got to the appointed spot, Barry Brugger, Scott Murphy and K.S. attacked. Barry Brugger threw R.C. to the ground and K.S. and Scott Murphy proceeded to kick him. R.C. had a knife. Barry Brugger took that away from him. R.C. was taken to a car where he was told to get into the trunk.

[9] After R.C. had been captured, Scott Murphy sent a message to C.S. which read, "blindfold him fer sure". Her response was "ya hun."

[10] They took R.C. to a shed located on a nearby property.

[11] Half an hour after they arrived at the shed, C.S. tied R.C.'s hands and feet.

[12] For up to eight hours Barry Brugger, K.S., C.S., Scott Murphy and another adult participated in confining R.C.. During that time they tortured him. His face,

arms and hands were burned with a cigarette numerous times. He was branded several times with a hot cigarette lighter. He was beaten with drumsticks and belts. He was urinated on, including having someone urinate in his mouth. He was forced to drink his own urine from a container. His hands were beaten with a sword sheath. His leg and foot were painted white. His hair was shaved into the shape of a penis. His eyebrows were shaved. He was forced to pull down his pants and expose his genitals. He was threatened that he would be raped and killed. A stick was pushed against his anus, through his clothing. A black air gun, looking very much like a 9 mm handgun, was pointed at him. One of his ears was pierced with a tire tool that resembles a cork screw and a padlock was inserted through the piercing and locked.

[13] C.S. admits to kicking R.C. and was present for and a party to the assaults and degradation of R.C.. She did not know beforehand that he was going to be confined to the shed but was there the entire time. Based on her texts to Scott Murphy she seems to have taken some delight in what was happening. One message reads, "Berry makin him suck his dick". When Scott Murphy sends her a message saying "Tell em to keep beating him don't stop r they", she replies, "yes lol you should see him". In text messaging, "lol" refers to laughter.

[14] K.S. knew that R.C. was going to be beaten. He was not aware beforehand that he was going to be confined to the shed. He left the shed for periods of time to smoke joints. He admitted to hitting R.C. twice and burning him once. He admitted to having the airgun in his hand but not to pointing at R.C.. He did not participate in urinating on R.C. or forcing him to drink his own urine. He was not a

party to those things and is not responsible for them. He was present for and a party to the other assaults. He did leave the property at around 3 a.m..

[15] R.C. managed to escape to a nearby home the next day at 8:30 am. He had been able to cut himself free.

[16] The pictures taken of R.C. showing his physical injuries are intensely disturbing. He is hardly recognizable. The medical reports indicate that one of his fingers had been broken. His face is bruised, burned, and swollen. His eyebrows are shaved off and his hair is shaved into the shape of a penis. His leg and foot are painted white.

[17] When R.C. was kidnapped, held against his will, and wantonly tortured, C.S. and K.S. were both involved as parties. They were more than innocent bystanders or even crudely amused observers. They were part of the depravity.

#### Sentencing principles:

[18] The Crown has not sought an adult sentence. The sentencing must be done according to the provisions of the Youth Criminal Justice Act ("YCJA").

[19] Section 38 (1) of the YCJA sets out that the purpose of sentencing is to hold young people accountable for offences through the imposition of "just sanctions" that have "meaningful consequences" for the young person and promote his or her rehabilitation and reintegration into society. That is a fairly broad statement. It is significant that it does not include any reference to deterrence or denunciation. A youth sentence cannot, in any circumstances, be used to "send a message" to the larger community as to what will or will not be tolerated. It

cannot be imposed to deter others from similar behaviors. It cannot be imposed to denounce certain behaviors. The sentence must be crafted to address the circumstances of the particular young person who is before the court.

[20] A youth sentence should recognize that the long term interests of society are served if young people are rehabilitated. Sometimes that may involve incarceration but most often that is achieved by not exposing a young person to the negative influences found in a youth correctional facility.

[21] That does not mean that young people should not be held accountable for their actions. They must however be held accountable as young people. Accountability as used in the YCJA is the equivalent of the principle of retribution in the adult context.

[22] Retribution is not vengeance. It is not pay back. It is not an eye for an eye. It is though, a response to a moral wrong. It includes consideration of the degree of moral culpability, the harm done to the victim and society, and the extent to which the young person's actions offended the values of society. The application of each of those requires the exercise of restraint.

[23] Moral culpability or moral blameworthiness has to be assessed based on the degree of participation of the young person, his or her level of sophistication and his or her life experience, among other considerations. It is not simply a reflection of the crime itself. The harm to the victim is a consideration that can slip into payback or vengeance. That cannot be allowed to happen. Our law and society have progressed beyond a stage where the punishment must not only fit the crime but somehow equal the crime in its severity. The requirement to

consider the normative character of the behavior, or the extent to which that behavior offends the values of society cannot result in deterrence or denunciation creeping into the youth sentencing process. It is not a way to publically affirm societal values.

[24] All of that has to be considered bearing in mind the young person's record of prior offences. Sentences imposed on similar young people in the region who have committed similar offences have to be taken into account as well.

[25] The sentence must be the least restrictive one that is capable of achieving the purpose of sentencing. While in adult sentencing there will be a range of appropriate sentences, a sentence imposed on a young person is proper only if it is **the** least restrictive sentence that is capable of responding to the purposes and principles of sentencing for young people.

[26] It is not a process that can be reduced to a checklist or a legal algorithm. At the same time it cannot be so subjective as to be arbitrary. Sentencing under the YCJA requires a consideration of the circumstances of the young person in the broadest sense. It requires a consideration of the circumstances of the offence. It requires the application of all the general principles of the YCJA, the purpose and principles of sentencing set out in the YCJA and sometimes very technical details of sentencing under the YCJA.

#### Circumstances of the Offences:

[27] People are capable of extreme cruelty. That is an unfortunate historical and present day truism.

[28] Sometimes that cruelty is unleashed in the context of a highly emotional situation. Sometimes it is related to psychiatric or psychological conditions. Sometimes it is fueled by drugs and alcohol. Sometimes it is coldly instrumental and used for a purpose, to extract information or to make an example of a victim. Sometimes it is a product of rage or revenge.

[29] It is a rare case where cruelty is as wanton and capricious as it was here. The person whose car was supposedly stolen may well have been angry. The others have no emotional context for their participation. Neither of the S.'s had a personal axe to grind with R.C..

[30] This was not cruelty that was a result of an emotional outburst.

[31] Neither C.S. nor K.S. was high or drunk to the point that they were not able to control what they did. Neither was acting in a drunken rage. Neither has a diagnosed psychiatric or psychological condition that would prevent them from appreciating what they were doing.

[32] While the kidnapping seems to have happened in the flow of events, the attack itself was highly planned. R.C. was lured to the place and set upon. They each knew that he was going to be beaten. That plan had to be developed. He was lured to the spot and great care was taken to make sure that he was exactly where he was supposed to be.

[33] The torture seems to have begun when the group got R.C. into the shed. At that point he became merely an object, not another human being. As a group they treated him like a thing to be cruelly and sadistically played with.



[34] That part does not seem to have been planned. As is often the case, each act of cruel depravity made the next one that bit easier. Once the young man has been subdued, it is only one step farther to confine him. Once confined it is only one more step to tie his hands and feet. Once he has been bound it becomes easier to see him merely as an object. Each act of torture or degradation makes the next one seem only worse by degrees. Their consciences are gradually turned off as they descend further.

[35] Sometimes an angry outburst or a moment of rage results in a person being shot or stabbed. People spend years in jail as a result of lapse of restraint or a moment of bad judgment. It takes something else to participate in the torture of another person over a period of time.

[36] The racial overtones of this attack cannot reasonably be denied. It was not racially motivated. There was no evidence of racial taunts or slurs. But, when a young black man is ambushed, attacked, tortured and painted white by white assailants, there is a powerful inference of a racial component to the event. Seeing the pictures of R.C. with the padlock in his ear, his head shaved and his leg and foot painted white, it is hard not to be drawn back to those hateful images of lynchings from the American south.

[37] The abuse and torture went beyond simply confining him, beating him and burning him. He was threatened with rape and death. Those threats were not empty ones. A stick was placed against his anus through his clothing. A gun that looked real was presented. The outrage went further when he was forced to drink

his own urine and had someone urinate in his mouth. His hair was shaved into the shape of a penis. This was beyond assault and abuse. It was obscene degradation.

[38] The disgusting depravity of the incident went even further when it was recorded on a cell phone video camera. And, when Scott Murphy told C.S. to make sure they didn't stop beating him, her reply? "Yes, lol you should see him." Another human being is confined, assaulted, tortured and degraded. Her response is "lol". A judge must be careful not to allow the shocking offensiveness of the behavior to overtake all other considerations. That is a real danger here. Judges do not have the luxury of making emotional responses.

[39] That being said, the actions of these young people offended the standards of decent human behavior. A person does not need to be intelligent, literate, mature or sophisticated to know that treating another person this way is not only wrong but deeply, fundamentally, profoundly and outrageously wrong.

[40] Neither of the S.'s was an active participant in each and every act against R.C.. They were each involved in the planning and the execution of the plan to gang up on him and beat him. They were each a party to the confinement, assault and degradation of their victim. They were not passive observers or people who just wanted to get away from there but who couldn't. They were a part of the action. While their degree of moral culpability is not as great as if each of them had personally struck every blow, personally shaved his head, personally urinated in his mouth, personally made him drink his own urine, personally painted him white, personally pierced his ear with a tire plug, personally held the stick to his anus, personally threatened him with rape and death and personally caused every

injury, they were more than just there for most parts of it. This was their crime not someone else's.

[41] At the same time, they were not the leaders of the group. While C.S. remained for the entire time, K.S. left and walked home at about 3:00 a.m. While being involved with this kind of abuse in any way is serious, their involvement has to be distinguished from those who were the actual leaders.

[42] The impact on the victim has to be considered. The harm to R.C. is incalculable. His physical scars have faded and he may not suffer any lasting physical signs of this attack. The lasting psychological impact on a person of being kidnapped, confined, assaulted and tortured over a period of hours should be beyond argument. In R.C.'s case must be added his own vulnerability as a young man who has been the subject of numerous reports, case conferences, court orders and counseling sessions. His own criminal record does not in even the very slightest or most subtle of ways lessen the significance of these attacks on him.

#### Personal Circumstances of C.S. and K.S.:

[43] The personal circumstances of each of the young people must be considered.

[44] C.S. and K.S. are brother and sister. C. is now 16 and K. is now 18. They were 15 and 17 when this incident took place. They both have lived in Dartmouth for most of their lives.

[45] Both grew up in a stable home with two parents. Each has positive relationships with both of their parents. Neither of them has had serious medical

issues and neither has been diagnosed with any kind of psychological difficulties. Unlike many of the young people who appear in this court, they have not been neglected or abused. They have not grown up either in an institution or in a series of foster homes or group homes. They have not been subject to grinding poverty nor has either of them been the victim of racism.

[46] Both parents in this case are supportive. There have been no issues during the time that C.S. and K.S. have been at home on house arrest. Their parents have been actively involved in their supervision.

[47] K.S. appears to have had some difficulties with school. He eventually was expelled from one school, withdrew from another after three weeks and is no longer enrolled in school at all. He has not given up on education. He has indicated that he intends to pursue educational opportunities through the Solutions Learning Program in Dartmouth. That program provides a basic educational foundation and then allows students to focus on developing skills in areas like woodworking, janitorial, food service or general office skills.

[48] C.S. is now in Grade 9. She has some academic challenges and her school has developed an individual program plan. She was seen by her school principal as having "great potential". She has been suspended on two occasions for disrespect toward the staff and for pulling a fire alarm.

[49] Their mother reported that when C. turned 13 she began to associate with an older peer group. K. was also involved with an older group at about that same time. Their parents removed them from the area to "get a fresh start". That didn't work. Both C. and K. began to identify with an older peer group in the area to

which the family had relocated. Those older friends eventually became their co-accused in this matter.

[50] C.S. has no record of prior offences. K.S. does. On October 4, 2010 he received a conditional discharge with respect to two assault charges and a theft under \$5000. It is neither a long record nor a very recent one. It does not involve crimes that approach these matters in their level of seriousness. Neither of them has worked his or her way through the system. They have essentially exploded on the scene with an extraordinary offence.

[51] It is no surprise that their mother was shocked by the behavior of her children. Given the nature of what happened it would be a rare parent who would see these actions as being consistent with the character of her child. It is almost always hard to square abusive or violent behavior with the person you know in an entirely different context. It is difficult to visualize the two young people in court today with their parents doing these things. Yet, that is the sad reality.

[52] The presentence report indicates that C.S. appeared to have "regret for the wrongs she committed". She was noted as being sincere in taking responsibility for her actions. On her own initiative she wrote a letter of apology to R.C.. It is quoted here, in its entirety, with the spelling and punctuation unchanged.

*Hello R., I am really Sorry for what that night to you i didn't think what was goin to happin to you and I know it was wong to do to someone. I wish it never even happined, I feel really sick for what happin that night, and I am dum for getting you in to something like that it was wong. I feel really bad because that was not right to do*

*that to you and it was wong and sick and so more other things. I would like to say sorry to you in person then over papper, I would like to tell you how sorry I am for that happin that night and like I sayed I am really sorry. By: C.*

[53] Those are the words of a 15 year old who seems to know that she has done something wrong but who is not capable of either comprehending or expressing the real depth of the situation.

[54] K.S. also appeared remorseful. He commented that "it was stupid thing to do", and that "people took it too far". He said, "when I left I should have brought him with me". C.'s word "dum" and K.'s word "stupid" do not begin to take the measure of this event. It may well be that they are no able to understand that their actions go far beyond "dum" or "stupid". The comment that people took it too far suggests that up to some point it was acceptable and things just got out of hand.

[55] This is just not the kind of thing that can be explained away by saying it was stupid or by saying you're sorry. Apologies are good things when they are timely and sincere. These statements are both of those things and as such should be fairly considered. They also appear to show a lack of any real insight.

[56] The S.'s seem to have had a relatively normal upbringing with the same challenges that many young people face. It is hard not to conclude that something however is very wrong. They have each, for some reason, gravitated toward a negative older peer group. They have persisted in doing that despite their parents' efforts. They have each shown themselves capable of participating in

cold and brutal violence. This is not the kind of thing that can be dismissed as the kind of thing young people do when they get in a group and things get out of hand. Something is very wrong.

Promotion of Rehabilitation and Reintegration:

[57] As well as holding a young person accountable a sentence must promote his or her rehabilitation and reintegration into society. That cannot result in a young person receiving a more restrictive sentence than an adult simply to provide for rehabilitation in an institutional setting.

[58] In this case, both of these young people have been at home while awaiting trial. They have not served a substantial period of remand in a custodial facility. In some respects, they and their family seem to have tried to put this situation behind them. There is no evidence however that whatever conditions underlie the willingness of either of them to participate to the extent they did in such wanton cruelty have been identified much less addressed. There is also no evidence to suggest that any such treatment or counseling could only be provided within an institution.

[59] Serving time in an institution is almost never a positive thing. Aside from the extraordinary costs to society of keeping a young person incarcerated, the young person is kept away from the often normalizing influences of school, work, friends and family. Each day in an institution exposes that person to the negative influences of a pro-criminal peer group. The costs to society are significant in the short term and potentially event more significant in the longer term. There are very good reasons while jail is a very last resort.

Sentences Imposed in Similar Cases:

[60] A sentence must take into account sentences imposed for similar offences on other young people in the region. Considering other sentencing cases always requires the exercise of some care and caution. In youth justice court that is particularly true.

[61] Youth sentencing is a highly individualized process. Young people are sentenced based on their own circumstances and sentences are tailored to provide consequences that are meaningful to them based on those circumstances. Legal precedent must be considered but it cannot result in a sentence becoming a function of precedent. Each other young person involved in each other case was sentenced based on his or her own individual circumstances. That makes it difficult to apply those results to this case. And, in this case, the sentence to apply to each of these young people must take into account his and her unique circumstances. The value of precedent is to insure that a sentence is not out of proportion to the sentences imposed on others.

[62] In *R. v. R.A.H.* (unreported, 12 December 2008 and 4 March 2009, Nova Scotia Youth Justice Court) Associate Chief Judge Pamela Williams dealt with a case involving the confinement and beating of a young woman at the hands of a group. The incident arose from a dispute about a boyfriend. R.H. dragged the victim by the hair to a house where she was confined, thrown against a wall and had her head banged against the wall, all in an effort to get her to fight. The victim refused.



[63] She was thrown down a stairwell. She was beaten with a mop and had her legs jumped on. As a result her legs were bruised all over. The victim had her forearm and shoulder burned with a cigarette. Her hair was cut off. She was then placed inside a freezer with cold water thrown on her. She remained in the freezer for 15 to 20 minutes.

[64] R.H. was sentenced based on a joint recommendation. She had no criminal record. She spent 122 days in pretrial custody, which with 1.5 credit for each day would amount to the equivalent of 183 days.

[65] The presentence report was very positive. R.H. showed genuine remorse and a real willingness to seek the help needed for rehabilitation.

[66] She was described as a young person who seeks acceptance and approval. She was described as overly eager trying to attach herself to the workers at the Nova Scotia Youth Facility. The young person lacked social skills and was caught up in a dysfunctional group dynamic that lead to the offence. She had been the victim of bullying herself and her past was seen as explaining much of the behaviour that gave rise to the serious charges.

[67] After receiving credit for the time spent in custody, she was sentenced to a deferred custody and supervision order for 4 months followed by a year of probation.

[68] It would appear as though R.H.'s background and positive presentence report, along with the nature of her role in the offences played a considerable part in the result. She had already spend the equivalent of 6 months in jail.

[69] In R. v. C.S. [2008] N.S.J. No. 218, and unreported 20 May 2008 (Nova Scotia Youth Justice Court) a 14 year old girl was one of three people charged with the brutal beating and assault of another young woman. The other two admitted their involvement in the assault. The adult was sentenced to 5.5 years of imprisonment.

[70] The assault arose out of a dispute about whether the victim had spread rumours about a friend's boyfriend having a gun. C.S. admitted that she struck the victim first with a closed fist, while the others joined in with punches and kicks. C.S. put out a cigarette in the victim's ears and burned her feet with a lighter. The group struck the victim with a belt buckle and lit her hair on fire. The victim suffered burns to her face and ears, a broken eye socket and a broken nose. The young person was found guilty of aggravated assault and breach of probation.

[71] The assessment of C.S. showed that she lacked moral and emotional development. She was described as emotionally needy. Her upbringing was characterized by a lack of parental control. Her age, maturity, character, background and criminal record were all considered in determining that a youth sentence would be appropriate. Associate Chief Judge Williams noted that the ability to redirect the young person through the implementation of intensive support and supervision and the prospect of funding an intensive treatment plan favoured a youth sentence rather than a longer adult sentence.

[72] In sentencing C.S. Associate Chief Judge Williams referred to a report that detailed the disturbing attitudes and behaviours that had been displayed by C.S. over a period of three years. At an early age she was given the opportunity and

took the opportunity to make her own choices. That resulted in her involvement with an older negative peer group, her involvement with crime and her involvement with drug and alcohol abuse.

[73] The report indicated that C.S. was still young enough that her sense of identity could be remolded and reshaped. That could only be done with intensive support, supervision, guidance and treatment. Two years was required to rehabilitate her and reintegrate her into the community. C.S. was not given credit for time spent on remand. The two year custody and supervision order was broken down as 16 months in custody and 8 months of supervision in the community.

[74] In R. v. E.L. (unreported 14 June 2006, Nova Scotia Youth Justice Court) the young person had been involved with a group of people all of whom had been drinking and smoking marijuana. One of the people became a victim of what amounted to a rather random assault. The young person said that she poured water over him and put a burning cigarette in his ear. She admitted to burning his face with a cigarette at least once. She realized at one point that things had gone too far. One of the males involved began cutting the victim's back with a knife. She said that it all seemed like a big joke to them at the time.

[75] She cooperated entirely with the police investigation of the matter.

[76] In the time after the offence, the 17 year old seems to have applied herself. She worked in her parents business. She was set to graduate from high school and was confident of being accepted into university. Her parents, who were described as having been devastated and distraught, took steps to arrange for

addiction counseling for their daughter. The young woman herself indicated, through her lawyer, that she saw a disconnect between the kind of person she saw herself as being and the kind of conduct she had engaged in. The young woman was reported by her lawyer to have said, "I intellectually understand what took place, but I can't understand it on an emotional level." The fact that she had no explanation was very disturbing to her. That itself indicates a level of real insight.

[77] A joint recommendation for one year of probation was accepted by the court.

[78] This case was noted by counsel in this matter as representing the "low water mark" for offences of this kind.

[79] Each sentence imposed on a young person is the product of a highly individualized process. While cases in which adults are sentenced can be distinguished from each other, cases involving young people are even more distinguishable. Precedent has a value but in this context its value is less as a guide or a benchmark and more as a way of establishing very basic parameters.

[80] Case law from this region suggests that in sentencing young people who have been involved with group beatings, there is a broad range of sentences that can be imposed. Each case has unique features and each young person involved had a different degree of involvement, different personal circumstances and different responses.

Summary:

[81] Defense counsel have recommended a Deferred Custody and Supervision Order. The longest such sentence permitted is 6 months. That would be a custodial sentence served in the community.

[82] Each has put forward the best possible argument for that. They are entirely correct in their assertion that, even in the face of a serious crime, a sentence should not be determined by taking the maximum as a starting point and considering why it should not apply. I asked during the sentencing hearing why this case should not attract the maximum sentence. That was not the right question. While acknowledging the horrific nature of the crimes both counsel have properly drawn attention to the circumstances of their clients. Both clients have entered guilty pleas at an early opportunity and confessed to their involvement in the matter within days of the incident. Neither was involved directly in all of the acts against the victim. They were part of a group of older friends who were the leaders. Neither has spent time in jail before all of this happened and only K.S. has any criminal record at all. Both have pointed to the extent to which each of the S.'s have shown remorse for what they have done. Neither has been diagnosed as having a condition that makes him or her a high risk to offend or that requires treatment that can be provided only in an institutional setting. Both have spent a considerable time on house arrest and have with the help of their parents, complied fully with the terms and conditions of their pretrial release.

[83] C.S. at 16 has what was described as a “dread” of going back to Waterville where she spent 2 nights on remand. Mr. Embree points out that she can, at this age, go in one of two directions. She can either take a pro-social route with her parents’ guidance or fall into the route taken by her adult co-accused. Jail will expose her to the wrong influences in the very much the wrong context. The ongoing threat of jail may serve a better purpose.

[84] The S.’s have a supportive family. Their parents were shocked and saddened by their behavior and have done nothing that would be seen as condoning, excusing or minimizing it. Their parents are a positive influence on both of these young people.

[85] Both of them have developed plans to continue with their education. They are not young people who have fallen between the cracks.

[86] Both of them have cooperated with the police investigation of the matter. Crown counsel has noted that while the Crown was confident in obtaining a conviction, the confessions of both in this case were important. The victim may not have been a compellingly reliable witness given some of the inconsistencies in his statements. The guilty pleas in this case are of some considerable value beyond expediting the matter and saving the victim from having to testify.

[87] The Crown has recommended a sentence of incarceration for both. For C.S., the Crown has recommended between 4 and 18 months in jail, followed by a period of probation to bring the total sentence up to the three year maximum permitted under the YCJA. For K.S., the Crown has recommended a period of between 4 and 12 months of incarceration followed by a period of probation. The

Crown points to the seriousness of the crimes as calling for time in jail but has not recommended a period of incarceration that approaches the maximum of three years. The reasons advanced by defense counsel and the early and significant guilty pleas, apply to make this case one where that maximum sentence should not be imposed.

[88] Incarceration is not a good thing. It is a last resort. Whenever it is considered a judge must ask whether any less restrictive sentence, such as deferred custody with house arrest, is capable of achieving the purposes of sentencing. Seeing a 16 year old who was terrified by the two nights she spent in custody while on remand, now facing separation from her family for an extended period of time serves as a practical affirmation of the legal obligation to search for consequences that do not involve jail. Leaving home for any young person can be traumatic. Leaving under these circumstances can only be heartbreaking for everyone involved.

[89] Sentencing is an individualized process but it is not only about what is best for the person being sentenced. That is a consideration but it not the only one. While the best interests of these two young people and society as a whole, have been argued as being served by their returning home with their family, going to school, getting some counseling, putting all of this behind them and staying away from the negative influences of an institution, that leaves out some other considerations.

[90] A sentence that does not involve incarceration in this case may go some way toward serving the purpose of reintegration and rehabilitation. It is doubtful

whether those interests would be properly served in the manner contemplated by the YCJA if the sentence is one that simply ignores the other principles. A sentence must hold a young person accountable. Sanctions must be just. They must provide meaningful consequences. They must be similar to other sentences in the region for similar young people. They must be proportionate to the offence. They must take into account the harm done to the victim and the community. If a sentence does not do those things, and the court takes a pass on moral judgment, the young person is not held to account for his or her actions. That is hardly conducive to the young person's rehabilitation.

[91] The principles of sentencing are not weighed against each other so that one is privileged over the others in any given case. Those principles and objectives have to be informed and influenced by each other.

[92] In this case, a sentence that did not involve a significant period of incarceration would not be just, would not be meaningful, would not be proportionate to the offence and would not consider the impact on the victim and the community. The YCJA requires that young people be treated differently from adults. That is because they are different. It does not mean that because they are under 18 they should not be held to moral account for their actions.

[93] The nature of the crimes is one consideration in making that determination. It is not the only one.

[94] It should be noted however that young people often fall in with people who exert negative influences over them. In the case of C.S. and K.S. their parents saw when that happened and tried to remove them from the area. Both however,



seem to have found trouble and the people who go with it despite the efforts of their parents. Something has drawn these two young people toward others involved in criminal activities.

[95] This was not a case of two well behaved but naïve children getting sucked into doing something stupid by some older sophisticates. They had each voluntarily associated themselves with the group who were involved. They were friends.

[96] This incident was not the result of a momentary lapse of judgment or inhibitions. The attack itself was planned and coordinated. C.S. descended to the point of using herself as sexual bait for the victim.

[97] As each act of defilement is done, the next seems to be an almost natural extension. Yet, to inflict that kind of treatment on another human being, even in the context of a group beating, is not something that people can do without having the facility to turn off any natural sense of empathy.

[98] There is no evidence with respect to any specific counseling that either of these two young people will require and how long that counseling might take. There is no report suggesting the extent to which either of them is at risk to reoffend. Even without such a report, it is reasonable to infer from the circumstances that whatever underlies their willingness to be involved with this needs to be addressed.

[99] Their circumstances are not identical. K.S. is the older of the two. In that respect, he bears more responsibility. This is not his first offence. He did however remove himself from the situation during the early morning hours. The younger

sibling, C.S. appears to have been somewhat more involved in encouraging the situation. Her age however is significant. She is just now finishing Grade 9. They should receive the same sentence.

[100] I am not satisfied that any sentence shorter than a one year custodial sentence could be sufficient to meet the objectives of sentencing. Serving a sentence at home would not do that and spending a summer in jail would not do that. That sentence be served as a period of 365 days, with 243 days in custody and 122 days under supervision in the community. That will mean that both will be in custody until February 2013. They will then spend 4 months under supervision in the community. That will be followed by a period of probation for a further 24 months. The terms of the probation, in addition to the statutory terms will include the requirement to report within three days of release, to reside with their parents unless they have permission from the court to reside elsewhere, to attend for assessment counseling and treatment and to participate and cooperate with the assessment and treatment. Each will also be required to make best efforts to be enrolled in an educational program or to obtain employment.

[101] A DNA order and a 5 year weapons prohibition will be signed with respect to both.