S.C.C. No. 02648

**IN THE SUPREME COURT OF NOVA SCOTIA**

**APPEAL DIVISION**

**Clarke, C.J.N.S.; Chipman and Freeman, JJ.A.**
Cite as: R. v. J.A.C., 1992 NSCA 50

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| **BETWEEN:** | ) | |
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| HER MAJESTY THE QUEEN | ) | Robert E. Lutes |
| | ) | for the Appellant |
| Appellant | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | |
| J. A. C. | ) | Joseph A. Cameron |
| | ) | for the Respondent |
| Respondent | ) | |
| | ) | |
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| | ) | Appeal Heard: |
| | ) | November 17, 1992 |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | November 27, 1992 |

**Editorial Notice:** Identifying information has been removed from this electronic version of the judgment.

**ERRATUM**

On page 14, second complete paragraph, line 6, should read "two months for the assault", deleting the words "with a weapon".

**CHIPMAN, J.A.:**

This is an appeal by the Crown from dispositions imposed upon the respondent, a young offender, respecting 14 offences committed by him between October, 1987 and April, 1990.

**OFFENCES:**

The offences, with the dispositions imposed and the dates of birth of the respondent and the victims, are summarized in the Crown's factum as follows:

[This page contained graphical images which may only be viewed in the original decision.]

The continuous combined duration of all of these dispositions - three years - is the maximum authorized when more than one disposition is made with respect to different offences; s. 20(4) of the Young Offenders Act. Included in them are dispositions of four months open custody for escape and breach of recognizance committed on October 16, 1991 and November 5, 1991. Those dispositions are not the subject of this appeal. At the time of disposition, the Crown had

submitted that there should be a total three year disposition made up of 24 months secure custody and the third year made up of a mix of open custody and probation. The Youth Court did impose a three year disposition, but it was made up of 20 months custody of which 12 were secure and eight were open, to be followed by 16 months probation. The Crown's appeal is focused on the latter two components of this disposition.

The foregoing summary of the offences hardly serves to describe the horror that must have been experienced by the two young victims who were, at the material times, a little over three years younger than their oppressor. However, it furnishes sufficient to convey to the reader that the respondent's misbehaviour was egregious, and far removed from the factual situations in the many cases involving sexual misbehaviour of young offenders that were referred to us. Not surprisingly, the victim impact evidence presented to the Youth Court showed that both of the young female victims, as well as their families, have been severely traumatized and it is questionable indeed if they will ever fully recover. The victims and the parents express fear and distaste of the respondent but, as well, recognize that he needs help, and how to provide that help was clearly a concern of the Youth Court judge at the dispositions, as it is for this court now.

**THE OFFENDER:**

It is necessary to devote more time to describing the offender than was required to describe his offences.

The respondent was born on December [...], 1973. The pre-sentence report indicates that unlike many perpetrators of violent and disgusting offences, this boy was apparently not brought up in an atmosphere of family violence or substance abuse. He had an unimpressive record in school but he avoided any major difficulty. It was clear, however, that when he entered the industrial employment program in the school, he was unwilling to make any commitment to skills development, became indifferent and disruptive and finally quit at the age of 16 before completing the program.

The respondent's subsequent employment history reflects his performance in

school.He had done part-time work at a grocery store, part-time landscaping work and part-time cutting pulp. One employer spoke of him as not willing to use the work skills that he had.

The respondent has very poor social skills, particularly with girls. His general health was satisfactory and although he had some experience with alcohol and street drugs, these do not appear to constitute a significant concern.

The respondent has been convicted of other offences committed after those which are the subject of these dispositions. A summary of dispositions made in Youth Court with respect to the later offences is as follows:

[This page contained graphical images which may only be viewed in the original decision.]

The respondent was described in the pre-sentence report by the investigating police officer as not cooperative, arrogant and cocky in the presence of others but extremely polite when alone. The respondent gave the impression to the police that he felt he had done nothing wrong. The officer was of the view that the community was scared and traumatized by the respondent's actions. Not surprisingly the officer expressed concern that the respondent had

established a pattern of behaviour which, if left unaddressed, would result in more serious ramifications.

The pre-disposition report goes on to touch upon that aspect of the respondent's behaviour which is of perhaps the greatest concern, namely his refusal to accept any responsibility for his actions, taking the position that there was only one sexual liaison with one of the victims "with consent". Reference was made to previous evaluations showing the respondent as uncooperative, unremorseful and unaware of the seriousness of his behaviour. The writer of the pre-disposition report (November 1, 1991) was of the impression that this situation had not altered to any great extent. The record also contained a report from Dr. K. Ahmad, Director of Adolescent Services of the Nova Scotia Hospital dated April 11, 1990 for use at the previous disposition hearing and another report from Dr. Ahmad dated October 2, 1991 for the purposes of the present disposition hearing, a psychological assessment from the Psychological Services Department of the Nova Scotia Hospital prepared for the Youth Court on October 28, 1991 and a psychologist's report submitted on the respondent's behalf with respect to consultations in February of 1990.

The psychological reports and those of Dr. Ahmad present a disturbing but not surprising picture. The respondent is diagnosed as having a conduct disorder of the solitary and aggressive type. The reports disclose that the respondent had seen "some blue movies with his friends". They showed explicit sexual acts similar to those performed by the respondent on his victims. The opinion is expressed that there is a pattern of behaviour of a sexual disorder, with the possibility of emerging problems associated with pedophilia or sexual sadism. Throughout the reports, the thread of denial and lack of appreciation of the horrible nature of his conduct runs. He is said to be manipulative, threatening and capable of false good behaviour. The difficulty in accepting any responsibility for his actions is emphasized over and over again. The absence of remorse is referred to repeatedly. The pattern of his behaviour and present attitude suggests a strong likelihood that he may repeat his offences. Particularly it is recommended that

he be maintained under close supervision pending assessment and treatment. It was recommended that he be removed from the adolescent unit of the hospital as he was becoming too friendly with the girls and could not be monitored at all times. It was recommended that he be placed in the forensic unit. Above all, the need for treatment was expressed over and over again.

The psychologist at the Marshall Treatment Centre at the Nova Scotia Hospital did not feel the respondent could be treated there. He recommended that he be assessed at the facilities in Kentville which are located not too far from the Nova Scotia Youth Centre at Waterville. At the disposition hearing, the Youth Court judge queried counsel for the Crown about this and, after a recess, was advised that the Centre had much greater flexibility in dealing with offenders in secure custody. The reason was that if a program arises within the open custody context, the Centre may make it available to offenders in secure custody. On the other hand, programs in the secure custody regime cannot be imposed upon a young offender in open custody without the offender's written consent. The court was also advised that there would be a secure custody program of four months duration available to those convicted of sexual offences. The program consisted of 12 hours a week dealing with such issues as anger management, social skills and addressing sexual and moral issues. The bottom line was that an offender was clearly better off from a treatment and counselling point of view in secure custody so that the Centre had full discretion to refer the offender to any program available through the facility.

A report from the Centre dated November 6, 1992 and a letter from Dr. J. S. Bishop, a psychologist, dated November 2, 1992 were tendered at the hearing of this appeal. The progress report states:

> "Since this time he has revealed a consistent pattern of manipulation and non-compliance to general rules and regulations . . . there have been numerous reports of situations where (the offender) has intentionally manipulated situations, indicating a general lack of respect for staff and a tendency to attempt to undermine staff authority."

While the respondent made some progress at a program for adolescent sex

offenders instituted in February of 1992, he has since regressed. The report concludes by stating that the past several months have been a step backward for him.

Dr. Bishop reported some progress but advised that the respondent is still at risk for re-offending. He recommends more participation in a future program for sex offenders and continued participation in individual counselling.

It is clear from this new material that the respondent still has a long way to go.

**DISPOSITION IN YOUTH COURT:**

In the extensive reasons given by the Youth Court judge at the disposition, a number of cases, particularly from this court, were reviewed. These were not cases where there could be any real comparison between the facts in them and the present case. However, most of them dealt with sexual offences and in many, the term of custody imposed in Youth Court was lowered by this court.

The Youth Court judge observed that the respondent was not a first offender. Thus it was relevant to some extent to consider general deterrence in meeting the purposes of sentencing which was to protect the public. The emphasis in this particular case was, in the Youth Court judge's view, to be placed on specific rather than general deterrence. Not to be overlooked was the relationship of punishment for young offenders to punishment of adult offenders for the same crime. There was no mathematical formula but proportionality was a consideration. The Youth Court judge observed that the pre-disposition report was generally unfavourable. He acknowledged the respondent's lack of remorse and lack of acceptance of responsibility for his actions. He recognized such mitigating factors as the passage of time, particularly with respect to the earlier offences which took place over four years previously, as well as the young age at which these earlier offences were committed. Also mitigating was the fact that the respondent was suffering a personality disorder which needed to be addressed and dealt with. Again, while reference was made to the importance of counselling and treatment, no specific way in which such counselling and treatment would deal with this seemingly insoluble

problem was spelled out for, or by, the Youth Court judge.

The Youth Court judge also observed that unlike an adult offender, the parole system would not operate to reduce the disposition imposed, although there was the opportunity for review by the court pursuant to s. 28 of the Young Offenders Act. The judge referred to the community outrage which followed the respondent's actions and acknowledged that while the offences were serious, the focus must be on the individual victims and not the atmosphere generated by the intense media publicity following the respondent's escape from custody. Such escape was indeed an aggravating factor.

The Youth Court judge concluded that it was appropriate to view the matter from the point of view of totality and in that context his opinion was that the disposition should be 20 month's incarceration of which 12 should be secure, to be followed by 16 month's probation. He then broke down the individual offences assigning certain portions of the incarceration to each. Finally, because he considered these offences to involve violence against a person, he imposed a five year ban on firearms pursuant to s. 100(1) of the Criminal Code.

After having imposed sentence, counsel for the respondent reminded the Youth Court judge that 42 days had already been served by the respondent. The Youth Court judge then stated that he was prepared to give credit for the 42 days served in secure custody and to consider that as time of the disposition to secure custody already served.

**ISSUES:**

The issues in this appeal are:

1. Whether the dispositions were adequate and if not what are.
2. Whether the Youth Court erred in giving credit for the 42 days time served after having pronounced the dispositions.

**DISPOSITION OF THIS APPEAL:**

The Youth Court judge and this court must apply the Policy For Canada With Respect To Young Offenders contained in s. 3 of the Young Offenders Act. The material

provisions are:

> "3.(1) It is hereby recognized and declared that
>
> (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
>
> (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;
>
> (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;
>
> . . .
>
> (f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;
>
> . . .
>
> (h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate."

Thus, these policy provisions require dispositions to reflect the objectives of accountability, protection of society, rehabilitation of the offender, supervision, discipline and control. A disposition imposed in accordance with these principles must necessarily strike a balance among these objectives. The emphasis varies in each case.

After reviewing the record, the argument of counsel before the Youth Court judge and the decision of that court, I am satisfied that the judge correctly analyzed the facts including

particulars of the offences and the offender, and carefully considered the existing jurisprudence drawn to his attention as well as additional cases that he reviewed. He correctly concluded that the cases give an idea as to how courts in the past have dealt with young offenders generally. The emphasis is generally on rehabilitation. First time offenders are rarely incarcerated and when deterrence is considered, the emphasis is more on the specific than the general. The question remains, however, whether at the end of the day he crafted an adequate sentence having regard to the extent to which deterrence, both general and specific, should have been emphasized in the unusual circumstances of this case. On consideration of the material before us, I have concluded that he did not.

Young offenders are indeed to be treated differently than adult offenders. Cases dealing with sentences imposed on adults for the same crimes are generally of limited value in sentencing young offenders. The extent to which deterrence figures in the balance in the sentencing process is quite different, among other things. Overall, the emphasis must be on the rehabilitation of the young person.

On the other hand, the legislation does not abolish deterrence as a proper element in the sentencing process. The Policy clearly recognizes the protection of society. It is well established that such protection is often best served by deterrence and nothing in the legislation takes this away. Indeed, it is clearly stated that young persons who commit offences should bear responsibility for their contraventions. Clearly the extent of that responsibility and the extent of the deterrence to be applied will vary, not only from case to case, but with the age of the youth. Common sense dictates that the Act be construed so as to take a different approach to an older offender than to a younger one, a different approach to a consistently bad offender than to an impetuous one, a different approach to a minor offence than to a major one. I do not think that it was ever intended courts should automatically treat young offenders with leniency. Indeed, leniency is not always in the best interests of the young offender. Reference is made in the Policy to the special needs of the offender and in many cases these will differ greatly from the offender's

wants. Specific deterrence is indeed a need of an offender.

Parliament has provided that the maximum combined duration of the dispositions made at any one time be three years. All of this could be in secure custody. In picking this maximum, Parliament must have intended that courts should impose it in the most serious of cases. There is thus no reason why courts cannot and should not do so when the circumstances warrant. Proportionality to adult sentences is to be given consideration. Thus, looking at the offences committed by the respondent, the maximum sentences for adult offenders are ten years for sexual assault, ten years for unlawful confinement, ten years for assault with a weapon and five years for threats.

These general observations aside, I turn now to these offences and this offender.

It need hardly be repeated that the offences are, in the words of Crown counsel, "heinous". The offender himself as appears from the record is a very unusual offender. He is potentially a very dangerous offender. All agree that he needs help. The staff at the Centre is trying to provide that help, but the progress to date is far from encouraging. The respondent is now an adult for the purposes of the Act. He will very shortly attain the age of majority. In fixing the disposition, we must do everything possible to guard against his repeating these offences upon his discharge. The protection of society is a major consideration.

What does appear from the unique circumstances of this case is that a solution far beyond the ordinary is warranted. General deterrence has a place here because we must teach young people at an early age that violence against other people, and women in particular, cannot be tolerated. Specific deterrence to this offender is needed because the authorities must be given the widest possible option to impose any program which might appear helpful to him. A longer period of incarceration in secure custody is therefore called for. The respondent's own special needs require this. As counsel for the Crown pointed out, custody assists in his rehabilitation because it offers structure, control, discipline and education.

The respondent refers to two letters of apology tendered to the victims by him

through his counsel to counsel for the Crown. These were written in May of this year from the young offender facility some five months after the Crown filed its notice of appeal herein. I cannot give these letters much weight in view of the overwhelming unfavourable picture of the respondent that appears from the record, particularly the latest reports on his progress at the Centre.

The Crown did not take a strong position respecting the credit given by the Youth Court judge against the disposition for the 42 days already served. This fact was drawn to our attention and I am of the opinion that it was not open to the court to make this order in the circumstances here present. The time of the dispositions must run from the date thereof, November 29, 1991.

I would vary the disposition by increasing the period of secure custody from 12 to 25 months, to be followed by the period of four months open custody fixed with respect to the convictions for escape and breach of recognizance. Consecutive to that, there should be one month open custody with respect to the first four offences in the summary which were committed while the respondent was under the age of 14 years. See s. 24.1(4) of the Act. These should be served concurrently with each other. This period of custody will then be followed by six months probation on the same terms as provided by the Youth Court, to be applicable to all of the offences.

Thus, the combined duration of these dispositions is three years. I would propose that the period of secure custody be assigned to the ten offences committed after the respondent had attained the age of 14 years, in the following manner: two months for each of the two sexual assaults by the bowling alley; three months for each of the two sexual assaults in the woods; two months for the sexual assault in the field; three months for the confinement in the woods by the bowling alley; two months for the assault with a weapon; one month for the threat; three months for the assault with a knife behind the school; and, four months for the sexual assault on

the [...] , all to be served consecutively, making a total period of 25 months secure custody.

The date from which the dispositions are to run should be November 29, 1991.

The firearms prohibition pursuant to s. 100(1) of the Criminal Code should remain.

J.A.

Concurred in:

Clarke, C.J.N.S.

Freeman, J.A.