NOVA SCOTIA COURT OF APPEAL
Citation: R. v. J.R.L., 2007 NSCA 62

Date: 20070523
Docket: CAC 273660
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

J. R. L.

Respondent

Restriction on publication: Pursuant to s. 110(1) and 111(1) of the **Youth Criminal Justice Act**

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	March 23, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal is granted, and the appeal is dismissed per reasons for judgment of Roscoe, J.A.; Cromwell and Oland, JJ.A. concurring.
Counsel:	Peter P. Rosinski, for the appellant David J. Mahoney, for the respondent

Pursuant to s. 110(1) and 111(1) of the Youth Criminal Justice Act.

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110 (1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT* APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) 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) 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:

[1] JRL, a young person pursuant to the **Youth Criminal Justice Act**, S.C. 2002, c.1 pled guilty to several offences arising out of a violent home invasion. The Crown appeals the sentence of six months deferred custody and 18 months probation imposed on JRL by Judge John G. MacDougall.

[2] The Youth Court Judge recognized that the crimes were horrendous. But after hearing extensive evidence over three days, he concluded that the young person had real prospects of turning his life around and that this would provide the best protection to the community in the future. The judge concluded that a period of custody would be more likely to hinder than to help rehabilitation and therefore would not provide the community with the best protection against future criminal behaviour. In my view, the judge did not commit any reveiwable error in reaching these conclusions on the compelling evidence before him. While this sentence must be viewed as exceptional and even extraordinary, it should not be disturbed.

Background Facts:

[3] On November 5, 2005, JRL, who was then 16 years old was the leader of a gang of at least eight young people who barged into a home where four other young people, two men and two women, were gathered. JRL organized the attack because MH, one of the male residents of that home, had recently broken up with JRL's sister, AL., who was 19 years old. AL was pregnant and JRL believed that MH had mistreated her by pushing her down some stairs. The plan was to scare MH and to rough him up a little as punishment for abusing his sister. A young man that JRL called to help with the plan brought four unloaded shotguns and several other youth as reinforcements with him. One of intruders armed himself with a baseball bat upon entering the home.

[4] Prior to JRL and his group arriving at the home, AL, his sister, had gone there to gather her belongings. She was in the midst of an argument with MH when her brother and his gang burst in. The residents of the home were told to lie on the floor. The two men, MH and AB were kicked, beaten and struck with the bat and the guns. JRL brandished a sawed-off shotgun. He admitted to striking MH in the head, kicking him in the ribs and to holding the shotgun to his head and pulling the trigger, telling him that "if he retaliated he would be dead".

[5] MH testified that the attack lasted around ten minutes. He received three wounds requiring stitches to his arms and head. He also suffered injuries to his knee, neck and back. AB, who was struck with the bat, suffered a cracked sternum, abrasions to his neck and arm, and a cut to his face which required stitches.

[6] At the sentencing hearing JRL admitted to using cocaine and marijuana prior to the attack.

[7] JRL's co-accused received sentences ranging from six years incarceration, for an adult with a serious record, to a conditional sentence for the young woman who drove one of the vehicles but did not otherwise participate in the attack.

[8] JRL surrendered into custody the following morning, admitted his involvement and identified several of the co-accused. He was held on remand for 16 days until November 21, 2005, and then released to the care of his mother and stepfather on strict conditions of house arrest. Subsequent applications resulted in relaxed conditions: in March allowing him to be absent from home while accompanied by his stepfather, and in July permitting absence for employment provided he gave details of any employment to the RCMP.

[9] On April 11, 2006 JRL entered guilty pleas to five offences: break and enter (s. 348(1)(a)), aggravated assault on AB (s. 268), assault causing bodily harm to MH, (s. 267(b)), pointing a firearm (s. 87), and breach of probation (s. 137 **YCJA**). Because of delays in the preparation of a pre-sentence report and a s. 34 assessment, the sentencing hearing did not commence until September 5, 2006. It continued on September 25 and October 2, 2006.

The decision under appeal:

[10] After hearing evidence over a period of three days from the two victims of the assaults, the investigating police officer, JRL's addiction counsellor, his stepfather and the psychologist who prepared an assessment, Judge MacDougall gave an oral decision which is unreported.

[11] The judge referred to **R. v. B.W.P.** 2006 SCC 27 and noted that the Supreme Court of Canada has clearly stated that under the **YCJA** issues of specific and

general deterrence are not relevant sentencing factors. The primary objective of sentencing is protection of society from criminal behaviour through rehabilitation of young offenders. The judge reiterated that the principles of the **YCJA** focus on rehabilitation and reintegration into society and that the sentence should impose meaningful consequences on the young person.

[12] The judge made specific reference to numerous subsections of s. 38 of the **YCJA**, noting particularly the principles of proportionality, parity, and accountability. With respect to the circumstances of the offences, he said:

> With respect to the involvement, there's no dispute that [JRL], following the invitation of his sister, initiated the process. The degree of responsibility that he held is significant because he was not only someone who was caught unawares, but he went in there and, for all intents and purposes, was a leader with respect to the commission of these offences. ... This is not a random act of violence. This is an act of violence that was directed as a particular individual and that is [MH]. [AB], as inevitably happens when people are on a rampage, became a victim unintentionally. The degree of control in this type of wild and uncontrolled behaviour is virtually non-existent. It was understood in the evidence that even individuals who had ... weren't living in the premises, were originally attacked until the focus was transferred to [AB] and [MH], and [JRL] played an important role in all of that from beginning through until the end. The involvement of [JRL] at that particular point in time was consistent with the lifestyle that he had engaged in up until that time in his life, for the preceding 12 months, or thereabouts. He was living in an undisciplined environment with his sister and [Mr. C.]. He was allowed to come and go as he pleased and he was willing to engage in the false sense of community that people with antisocial inclinations use to give themselves some sense of comfort, not by being included in a positive group, but being satisfied that they are excluded from the group where they found they didn't fit in. ...

[13] The judge then considered s. 39 of the **YCJA** and said that there is no dispute that these were violent offences. He recognized that a non-custodial sentence would not address the issues of uniformity and deterrence when he said:

> The options that are posed by Mr. Mahoney clearly do not address the issues of uniformity and of deterrence that are secondary in the **Youth Criminal Justice Act**, but would be primary in an adult court. Specific, general deterrence, the uniformity of sentencing all are primary in the adult court setting. The ... my reading of the **Youth Criminal Justice Act** is that I have to look at the alternatives, and even though these alternatives to custody are subject to, and

> subservient to, the Section 38 considerations, even in Section 38 I have to ... I am reminded once again that it has to be the least restrictive sentence that can be imposed.

[14] In considering the circumstances of the offender, Judge MacDougall said:

> The facts are that [JRL] involved himself in a particularly gruesome and violent offence. Up and to that time, he was lacking control and discipline and a measure of social conscience with respect to his behaviour. Since that time, for whatever reason, he has, in many respects, turned a corner, has been living under the roof of his mother and stepfather and has been abiding by conditions, for the most part. The use of marijuana was, for a long period of time, a daily occurrence for [JRL] prior to the commission of the subject offences. Since that time, as disclosed by Ms. Woodworth, and as disclosed to Ms. Woodworth, he has curtailed much of the use of marijuana and, by his own report, it is down to once or twice a week. The positive in the disclosure of ongoing marijuana use to Ms. Woodworth [shows] [JRL] was open and honest.
>
> The use of marijuana causes concern for two reasons. One, that it is strictly against the term of release, but more importantly, it indicates that [JRL] continues to be influenced by his peers who provided him with the drug, and if given a situation and circumstance, will continue, quite possibly, to set his own course as to his drug use, despite the risk to his mother and stepfather and despite the guidance and time that they have to put in attempting to assist him.
>
> In many other respects, he has been exemplary. The strict conditions have to be acknowledged as being a deprivation of liberty, and although I will not accept Mr. Mahoney's recommendation that I transfer the restriction on his experience through his release conditions directly to custodial disposition, there's no question that that transformation from where he was prior to the date of commission of these offences until following has to be acknowledged.

[15] Returning to the parity issue, the judge considered the sentence he had imposed on CC, one of the co-accused, and remarked:

> The fact that he has done so distinguishes him from [CC]. At the time of [CC]’s sentencing, he was ... and the reason I focus on his particular situation is because of the similarities, in many respects, between [JRL] and [CC], except for the fact that [CC] had a much lesser role in all of the events of the night in question. [CC] came to Court without the support of his family, without the history that he had been able to live within the restrictions that might have otherwise been imposed. It is my recollection from his sentencing that he was out

> of control and that in his presentence report, his family was at wit's end with respect to what they could provide and what they could do to enforce discipline.
>
> With respect to my comments on [CC], number 1, he is an offender ... a young person, and therefore anything that would lead to his identity is banned from publication - and I say this for the purpose of the media - and I would also suggest some type of sympathetic or sensitive reporting, if there is to be any at all, with respect to distinguishing his circumstance because of the limited resources that his parents had to offer. It is exceptional that someone in [JRL]'s situation would have a mother and stepfather who are prepared to provide him with the support that he had over the last ten-and-a-half months.

[16] The judge then commented extensively on the two reports concerning JRL, one from psychologist Dennis Allaby and one from the youth worker, Mike Reddy. He noted that JRL needed to further his education, address issues of substance abuse, anger management and coping skills, and a period of intensive supervision. He commented:

> The issue then becomes whether or not [JRL] is to receive a custodial period of a significant length, such as recommended by the Crown. There is no question that the period would be justified in an adult court, or for someone who has a lengthier record or for somebody who has a history of violence and a history of an inability to abide by conditions and discipline that is imposed through a home environment.
>
> The impact of a period of custody is suggested by Mr. Allaby as being counter productive because of the risk that [JRL] would fall in with a peer group that would not support the pro-social program that is recommended in the assessment report.

[17] At the point where the judge indicated that a deferred custody would be appropriate, Crown counsel interrupted him to draw his attention to s. 42(5) of the **Act** which precludes the use of a deferred custody sentence if the youth has been found guilty of a serious violent offence. After discussion the judge noted that since no application had been made pursuant to s. 42(9) for a determination that the offences were serious violent offences, he was not precluded from imposing a deferred custody order.

[18] The judge imposed a six month deferred custody order with numerous conditions, including that he reside with his mother and step-father subject to

house arrest with the exception of when he is attending work or school, medical appointments, treatment, counselling, or other approved programs, that he refrain from the use of alcohol and non-prescription drugs, that he submit to urinalysis and breath testing upon demand of a police officer or provincial director, and that he attend for assessment, counselling and treatment as directed. A period of 18 months probation with similar conditions was also ordered as well as a DNA order and a five year weapons prohibition.

[19] Deferred custody is described by Nicholas Bala in **Youth Criminal Justice Law** (Toronto: Irwin Law, 2003) in the following terms at 457: (see **R. v. K.G.B.**, [2005] N.B.J. No. 433, ¶ 57):

> Under section 42(2)(p) a judge may sentence a young offender to "deferred custody and supervision," which allows the youth to serve what would otherwise be a custodial sentence in the community but subject to strict conditions and with the possibility of immediate apprehension and placement in a custody facility if the youth is believed to "have breached or to be about to breach" any of the conditions. This provision is in some respects similar to the adult "conditional sentence of imprisonment" - sometimes colloquially called "house arrest" - although there are some significant differences. Section 42(5) specifies that a sentence of deferred custody and supervision is only to be imposed if a youth has been found guilty of an offence that is "not a serious violent offence." Further, the imposition of such a sentence must be "consistent with the principles and purposes of section 38, and the conditions for imposition of a custodial sentence in section 39 must be satisfied.

New Evidence:

[20] At the request of the court, and on consent of the Crown and counsel for the respondent, we were presented with post-sentencing updates which advised us of the circumstances of JRL since he appeared before Judge MacDougall seven months ago. We learned that after being sentenced, JRL attended the inpatient Choices Adolescent Treatment Program, a two month substance abuse program run by the IWK Health Center in Halifax. He successfully completed the program and according to the addictions therapist in charge, JRL was a positive, cooperative, consistent and appropriate participant. As well, JRL's mother and step-father wrote letters to the court indicating that he has completely changed his pre-offence behaviour and attitude, has adhered to the conditions in his court orders, has been

attending anger management classes once a week, and has completed the Choices program. He has been working full time at a scrap yard and has written a test to become a forklift operator.

[21] Mr. Mike Reddy, JRL's probation officer, confirmed the information supplied by JRL's parents and the Choices therapist in his updated report dated April 26, 2007. Contact with his employer also substantiated that JRL has regularly reported to work, has worked 44 hours per week since July 2006, and has satisfactorily performed his duties there. The director of John Howard Restorative Justice advised that JRL successfully completed the anger management program and has "appeared to have learned a lesson". As well, JRL's football coach indicated that he is a member of a varsity league team and is "very respectful". Mr. Reddy concluded by saying that since October 2006, JRL:

> ... had responded appropriately to direction given and to his Court Orders. ... He has reported as directed and has been subject to curfew checks. He has maintained employment and at the time of this report, was involved with an organized sports team. During the supervision of the Young Person, the subject has been, in the opinion of this writer, an appropriate candidate for community based supervision.

Grounds of appeal:

[22] The Crown raises the following issues:

> That the sentence ordered is inconsistent with the purpose and principles set out in s.3 and 38 of the Youth Criminal Justice Act;
>
> That the sentence ordered is demonstrably unfit having regard to the nature of the offence committed and the circumstances of the offence and the offender.

[23] The Crown's arguments focus primarily on the parity issue, that is, that JRL's sentence was disproportionately lenient, compared to the other co-accused. It is argued that resources were not available in the community to deal with JRL's substance abuse problems and that therefore a custodial sentence was required. As well, it is asserted that since JRL served 16 days in pre-sentence custody a six month deferred custody order was not permitted. Pre-trial custody has to be taken into account and if it had been in this case, the maximum period of deferred custody was exceeded. Furthermore, the Crown argues that the judge overemphasized rehabilitation and did not give sufficient weight to the principle

that youthful offenders should face meaningful consequences for their crimes and as a result, the sentence is unfit. Finally, it is submitted that the requirement in the deferred custody order and the probation order that the respondent produce bodily samples for drug and alcohol testing, is contrary to law, further to the recent decision in **R. v. Shoker,** [2006] S.C.J. No. 44.

Analysis:

1. Standard of Review:

[24] The standard of review of a sentence of the Youth Court is the same as that for an adult sentence. See: **R. v. T.M.D.**, 2003 NSCA 151, ¶ 8 and **R. v. C.N.**, [2006] O.J. No. 3825 (C.A.) ¶ 20. Our role is to examine the decision and consider whether the sentencing judge erred in principle, failed to consider or overemphasized a relevant factor, or imposed a demonstrably unfit sentence. Whether a youth sentence is unfit, must be measured in the context of the purposes and principles of sentencing as set out in detail in the **YCJA**.

2. **Youth Criminal Justice Act** sentencing principles:

[25] Section 38 provides:

> 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) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:
>
> (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
>
> (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and

(e) subject to paragraph (c), the sentence must

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

(3) In determining a youth sentence, the youth justice court shall take into account

(a) the degree of participation by the young person in the commission of the offence;

(b) the harm done to victims and whether it was intentional or reasonably foreseeable;

(c) any reparation made by the young person to the victim or the community;

(d) the time spent in detention by the young person as a result of the offence;

(e) the previous findings of guilt of the young person; and

(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

[26] The parts of the declaration of principles, relevant to sentencing, in s. 3 provide:

3. (1) The following principles apply in this Act:

(a) the youth criminal justice system is intended to

(i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,

(ii) rehabilitate young persons who commit offences and reintegrate them into society, and

(iii) ensure that a young person is subject to meaningful consequences for his or her offence in order to promote the long-term protection of the public;

...

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

...

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

[27] As stated by Blair, J. A. in **R. v. J.S.,** [2006] O.J. No. 2654 (C.A.):

[45] The thrust of the sentencing regime under the Act is that options other than custody are to be given priority and that custody is a last resort. As noted above, s. 38(2)(d) specifically provides that "all available sanctions other than custody that are reasonable in the circumstances" are to be considered. Section 39

> reinforces this concept by prohibiting a youth court justice from committing a young person to custody under the youth sentences provisions of s. 42 unless one of the four gateway exceptions set out therein applies. All of this is consistent with the new Act's emphasis on accountability, rehabilitation and the reintegration into society of young persons who commit offences.
>
> [46] Section 42 provides the youth justice court with a wide variety of youth sentence options - 17 in total. Not until one reaches subsection 42(2)(n) does a custodial option emerge. [See Note 5 below] Subsection 42(2)(n) empowers the youth justice court to:
>
> > make a custody and supervision order with respect to the young person, ordering that a period be served in custody and that a second period - which is one half as long as the first - be served ... under supervision in the community subject to conditions, the total of the periods not to exceed two years from the date of the coming into force of the order or, if the young person is found guilty of an offence for which the punishment provided by the **Criminal Code** or any other Act of Parliament is imprisonment for life, three years from the date of coming into force of the order.
>
> Note 5: Subsequent provisions in the same section impose a stricter regime in the case of "presumptive offences" (murder, attempted murder, manslaughter, aggravated sexual assault and other "serious violent offences" committed by young persons of fourteen years of age or older).
>
> [emphasis added]

[28] As mentioned by Judge MacDougall, in **R. v. B.W.P.** , *supra*, the Supreme Court of Canada interpreted the sentencing principles set out in the **YCJA**. The Court found that general deterrence, specific deterrence and denunciation were deliberately excluded as principles for youth sentencing. At ¶ 4, Charron, J., for the Court explains:

> ... Rather, Parliament has sought to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done.

3. Parity:

[29] Several of JRL's co-accused received harsher sentences. Judge MacDougall sentenced all the offenders. One youth with a much longer record was sentenced to three years custody. CC, another youth was sentenced to 18 months custody in addition to 82 days pre-sentence custody. The adults, who both had long records, received six years and four years incarceration.

[30] One of the principles that the sentencing judge must consider is s. 38(2)(b) of the **Act** which states that young people in similar circumstances, who commit the same or a similar crime should receive similar sentences. The appellant argues that the judge completely failed to apply this principle. The co-accused CC is used as the comparator in its argument. CC was a very similar age to JRL, he had no prior record compared to JRL's one prior offence, he was minimally involved as a follower compared to JRL's leadership role and he pled guilty several months before JRL. CC struck one of the victims with a baseball bat. CC was sentenced to 18 months custody and 12 months probation.

[31] The respondent points out that a major difference between JRL and CC is that at CC's sentencing hearing both counsel recommended a sentence that included several months of custody. The respondent also notes that the assessment for CC recommended a structured environment for a lengthy period.

[32] Judge MacDougall was cognizant of the parity principle and as the sentencing judge for all of the young people involved in the home invasion certainly had a clear understanding of their different roles, their different circumstances and their individual requirements for rehabilitation and reintegration. Although parity is a principle to consider, it is not an overriding factor. The **Act** requires attention to several other principles as well, and it is the role of the youth court judge to determine the significance of all of the principles. Here it is apparent from the judge's discussion of the sentence imposed on CC, quoted above at ¶ 14, that he was satisfied based on JRL's supportive parents and his adherence to most of the conditions of his release over a period of 10 months that JRL did not need the same measure of control to effect rehabilitation and reintegration as did CC.

[33] I am not persuaded that the judge erred in principle in the application of the parity principle in these circumstances.

4. Community resources:

[34] The Crown submits that the sentencing judge erred by finding that the resources required to rehabilitate JRL existed in the community. It asserts that there was an over-emphasis on rehabilitation and that the only suitable sentence was a custodial sentence where all of the programs required by JRL would be easily available.

[35] The Crown does not take issue with the judge's determination of which resources were required to assist in JRL's rehabilitation. It questions his finding that suitable resources were available outside of the Waterville Institution.

[36] Judge MacDougall based his finding of fact that the required programs were available in the community on the evidence of Dennis Allaby, the psychologist, and his own extensive experience as a judge in the community. With respect to the recommendation of Mr. Allaby that JRL be referred to the Choices program, the judge said:

> I am familiar with the Choices program that addresses substance abuse issues. It is an established program and I will speculate that it's been around for 20 years in the metro area. It's a residential program that addresses not only the substance abuse issues but also other aspects of a young person's life, including education and career advancement. When Mr. Allaby says it's four to six months, that is my understanding of the intensive nature of that particular program. The length of the program is, to a large degree, determined by the needs of the participant and it is not a straight in and out a set period of time.

[37] Another factor important to Judge MacDougall's reasoning was the ability of JRL's parents to assist in his supervision and to be involved in the rehabilitation process.

[38] As for the availability of the programs that JRL needed to effect rehabilitation in the institutional setting, the judge accepted the opinion of Mr. Allaby that a custodial sentence would be counter productive because of the risk of association with a negative peer group. (See ¶ 16 above)

[39] This court is not entitled to substitute our view of the evidence or our opinion of the ability of JRL's parents to supervise him. We owe special deference

to the frontline judges who wrestle with the problems inherent in selecting appropriate programming for youthful offenders every day. As stated by MacDonald, C.J.N.S. in **R v. K.R.D.**, 2005 NSCA 13:

> [7] ...
>
> > [10] This deference reflects a recognition of the unique qualifications of front line judges and is equally applied whether the sentence arises after a trial or from a guilty plea. As explained by the Court in **R. v. C.A.M.**, *supra*:
> >
> > > [91] This deferential standard of review has profound functional justifications. As Iacobucci J. explained in **Shropshire**, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both **Shropshire** and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. . . .

[40] I would not interfere with Judge MacDougall’s findings of which programs were available to JRL in the community.

5. Credit for time served on remand:

[41] The Crown argues that the six month deferred custody order was not a permissible sentence because six months is the maximum allowable for a deferred custody order. It is submitted that since credit must be given for the 16 days spent on remand, the sentence was, in effect, six months and 16 days, which is illegal.

[42] As quoted above at ¶ 25, s. 38(3) of the **YCJA** states that the sentencing judge shall take into account any time the youth has spent in detention as a result of the offence. Section 42(2)(p) stipulates that a deferred custody and supervision order cannot exceed six months duration.

[43] At the sentencing hearing the Crown was recommending a three year custodial sentence and briefly suggested that JRL be given credit for the 16 days on remand. Neither defence counsel, who recommended deferred custody, nor the judge appeared to reflect on s. 38(3).

[44] The Crown on appeal relies on **R. v. TB**., [2006] O.J. No. 584 (C.A.)(Q.L.). In that case the young person had been on remand for six months prior to sentencing for several offences including two robberies and trafficking in cocaine. The sentencing judge imposed a 33 month custodial sentence. The Ontario Court of Appeal found that the sentence exceeded the maximum allowed of 36 months because no deduction had been made for pre-sentence custody. While the sentencing judge has discretion to assess the quantum of the credit, some credit must be given, taking into account matters such as the conditions of the custody, the reason for it and the length of it. T.B was given credit on a one to one basis, reducing his custodial sentence to 30 months.

[45] A few months later, the court revisited **T.B.** and stated that in "an exceptional case", the court could reduce the credit to be given to less than one to one. See: **R. v. E.L.**, [2006] O.J. No. 1517 (C.A.)(Q.L.). In that case the credit given was slightly less than 1 day credit for every 6 days served.

[46] A different approach was taken by the Saskatchewan Court of Appeal in **R. v. C.J.A.**, [2005] S.J. No. 410 (C.A.). In that case the young person spent 10 weeks on remand. The sentencing judge expressly considered the remand time noting that it had been beneficial in beginning the rehabilitation process and that it was a

factor to consider in comparing the circumstances of a co-accused who did not serve significant remand time. A six month deferred custody order was approved on appeal. Richards, J.A. stated:

> 41 Although I appreciate the Crown's concerns on this point, I do not agree that the sentence imposed was demonstrably unfit within the meaning of **R. v. C.A.M.**, *supra*. The key in this regard, and the apparent key for the sentencing judge, was that C.J.A. had spent ten weeks on remand prior to sentencing. As noted by the sentencing judge, on the standard two-for-one calculus this amounted to the equivalent of five months in custody.
>
> 42 The Crown paid little attention to the time C.J.A. spent on remand in either its written or oral submissions but that time is a significant factor in assessing the overall suitability of his sentence. In my view, the sentence here may well not have been fit in the absence of the remand time. However, the reality is that C.J.A. did spend the equivalent of five months in custody and the sentencing judge, pursuant to s. 38(3)(d) of the **YCJA**, properly took that reality into account.

[47] I prefer this approach. In my view, the time spent in pre-sentence detention can be “taken into account” without expressly giving specific credit for time served by deducting the number of days or some ratio of that number from the number of days of a custodial sentence. When the sentence imposed is not a custodial sentence to be served in an institution, taking the remand time into account does not necessarily have to result in a deduction in the length of sentence. It can be taken into account by reducing the type or severity of the sentence.

[48] Although the judge in this case erred in principle because he did not specifically take the remand period into account, given the brevity of the remand, it is not an error that should necessarily cause a change of disposition if the sentence is otherwise fit. Following the reasoning of **C.J.A.**, this oversight did not make the deferred sentence an illegal sentence. To deduct the 16 days from the six month deferred custody portion of the sentence would make little sense at this point, now that it has been completely served.

6. Meaningful consequences:

[49] The Crown submits that Judge MacDougall overemphasized the first two principles in s. 3(1)(a) and ignored the third. For convenience I will repeat the section:

> 3. (1) The following principles apply in this Act:
>
> (a) the youth criminal justice system is intended to
>
> (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
>
> (ii) rehabilitate young persons who commit offences and reintegrate them into society, and
>
> (iii) ensure that a young person is subject to meaningful consequences for his or her offence
>
> in order to promote the long-term protection of the public;

[50] The Crown asserts that only a custodial sentence could subject JRL to meaningful consequences for his offences. I disagree. To be "meaningful" a sentence does not necessarily require an imprisonment component.

[51] Once again, deference is owed to the judgment of the sentencing judge who has to consider not only what will constitute meaningful consequences for this offender, but also has to fashion a sentence that accords with the other principles of the **Act**, particularly those which promote rehabilitation and reintegration and demand that the least restrictive sentence capable of achieving the objectives of s.38 be levied.

[52] In **R. v. C.D.; R. v. C.D.K.**, 2005 SCC 78, the Supreme Court discussed the meaning of "violent offence" as used in s. 39(1)(a) of the **YCJA** in determining whether deferred custody was an allowable sentence. In the circumstances before the court, none of the other preconditions for a custodial sentence was present, so if the offences were not violent, a deferred custody order would not be permitted. In this context, Justice Bastarache, for the majority, discussed the objects of the **YCJA** and its restrictions of the use of custodial sentences. After quoting s.3(1)(a)

at ¶ 34, he describes the repetitious manner in which the **Act** accentuates that the use of incarceration should be very restricted:

> ... While the Act may be generally concerned with the protection of the public, it also has some specific goals, including restricting the use of custody for young offenders. This particular goal is evidenced in the preamble of the Act, as well as in s. 38(2).
>
> 35 Turning first to the preamble, there are two parts that demonstrate that the Act is aimed at restricting the use of custody for young persons. First, there is the part of the preamble that states that "Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the **Canadian Charter of Rights and Freedoms** and the **Canadian Bill of Rights**, and have special guarantees of their rights and freedoms". This reference to the **Convention on the Rights of the Child**, Can. T.S. 1992 No. 3, is important because art. 37(b) of the Convention provides that:
>
> > No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
>
> 36 The second part of the preamble that demonstrates that the Act is aimed at restricting the use of custody for young offenders reads as follows:
>
> > ... -WHEREAS- Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons.
>
> 37 Turning next to s. 38(2) of the **YCJA**, it sets out the principles that a youth justice court is to follow in determining a youth sentence. Two principles in particular reveal the Act's focus on restricting the use of custody for young offenders. First, the sentencing principle set out in s. 38(2)(d) provides that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons". Second, the sentencing principle set out in s. 38(2)(e)(i) provides that "the sentence must ... be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1)".

...

39 The goal of restricting the use of custody for young offenders is also reflected in the scheme of the Act, and, in particular, in s. 39. For instance, as noted above, subs. (1) of this section provides for only four "gateways" to custody. If an offence committed by a young person does not fit through one of these gateways, then a youth justice court cannot impose a period of custody. However, even if one of the gateways to custody in subs. (1) does apply, subs. (2) prohibits a youth justice court from imposing a custodial sentence under s. 42 (youth sentences) unless the court has determined that there is no reasonable alternative, or combination of alternatives, to custody that is in accordance with the purpose and principles set out in s. 38. Furthermore, subs. (3) sets out a number of factors that a court must consider in determining whether there is a reasonable alternative to custody, such as the alternatives to custody that are available and that have been used in respect of young persons for similar offences committed in similar circumstances, and subs. (9) requires a court that imposes a custodial sentence "[to] state the reasons why ... a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1)".

40 The remaining subsections of s. 39 also support the goal of restricting the use of custody for young offenders. For instance, subs. (4) makes it clear that the previous imposition of a particular non-custodial sentence on a young person does not preclude a court from imposing the same or any other non-custodial sentence for another offence. Subsection (5) prohibits a court from using custody as a substitute for appropriate child protection, mental health or other social measures. Subsections (6) and (7) require a court to consider a pre-sentence report and any sentencing proposal made by the young person or his or her counsel before imposing a custodial sentence unless the court, with the consent of the prosecutor and the young person or his or her counsel, determines that the report is not necessary. Finally, subs. (8) prohibits a court that is determining the length of a sentence that includes a custodial portion from taking into consideration the fact that the supervision portion of the sentence may not be served in custody and that the sentence may be reviewed by the court under s. 94.

...

48 Although these amendments [to the YOA] were aimed at reducing over-reliance on custody for young offenders, they continued to give significant discretion to youth court judges and, therefore, had little effect on sentencing patterns: Bala, **Youth Criminal Justice Law**, at p. 447. With this in mind, it would appear that the **YCJA**, which departs from the **YOA**'s discretionary approach to custodial dispositions and instead provides for clear conditions that

must be satisfied before a custodial disposition can even be considered as an option, was designed, in part, to send a clearer message to those involved in the youth criminal justice system about restricting the use of custody for young offenders: see also Bala, **Youth Criminal Justice Law**, at p. 447. This conclusion is supported by comments made by the then Minister of Justice and Attorney General of Canada Anne McLellan when the **YCJA** was introduced for its second reading in Parliament. Specifically, the Minister stated that:

> As we also know, the existing **YOA** has resulted in the highest youth incarceration rate in the western world, including our neighbours to the south, the United States. Young persons in Canada often receive harsher custodial sentences than adults receive for the same type of offence. Almost 80% of custodial sentences are for non-violent offences. Many non-violent first offenders found guilty of less serious offences such as minor theft are sentenced to custody.
>
> The proposed youth criminal justice act is intended to reduce the unacceptably high level of youth incarceration that has occurred under the **Young Offenders Act**. The preamble to the new legislation states clearly that the youth justice system should reserve its most serious interventions for the most serious crimes and thereby reduce its over-reliance on incarceration.
>
> In contrast to the **YOA**, the new legislation provides that custody is to be reserved primarily for violent offenders and serious repeat offenders. The new youth justice legislation recognizes that non-custodial sentences can often provide more meaningful consequences and be more effective in rehabilitating young persons.
>
> (House of Commons Debates, February 14, 2001, at p. 704)

[emphasis added]

[53] The judge in this case considered the principles stated in the **Act**, recognized that custody was to be utilized as a last resort and only for grievous crimes or repeat offenders, and, while accepting that the offences were brutal and revengeful, he reasonably concluded that incarceration was not necessary in this case. The six month deferred custody order followed by 18 months probation, both with strict conditions for house arrest, treatment and counselling conveyed meaningful consequences for JRL. When combined with the remand period and the house arrest prior to the sentencing, the total period of restricted liberty approached three

years. Under the circumstances, I am not persuaded that the sentence requires the intervention of this court.

7. Bodily samples:

[54] The Crown submits that conditions in the deferred custody order and the probation order are without statutory authority and should be struck out to comply with the decision of the Supreme Court of Canada in **R. v. Shoker**, *supra.* The respondent distinguishes **Shoker** and argues that the orders are permissible under the **YCJA**. Although the record does not reveal a specific consent to the conditions, the respondent does not object to the requirement that he provide urine and breath samples upon demand.

[55] Both the deferred custody order and the probation order herein contain the condition:

> Submit for urinalysis or sample of breath upon demand of a peace officer or probation officer [Provincial Director] to determine if alcohol or drugs are in his system.

[56] In **Shoker**, Charron, J., for the majority of the Court, concluded:

> 26 For these reasons, I would conclude that there is no statutory authority for requiring Mr. Shoker to submit bodily samples. In the absence of a legislative scheme authorizing the seizure of bodily samples, the enforcement of abstention conditions must be done in accordance with existing investigatory tools. ...

[57] In **Shoker**, an adult sentencing case, the Court examined the optional conditions of a probation order provided for in s. 732.1(3) of the **Criminal Code**. The court concluded that s. 732.1(3), permits an order requiring abstinence from the use of alcohol or other intoxicating substances. However, the residual clause, allowing for "other reasonable conditions" permits conditions intended to help rehabilitate and monitor the probationer's behaviour but did not authorize "conditions intended to facilitate the gathering of evidence for enforcement purposes" (¶ 22) because they were "punitive" (¶ 13).

[58] The section at issue in **Shoker**, regarding optional conditions in probation orders states:

> 732.1 ...
>
> (3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:
>
> ...
>
> (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

[59] The section in the **YCJA** allowing optional conditions of a probation order states:

> 55. ...
>
> (2) A youth justice court may prescribe, as conditions of an order made under paragraph 42(2)(k) or (l), that a young person do one or more of the following that the youth justice court considers appropriate in the circumstances:
>
> ...
>
> (h) comply with any other conditions set out in the order that the youth justice court considers appropriate, including conditions for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences; and [emphasis added]

[60] Interestingly, in **Shoker**, Justice Charron remarked:

> 13 ... On the other hand, conditions of probation imposed to punish rather than rehabilitate the offender have been struck out: **R. v. Ziatas** (1973), 13 C.C.C. (2d) 287 (Ont. C.A.); **R. v. Caja** (1977), 36 C.C.C. (2d) 401 (Ont. C.A.); **R. v. Lavender** (1981), 59 C.C.C. (2d) 551 (B.C.C.A.); R. v. L. (1986), 50 C.R. (3d) 398 (Alta. C.A.). In contrast, punitive conditions may be imposed pursuant to s. 742.3(2)(f) as part of a conditional sentence: **Proulx**, at para. 34. [emphasis added]

[61] The provisions of the **Criminal Code** dealing with optional conditions in a conditional sentence provide:

> 742.3 ...
>
> (2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:
>
> ...
>
> (f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences. [emphasis added]

[62] This provision, which Justice Charron stated did allow for punitive conditions such as the provision of bodily samples on demand, is almost the same as s. 55(h) of the **YCJA**. Both provisions use the identical words "securing the ... good conduct"; and the words in the adult clause "...preventing a repetition ... of the offence or the commission of other offences" must certainly have the same meaning as that in the **YCJA**: "... preventing ... from repeating the offence of committing other offences".

[63] As well, the section of the **YCJA** which sets out conditions that may be included in a deferred custody order, s. 105(3)(h), uses the same wording:

> (h) comply with any other conditions set out in the order that the court considers appropriate, including conditions for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences.

[64] Based on this comparison of the relevant provisions of the **YCJA** with the **Criminal Code**, I conclude that the decision in **Shoker** is inapplicable to conditions attached to probation orders and deferred custody orders imposed upon young people pursuant to the **YCJA**. Furthermore, it is clear based on the evidence that JRL needed to abstain from alcohol and drug use and that these conditions will help secure his good conduct and prevent the commission of other offences.

Therefore the conditions in the orders under appeal should not be disturbed.

8. Is the sentence demonstrably unfit?

[65] The Crown submits that even if none of its other arguments is accepted, in the totality of the circumstances, the sentence was demonstrably unfit. Other cases where young people have been sentenced to lengthy terms of custody for the commission of similar crimes of violence are cited. See for example: **R. v. J.S.,** [2006] O.J. 2654 (C.A.) (Q.L.); **R. v. J.S.M.,** [2005] B.C.J. No.1831 (C.A.) (Q.L.); **R. v. C.N.** (2006), 213 C.C.C. (3d) 56 (Ont. C.A.). Although before Judge MacDougall the Crown sought the maximum three years custody, it now indicates that an 18 month custody and supervision order would be appropriate.

[66] The aggravating circumstances here include the fact that JRL was the instigator of the invasion, the use of the firearms, the viciousness of the attack, the serious injuries inflicted on the two victims, and the frequent use of illegal drugs. Given these factors, it was certainly open to the sentencing judge to consider a significant custodial disposition. It would have been wrong to rule out any possibility of a custodial sentence. The judge appears though to have taken these aggravating circumstances into account in his reasoning and did not automatically exclude the possibility of incarceration. However, one factor he appeared to overlook, or at least his reasons do not reveal that he took it into account, is that required by s. 39 (3)(b):

> 39...
>
> (3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
>
> ...
>
> (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
>
> ...

[67] JRL had one prior conviction. On February 13th, 2005, eight months prior to the home invasion, he was the occupant of a motor vehicle in which a firearm was located, contrary to section 94(1) of the **Criminal Code.** On April 25, 2005 he was sentenced to nine months probation. Therefore he was on probation at the time of the offences in November and it was his second firearm offence. It was an error in principle not to have taken into account the non-compliance with a previous non-custodial sentence.

[68] In my view though, in light of other circumstances, when the omitted factor is taken into account, it does not have such a significant impact so as to alter the sentence. While there was a breach of a previous probation order, there had been seven months of probation prior to these offences without incident. More importantly though, after the charges arising out of the home invasion were laid, JRL completed more than 10 months of house arrest with strict conditions without further non-compliance charges. This counterbalances the previous breach while on probation and was an indication of a sincere attempt to change his ways. The sentencing judge was most impressed by this effort on JRL's part and was satisfied on that basis that he was likely to comply with a further period of restrictions while remaining under his parents' supervision. Despite the failure to consider s. 39(3)(b), I would not interfere with his conclusions.

Conclusion:

[69] Judge MacDougall applied the appropriate principles of sentencing as directed by the **YCJA**. The learned and experienced youth court judge determined, after careful consideration of the circumstances of the offences and the offender, that the best way to ensure long term protection of the public was through promotion of rehabilitation rooted in community-based treatment programs and strict parental supervision. In my opinion he did not ignore or overemphasize any factors and the sentence imposed was not demonstrably unfit. The post-sentence reports confirm that progress towards rehabilitation has commenced.

[70] I would grant leave to appeal but dismiss the appeal.

Roscoe, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.