

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. M.A.C.*, 2022 NSCA 4

Date: 20211214

Docket: CAC 506074

Registry: Halifax

Between:

M.A.C.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Sections 110(1) and 111(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: By written submissions (last submission filed on December 13, 2021)

Subject: Sentencing under the *Youth Criminal Justice Act*, S.C. 2002, c.1 as amended; ss. 38(2)(e.1)(i) and (ii); rehabilitation and reintegration; joint recommendation.

Summary: The Youth Court judge imposed an “abstain” condition relating to cannabis possession and use in the young person’s Probation Order, which the parties had not requested in their joint submission on sentence. M.AC. sought leave to appeal the imposition of the condition.

Issues:

- (1) Should leave to appeal be granted?
- (2) When the judge imposed the “abstain” condition did he fail to consider ss. 38(2)(e.1)(i) and (ii) of the *YCJA*, thereby committing an error of law?

- (3) Did the judge err in law by relying on evidence not before him?
- (4) Did he err in law by “jumping” the joint recommendation?

Result:

Leave to appeal granted and the appeal allowed. The judge erred in law. He made no mention of ss. 38(2)(e.1)(i) and (ii) of the *YCJA* in his reasons. His focus on abstinence was grounded in his view that cannabis use by young persons is illegal and harmful. He rejected the harm reduction recommendation in M.A.C.’s s. 34 psychological assessment, which was aimed at supporting her rehabilitation and reintegration and not punishing her for resorting to maladaptive coping. He imposed the cannabis “abstain” condition after drawing on unidentified sources he said did not support harm reduction as an approach to problematic cannabis use by young persons. He was required to sentence M.A.C. in accordance with the purpose and principles of the *YCJA* – holding her accountable through just sanctions that have meaningful consequences and promote her rehabilitation and reintegration. It was an error for him to depart from the joint recommendation of the parties that did not include an “abstain” condition in the Probation Order. He provided counsel with no opportunity to make submissions in response to his view that M.A.C. should be prohibited from using cannabis. The “abstain” condition is replaced with a condition that states M.A.C. is not to “take, use, possess, or consume any alcoholic beverages or any controlled substance as defined in the *Controlled Drugs and Substances Act*, except where legally prescribed by [her] doctor”.

This information sheet does not form part of the court’s judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 11 pages.

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Judges: Derrick, Fichaud, and Beaton, JJ.A.

Appeal Heard: By written submissions (last submission filed on December 13, 2021)

Written Release: January 17, 2022

Held: Leave to appeal granted, appeal allowed per reasons for judgment of Derrick, J.A.; Fichaud, and Beaton, JJ.A., concurring

Counsel: Paul Sheppard and Christa Thompson, for the appellant
Erica Koresawa, for the respondent

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 110 (1) and s. 111(1) OF THE YOUTH CRIMINAL JUSTICE ACT, S.C. 2002, c. 1 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related

to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) – Identity of victim or witness not to be published – Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Reasons for judgment:

Introduction

[1] On April 7th, 2021, M.A.C., 17 years old and a young person within the meaning of the *Youth Criminal Justice Act*, S.C. 2002, c.1 as amended, was found guilty, pursuant to s. 36 of the *YCJA*, of offences committed in April, May, July, and October 2020, and February 2021. Her guilty pleas were for theft from the Nova Scotia Liquor Commission, breaches of conditions of a Probation Order, an assault, and two separate incidents of damage to property. Judge Daniel MacRury, presiding as a judge of the Youth Justice Court, accepted a joint recommendation from counsel and sentenced M.A.C. to 12 months of probation. An “abstain” condition in the Probation Order is the subject of this appeal.

[2] At the time of her offences, M.A.C. was in the care of the Minister of Community Services. She was subject to an 18-month Probation Order imposed on February 13th, 2020 with a condition that she abstain absolutely from the use, consumption, and possession of all non-medically prescribed drugs. On May 9th, 2020, police were called to the group home where M.A.C. was living. After noticing a strong odour, group home staff found cannabis in her room. The police officers spoke to M.A.C. and formed the opinion she had been consuming cannabis. This led to her being charged with and pleading guilty to breaching her probation.

[3] The other offences M.A.C. pleaded guilty to on April 7th did not involve her cannabis use.

[4] In preparation for M.A.C.’s sentencing, a psychological assessment was ordered pursuant to s. 34 of the *YCJA* (“the s. 34 assessment”). The assessment recommended a harm reduction, not an abstinence approach to M.A.C.’s cannabis use. Defence counsel argued forcefully in support of the recommendation. Crown counsel left it to the judge to determine, “given the comments made in the report [the s. 34 assessment]”, whether an “abstain” condition should be in the proposed Probation Order.

[5] The judge included an “abstain” condition in the Probation Order, strictly prohibiting M.A.C. from using, possessing, or consuming cannabis.

[6] M.A.C. sought leave to appeal this aspect of her Probation Order. The Crown conceded leave should be granted and the appeal allowed. An Order to this effect was issued on December 14th, 2021, with reasons to follow. These are those reasons.

The s. 34 Psychological Assessment

[7] Dr. Jeffrey MacLeod, a registered psychologist, prepared the s. 34 assessment. Dr. MacLeod noted that M.A.C. “presents with a constellation of difficulties that are consistent with those of youth who have experienced repeated childhood traumas and adverse life experiences”.

[8] Dr. MacLeod detailed what M.A.C. told him about her cannabis use:

[M.A.C.] reported that she began using marijuana on a daily basis by the time she was 13 years of age. She switched to “poppers” [tobacco and cannabis] a few years ago and indicated she exclusively smokes poppers at the current time.

[M.A.C.] indicated that she has attempted to reduce her marijuana at times and has taken “tolerance breaks” to reduce her tolerance to the effects of marijuana and tobacco. However, she said she has struggled with withdrawal effects when she attempted to cut down her use (i.e., headaches, irritability, vomiting, anxiety, difficulty sleeping, and urges to use) and as a result has had little success in that effort. Although she has attempted to reduce her use, [M.A.C.] indicated that she does not want to stop using poppers at the current time and even expressed ambivalence about reducing her use, indicating that she does not feel that her use of poppers has negative effects, but she acknowledged that it would be better for her to have other methods of coping with distress...[M.A.C.’s] cannabis use has resulted in legal charges; further, it has created conflict with group home staff. In order to avoid conflict with group home staff, [M.A.C.] now smokes poppers and keeps her marijuana and tobacco in the forest within walking distance of the group home. However, group home staff do not know the location where she smokes poppers, creating a scenario with some risk for [M.A.C.]...

[9] M.A.C. informed Dr. MacLeod she was secretive about where she went to smoke poppers to avoid the risk the substances would be confiscated as had happened previously. Dr. MacLeod identified risks associated with M.A.C.’s surreptitious cannabis use, including the potential for additional criminal charges. He emphasized the need to focus on working with M.A.C. to address her issues:

...To the extent possible , [M.A.C.’s] caregivers are encouraged to ensure her safety and monitor her substance use, but also consider the potential harm of further criminalization of this behaviour prior to contacting police if she is found in possession of substances...[M.A.C.’s] cannabis use is likely to continue at the

current time and the emphasis of efforts to encourage behaviour change should be on ensuring she is engaged in treatment and making progress in a variety of domains in her life”.

[10] The tensions between M.A.C.’s reliance on cannabis and the need to engage her in addressing the underlying issues suggested to Dr. MacLeod that a harm reduction approach had the greatest value:

...Given that [M.A.C.] is unlikely to remain abstinent from marijuana use in the near future, such efforts are unlikely to help [M.A.C.] and are likely to strain her relationships with staff while also motivating her to maintain secrecy around her substance use. A harm reduction approach which seeks to ensure [M.A.C.’s] safety while also providing support for her to change her use (see recommendations section) would be more desirable.

[11] Dr. MacLeod made a number of recommendations. Under “Substance Use Treatment” he said:

[M.A.C.’s] cannabis use represents an ongoing risk of further charges, serves to perpetuate unhelpful methods of coping with distress, and may impact cognitive development. [M.A.C.] is currently ambivalent about changing her substance use given her lack of alternative coping strategies. As such, an approach that focuses largely on harm reduction and motivation to change is likely to be the most effective in the short term, and expectations of abstinence are likely to be counterproductive. As [M.A.C.] develops additional coping strategies to manage her anxiety and trauma symptomatology, she may be more receptive to further reducing and/or eliminating her substance use.

M.A.C.’s Sentencing Hearing

[12] Crown and defence made a joint recommendation that M.A.C. receive a 12 month Probation Order with conditions, pursuant to s. 42(2)(k) of the *YCJA*.

[13] The Crown noted that, according to the s. 34 assessment, M.A.C. “in the past...hasn’t done very well but is doing much better now”. M.A.C. was making progress toward being more pro-social and avoiding conflict with the law. She was working with professionals to address the underlying causes of her problematic behaviours.

[14] Crown counsel indicated her original draft of the proposed Probation Order had included “an abstain clause”. The s. 34 assessment caused her to reconsider. She told the judge:

Clause ten, the Crown had put in a, when first drafting, had put in an abstain clause. It appears from the report and I note that the...the angle or the direction that the service providers are going on a more risk management approach with respect to substance use and I know she is underage so, you know, she is not supposed to be using any substances at all but I leave it to the Court whether the abstinence clause, given the comments made in the report, whether that should be included in the probation order.

[15] The Crown viewed a probation order as satisfying the principles of sentencing under the *YCJA* “as well as taking into account the comments and the recommendations that we have found in the assessment report”.

[16] The defence emphasized the dislocation and trauma M.A.C. had experienced throughout her life. Drawing from the s. 34 assessment, defence counsel noted that M.A.C., who is racialized, had “attachment issues and childhood trauma that have manifested into maladaptive coping in the form of substance use, emotional issues, ...and issues related to anger and trust”. M.A.C. struggled with anxiety and a “constant state of worry”. Loss of control was a major source of stress for her. M.A.C. resorted to cannabis to help her cope. Alcohol abuse was no longer the issue it had once been.

[17] Defence counsel referenced the s. 34 assessment’s “meaningful and thoughtful suggestions” for addressing M.A.C.’s substance abuse issues. She described harm reduction as “the big picture”:

...instead of punishing her each and every time she slips with these maladaptive coping skills that she’s developed over time, rather the emphasis of harm reduction is to focus on reducing her use of substances and capitalizing on the success she makes and she appears to be motivated in [*sic*] this front.

[18] According to defence counsel, M.A.C. was “actively working on reducing” her consumption of cannabis. She was open to working with her probation officer and her social worker on a harm reduction plan. The judge was told M.A.C.’s probation officer and other “support people” were “really buying into this harm reduction approach...”

The Judge’s Inclusion of the “Abstain” Condition in the Probation Order

[19] The judge acknowledged he had been presented with a joint recommendation and said he was accepting it. Addressing M.A.C., he went on to indicate an “abstain” condition would be included in the Probation Order:

...I disagree with Defence counsel in relation to the abstention. I have to tell you that one, it's illegal for you to possess/consume alcohol and I'm certainly not going to condone it. While I respect some clinicians in relation to harm reduction, they're not all in agreement in all due respect, especially in relation to drugs with young people. Certainly psychiatrists certainly are concerned about marijuana use at that young age and have expressed it in many reports so I don't think there's a consensus on that in all due respect. But the bottom line is this, it's not legal and I'm certainly not going to condone it and with respect, I wanted to tell you, M.C., why I'm not accepting that because basically although you've had challenges, I think that you have improved and the fact that you've cooperated so well with the report tells me that you want to continue on that road and I want to support you on that road as much as I can within the restrictions that I have in my position...

[20] Clause "J" of the Probation Order required M.A.C. to abstain from cannabis use:

You shall abstain from the possession and/or consumption of alcohol, other intoxicating substances and non-prescription drugs, and to take prescribed medications only in compliance with a doctor's medical prescription.

The Position of the Parties

[21] M.A.C. and the respondent Crown agreed on appeal that Clause "J" of the Probation Order should state:

Do not take, use, possess, or consume any alcoholic beverages or any controlled substance as defined in the *Controlled Drugs and Substances Act*, except where legally prescribed by your doctor.

[22] The December 14th, 2021 Order from this Court has effected this change. Use of cannabis by M.A.C. now does not constitute a breach of her Probation Order.

The Issues

[23] Four issues are raised by this appeal:

- 1) Should leave to appeal be granted?
- 2) When the judge imposed the "abstain" condition did he fail to consider ss. 38(2)(e.1)(i) and (ii) of the *Youth Criminal Justice Act*, thereby committing an error of law?

- 3) Did the judge err in law by relying on evidence not before him? and
- 4) Did he err in law by “jumping” the joint recommendation?¹

Standard of Review

[24] Appellate review in sentence appeals is highly deferential, leading to intervention only where the sentence is demonstrably unfit or the judge made an error in principle that impacted the sentence imposed.² Errors in principle include an error of law. In this case, the judge erred in law by including an “abstain” condition in M.A.C.’s Probation Order. The usual deference to be afforded a sentencing decision is therefore displaced in this case. Appellate intervention is warranted.

Analysis

Issue #1 – Leave to Appeal

[25] The issues raised by this appeal are both “arguable” and “not frivolous” and therefore clear the hurdle for leave to appeal.³ Leave to appeal is granted.

Issue #2 – ss. 38(2)(e.1)(i) and (ii) of the YCJA

[26] The judge was obligated to sentence M.A.C. in accordance with the provisions of the YCJA:

s. 38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

...

(2) (e.1) if this Act provides that a youth justice court may impose conditions as part of the sentence, a condition may be imposed only if

- (i) the imposition of the condition is necessary to achieve the purpose set out in subsection 38(1),

¹ *R. v. Anthony-Cook*, 2016 SCC 43, at para. 52

² *R. v. Friesen*, 2020 SCC 9, at paras. 25-26; *R. v. Lacasse*, 2015 SCC 64, at paras. 39-44.

³ *R. v. Tamoikin*, 2020 NSCA 43, at para. 43; *R. v. DeYoung*, 2017 NSCA 13, at para. 31.

- (ii) the young person will reasonably be able to comply with the condition, and
- (iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures;

[27] Conditions in probation orders under the *YCJA* must comply with the objectives and principles of the legislation. The statutory provisions relevant to this appeal enshrine principles of accountability, just sanctions, meaningful consequences and the promotion of the young person’s rehabilitation and reintegration into society, thereby “contributing to the long-term protection of the public”.⁴ Probationary conditions must be necessary to achieve these purposes and the young person must be reasonably able to comply with the condition. Otherwise, the condition is not to be imposed.⁵

[28] The judge made no mention of these statutory provisions in his reasons. He did not indicate how he reconciled the inclusion of an “abstain” condition in the Probation Order with them. His focus on abstinence was grounded in his view that cannabis use by young persons is illegal and harmful and something he was “not going to condone”. The only available conclusion is that he failed to consider the requirements of the *YCJA*, thereby committing an error of law.

[29] The judge’s reasons indicate he also did not consider the issues of compliance and whether an “abstain” condition was necessary to achieve the purpose of sentencing under the *YCJA*. Dr. MacLeod recommended harm reduction as the mechanism for achieving M.A.C.’s rehabilitation and reintegration. The s. 34 assessment provided clear evidence M.A.C. would not reasonably be able to comply with an “abstain” condition. Dr. MacLeod noted that M.A.C. was a regular consumer of cannabis, has not reduced her usage and is not currently interested in doing so, and relies on cannabis in the absence of other coping strategies.

[30] Dr. MacLeod contextualized M.A.C.’s cannabis use and the likelihood she would refrain from it. His opinion was a sufficient basis for the judge not to have included an “abstain” condition in her Probation Order:

Although it is important to hold youth accountable for their actions, youth in care of child protection agencies are at risk of disproportionate criminalization relative to their peers simply because they are in care. Additionally, such youth, including

⁴ *YCJA*, s. 38(1)

⁵ *YCJA*, s. 38(1)(e.1)(i) and (ii)

[M.A.C.], often present with problematic emotion dysregulation and substance use that occurs in the wake of multiple childhood traumas and separation from childhood attachment figures. These youth are likely to engage in defiant or disruptive behaviours at least occasionally in their place of residence, and such incidents are better addressed in a supportive manner by a trusted adult rather than through police involvement and further criminalization. Such an approach would serve to build skills rather than criminalize behaviour and potentially result in court-ordered conditions that may result in charges related to failures to comply. As a result, it is respectfully suggested that the court consider the context within which [M.A.C.'s] offenses occurred, the particular vulnerability of youth in care, and the progress she has made in recent months when considering a sentence. Furthermore, [M.A.C.] would likely benefit from a harm reduction approach in addressing her substance use. She is unlikely to remain completely abstinent from cannabis use in the near future...

[31] The “abstain” condition was not necessary to hold M.A.C. to account. It cannot be said to be “a meaningful consequence” for M.A.C.’s offending. As described earlier, only one of M.A.C.’s offences involved cannabis. None of the other offences were shown to have been the result of cannabis use nor was M.A.C. otherwise involved in crimes associated with cannabis such as trafficking or drug-impaired operation of a motor vehicle.

[32] The judge was also in error when he dismissed the recommended harm reduction approach on the basis he would be condoning illegal behaviour. He was required to sentence M.A.C. in accordance with the purpose and principles of the *YCJA* – holding her accountable through just sanctions that have meaningful consequences and promote her rehabilitation and reintegration. Those objectives are achieved in M.A.C.’s case by a harm reduction approach to her cannabis use, which, in Dr. MacLeod’s opinion, “will help her eventually move towards reduction of use”. As Crown counsel noted in her factum, including the “abstain” condition to signal that cannabis use is not being condoned “was to reinforce a societal norm: young people should not consume cannabis. The condition thereby acts as a social measure to prevent consumption by the appellant...” This was not permissible under the *YCJA*. Section 38(2)(e.1)(iii) directs that a probationary condition is not to be used as a substitute for social measures.

[33] I agree with the submissions by both counsel on appeal that the “abstain” condition would serve to impede M.A.C.’s rehabilitation and reintegration. The therapeutic plan for M.A.C. was a holistic one, aimed at addressing her issues in an integrated fashion. The s. 34 assessment emphasized that promoting a trust relationship with M.A.C.’s service providers and supporting the development of

healthy alternative coping methods will move M.A.C. toward rehabilitation and reintegration. The inclusion of the “abstain” condition was not compatible with these objectives.

Issue #3 - The Judge’s Error of Relying on Evidence Not Before Him

[34] The s. 34 psychological assessment was the only evidence the judge had before him at M.A.C.’s sentencing. His comments about “some clinicians” not being in agreement with harm reduction as an approach to problematic cannabis use by young persons and “certain psychiatrists” expressing concerns about cannabis use “in many reports” were without foundation. It was a clear error for him to reject Dr. MacLeod’s authoritative and unchallenged opinion and base the inclusion of an “abstain” condition in M.A.C.’s Probation Order on his personal belief about a lack of consensus amongst professionals.

[35] There was no evidence of this lack of consensus before the judge at M.A.C.’s sentencing. The judge was drawing on unidentified sources without providing counsel any opportunity to contest their relevance to M.A.C.’s specific circumstances. In contrast, Dr. MacLeod’s analysis and opinion that harm reduction was the most effective approach to M.A.C.’s cannabis use had not been challenged. He did not suggest her cannabis use was unproblematic. His opinion and recommendation took a nuanced approach and sought to integrate M.A.C.’s reliance on cannabis with fostering the development of trusting, supportive relationships with her service providers.

[36] The s. 34 psychological assessment was specifically ordered to assist in M.A.C.’s sentencing. It was comprehensive, individualized, and authoritative. Crown and defence accepted the opinions and recommendations it contained and relied on it exclusively in formulating their joint recommendation. There was no rational basis for the judge to have dismissed Dr. MacLeod’s harm reduction recommendation and substituted his own views.

Issue #4 - “Jumping” the Joint Recommendation

[37] M.A.C.’s sentencing proceeded on the basis of a joint recommendation that the judge indicated he was accepting. He then imposed a condition neither counsel had sought. He should have taken this into account. He was bound to follow the joint recommendation unless doing so would bring the administration of justice

into disrepute.⁶ It was an error for him to have departed from the joint recommendation in this case.

[38] The judge did not raise with counsel his intended dismissal of Dr. MacLeod's harm reduction recommendation. He provided them with no opportunity to make submissions in response to his view that M.A.C. should be prohibited under the Probation Order from using cannabis.⁷

[39] As counsel for the respondent Crown has noted, the judge's treatment of the joint recommendation was not raised as a ground of appeal. I agree with how Crown counsel framed this issue in her factum: "However, the youth court judge's departure from the joint recommendation is animated by some of the same issues underlying the grounds of appeal: a failure to take into consideration relevant sentencing principles and a departure from recommendations without adequate reasons or discussion".

Disposition

[40] Leave to appeal is granted and the appeal allowed. The replacement Clause "J" in M.A.C.'s April 7th, 2021 Probation Order is a fit and proper component of her sentence, reflecting the harm reduction approach to her cannabis use. This promotes M.A.C.'s ongoing engagement with her service providers and the supports they can offer her on the road to her ultimate rehabilitation.

Derrick, J.A.

Concurred in:

Fichaud, J.A.

Beaton, J.A.

⁶ *Anthony-Cook, supra*, note 1, at para. 5.

⁷ *Ibid* at paras. 50-59.