IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. R.D., 2015 NSPC 83

Date: December 7, 2015
Docket: 2833032, 2833047, 2833062, 2833077, 833080, 2833106

Registry: Halifax

BETWEEN:

HER MAJESTY THE QUEEN

v.

D.(R.)

DECISION ON SENTENCE

BEFORE THE HONOURABLE JUDGE ANNE S. DERRICK

HEARD:	December 2, 2015
DECISION:	December 7, 2015
CHARGES:	sections 268 x 3, 348(1)(b), 351(2), *Criminal Code*
COUNSEL:	James Giacomantonio and Jamie Van Wart, for the Crown
	Shawna Hoyte, Q.C., and Esher Madhur, Senior Law Student, for D.(R.)

By the Court:

Introduction

[1] On November 30, 2014 the suppertime break-in of an occupied home ended with three teenagers wounded by gunshots. The shooting of one of those teenagers, Ashley Kearse, left her paralyzed. A robbery that went terribly wrong is what brought the three teenagers and four masked intruders together with catastrophic consequences.

[2] D.(R.) was one of three young persons who, in the company of a young adult, went into the home. He was arrested within hours, at home. His friends, two other young people whom I have already sentenced - S.(E.) and B.(D.) - were arrested the next day. They were all charged with attempted murder of the three victims, break and enter and robbery, and having their faces masked during the break-in and robbery. D.(R.) was also charged with breaching a Recognizance dated August 27, 2014 that prohibited him from associating with B.(D.).

[3] None of the young persons was the shooter. On August 24, 2015, the Crown indicated it was willing to accept guilty pleas from D.(R.) and the two other youths to three counts of aggravated assault, break and enter, and the charge of having their faces masked. At the time of his guilty pleas, D.(R.) had been detained at the Nova Scotia Youth Facility for almost nine months. The Crown took this into account in ultimately deciding to withdraw its application to seek an adult sentence.

[4] The original position of the Crown was that all three young persons should be sentenced to a lengthy Custody and Supervision Order ("CSO") of 2 – 3 years on top of the 12 months they had spent in the Nova Scotia Youth Facility ("NSYF") by the time of sentencing. Defence counsel indicated they would be arguing for a sentence of a one-day CSO followed by 18 months of probation with strict conditions. These positions were advanced during the sentencing hearings for S.(E.) and B.(D.) which occurred on November 9 and 12, respectively.

[5] The ground shifted after I imposed essentially identical sentences on S.(E.) and B.(D.). (*R. v. E.S., 2015 NSPC 81* and *R. v. D.B., 2015 NSPC 82*) In the wake of those sentences, the Crown has submitted that D.(R.) should be sentenced consistently with S.(E.) and B.(D.) as there is nothing to distinguish their circumstances or the circumstances of their offending. In the Crown's submission

S.(E.), B.(D.) and D.(R.) are "identically situated from a moral blameworthiness perspective." The Crown's original position on sentencing in relation to these young persons reflected this view. What has influenced a change in the length of sentence being sought by the Crown for D.(R.) is the principle of parity now that S.(E.) and B.(D.) have been sentenced.

[7] Ms. Hoyte does not concede that D.(R.) should be sentenced on the same basis as S.(E.) and B.(D.). While there was some suggestion at the sentencing hearing that he is not as morally culpable as S.(E.) and B.(D.), I understand the principal emphasis of the Defence submissions is on the differential impact of a custodial sentence for D.(R.) Ms. Madhur, assisting Ms. Hoyte, expressed the point in these terms: "A custodial sentence for [D.(R.)] would have a disproportionate detrimental effect that would not achieve substantive parity with his con-accused." I will be returning later in these reasons to explain the basis for this submission.

[8] In Ms. Hoyte's submission, accountability for D.(R.) can be achieved through a 21-month probation order with strict conditions that should include: electronic monitoring, no substance use, mental health counselling, an obligation to continue his education, and a firearms prohibition. Ms. Hoyte submits that for reasons unique to D.(R.) he should serve no further time in custody.

[9] This is a lengthy decision as were my decisions in S.(E.) and B.(D.). I will be explaining my reasoning in detail. There will be a certain amount of repetition from the sentencing decisions I rendered in relation to S.(E.) and B.(D.), with me taking the same position in these reasons on such factors as accountability, denunciation as an objective in youth sentencing, how time in detention is to be taken into account, and the principle of parity in relation to cases submitted by the Crown in the first two sentencings. Crown and Defence have had the benefit of my decisions on the sentences for S.(E.) and B.(D.). Where I have used in this decision precisely the same language as contained in my reasons in *R. v. E.S., 2015 NSPC 81* and *R. v. D.B., 2015 NSPC 82* it is because that language is equally applicable to D.(R.).

The Defence Submission for a Different Sentence for D.(R.)

[10] The inapplicability of parity in D.(R.)'s case is the central pillar of Ms. Hoyte's submission that he should receive no further custody. Ms. Hoyte says D.(R.) is distinguishable from S.(E.) and B.(D.) and that the dissimilarities between him and his co-accused should lead to a different sentence notwithstanding that he has been found guilty of the same offences committed in similar circumstances.

[11] D.(R.)'s sentencing hearing proceeded on the basis of Ms. Hoyte examining the authors of the section 34 psychological and psychiatric assessments. She primarily pursued the themes of trauma and coping. This was explored in the context of D.(R.)'s circumstances which are different from those of S.(E.) and B.(D.). What is different about them is that D.(R.) is in the same youth facility as the young person who was convicted and sentenced for attempting to kill him in 2013. Although they are kept separate, D.(R.) and his perpetrator have both been living at the NSYF for the past year, the only facility in Nova Scotia for young persons remanded or sentenced under the *YCJA*. D.(R.)'s perpetrator was sentenced by me in November 2014 to a "go-forward" three year youth sentence. (*R. v. "X", [2014] N.S.J. No. 609*)

[12] It is these circumstances that underpin the Defence submission that D.(R.)'s experience of custody is materially different from the experience of S.(E.) and B.(D.) Ms. Hoyte has submitted further custody will be harmful to D.(R.)'s rehabilitation and reintegration. Ms. Hoyte says D.(R.) is not "similar" to S.(E.) and B.(D.) within the meaning of the parity principle. The parity principle is expressed in section 38(2)(b) of the *YCJA* and provides that "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."

[13] I will be returning to discuss the evidence adduced at D.(R.)'s sentencing hearing and the Defence submissions about accountability in his case and parity. What is not in issue now that I have sentenced S.(E.) and B.(D.) are the facts, my reasoning in relation to certain issues, and how I have determined certain factors should be applied in these three cases.

Facts

[14] D.(R.) has admitted to facts that are contained in an Agreed Statement of Facts. (*Exhibit 1*) I will summarize these facts briefly with a focus on the essential details.

[15] The [… Drive] residence that D.(R.) broke into on November 30 was the site of an earlier robbery in which he had participated. The first robbery had been committed by D.(R.), S.(E.) and B.(D.) earlier that November. It had been a success. Drugs and money were located and taken and no one got hurt. Better still, it was never reported. D.(R.) and his confederates got away scot-free. There were no repercussions at the time.

[16] On November 30, D.(R.), S.(E.) and B.(D.) went back to [… Drive] with a young adult, whom I shall refer to as the gunman. They all wore bandanas that covered the lower half of their faces. The gunman had a revolver. It has been accepted by the Crown that D.(R.), S.(E.) and B.(D.) did not know this. However, D.(R.) has admitted that:

> … his intention was to commit a robbery at [the residence] and to assist his co-perpetrators in committing a robbery. Though he did not intend to cause injury to the victims of the robbery, he ought to have known that assaultive actions by one of his co-perpetrators was a probable consequence of the robbery. (*Exhibit 1, Agreed Statement of Facts, paragraph 53*)

[17] The four intruders did not all enter the home together. Like S.(E.), D.(R.), went in through the unlocked front door with the gunman. One of them let B.(D.) in through the back door which ensured none of the occupants would be able to slip out that way once they realized what was happening.

[18] The intruders confronted two teenagers, L.S. and J.L., in the living room and made demands for "money" and "anything of value." They directed L.S. and J.L. into a bedroom where Ashley Kearse was playing video games. While all three teenagers were on the bed, the gunman produced the gun. There was a verbal exchange between Ms. Kearse and the gunman. She knew the gunman and courageously tried to defuse the situation, urging him not to shoot and to consider the consequences. She told him: "You're just going to get yourself in trouble." She recalls the gunman's response: "I'm not going to get in trouble because none of you guys are going to make it out of here alive." Quite understandably, Ms. Kearse became extremely upset. She started screaming at the gunman not to shoot. The gunman opened fire at the three teenagers on the bed.

[19] When the gun was produced and the shooting started, D.(R.) was in the hallway outside the bedroom with B.(D.) According to the Agreed Statement of Facts, J.L. recalls the gunman directing D.(R.), B.(D.) and S.(E.) out of the bedroom prior to the shooting. L.S.'s recollection is of them "going back and forth and talking to each other" while the gunman was in the bedroom holding the gun on him and his friends. (*Exhibit 1, paragraph 14*) S.(E.) has admitted to being in the bedroom when the gunman pulled out the gun. The description in the Agreed Statement of Facts of D.(R.)'s role does not contain this admission. (*Exhibit 1, paragraphs 49 – 53*)

[20] The robbery ended with the shootings. The cell phone that had been taken from L.S. and some cigarettes were later found on the front lawn of the residence.

[21] L.S. and J.L. have made a full recovery from being shot at close range. Ashley Kearse did not. She was shot twice, taking bullets to the top of her neck. The damage to her spinal cord has left her permanently paralyzed. She faces a lifetime of physical and psychological challenges. In her victim impact statement which I will discuss later, Ms. Kearse gave a searing account of her life as a 19-year-old quadriplegic.

Documentary Evidence at Sentencing

[22] Extensive documentary material has been filed for this sentencing. I have reviewed:

- A pre-sentence report dated June 9, 2015 prepared for D.(R.)'s sentencing on the prior robbery (*Exhibit 15*);
- A pre-sentence report update dated November 2, 2015 (*Exhibit 19*);
- An undated *Gladue* Report prepared for the prior robbery sentencing (*Exhibit 14*);
- A section 34 psychological assessment dated October 16, 2015 and authored by Dr. Joanna Hessen Kayfitz, a psychologist (Candidate Register) (*Exhibit 18*);
- A psychiatric report dated November 8, 2015 by Dr. Jose Mejia, Clinical Lead Youth Forensic Services at the IWK (*Exhibit 17*).

[23] I have also received a copy of D.(R.)'s youth record (*Exhibit 16*) and a CD of Judge Gregory Lenehan's oral reasons for conviction, delivered on April 29, 2015, following the trial in the Halifax Youth Court of D.(R.), S.(E.), B.(D.) for the first robbery.

The Victim Impact Statement

[24] Only Ms. Kearse prepared a victim impact statement. L.S. and J.L were given the opportunity but chose not to provide statements. Even without their statements, I know they sustained significant injuries from being shot multiple times and I am prepared to infer that the experience of being accosted by masked robbers in L.S.'s home and then being subject to, and witnessing, the shootings, will have had a profound psychological effect on them.

[25] Ms. Kearse read her victim impact statement in the presence of D.(R.), S.(E.), and B.(D.) and members of their families. She described in crystalline words all that she has lost – "I lost everything" - and what she endures. She spoke of how she had put off writing her statement as long as she could. In her words: "I guess I thought the more I procrastinated and ignored it maybe this would all go away and things could go back to the way they were." Ms. Kearse described the horror of being shot, feeling that she was dying and being in terrible pain. When she learned that she was paralyzed and saw the pain on everyone's face she said it felt "like my heart was ripped out of my chest." Since then Ms. Kearse has been living with the reality of quadriplegia. She talked about the devastating burden of being paralyzed: "I hate waking up most days I don't even get out of bed I hate going out I hate myself I don't see the point to anything anymore I feel weak because this happened to me I feel ugly I hate looking at myself. I lost everything that night I lost who I was." Ms. Kearse nailed her experience with these heartrending words: "everything I knew now doesn't apply to me I have to find new ways and it's so hard to see everyone I love able to go and do things I can't they ripped me away from everyone and everything…" As Ms. Kearse said later in her statement: "…its such a horrible feeling seeing your friends and being used to just going with them and now you have to watch them go and there's nothing you can do."

[26] Ms. Kearse identified the losses she has endured and the enormous challenges she continues to face: she lost her boyfriend and close friends and the ability to have a carefree relationship with her little brother and her cousins. Her changed circumstances have either overwhelmed relationships or fundamentally altered them. She struggles to adapt to her life as it is now: "…I never imagined I would ever of ended up so helpless it breaks my heart every day I don't ever feel happy or excited about anything anymore I constantly fight back crying all day everyday it feels like someone is constantly sitting on my chest choking me I feel alone whether there's people there or not…I just want my life back with everything in me I can't do anything I love anymore…" Ms. Kearse missed out on her final year at high school, and could not attend either the graduation of her friends or the prom. These are huge events in the life of a teenager. Ms. Kearse talked about how excited she had been to go to prom and graduate with her friends.

[27] Ms. Kearse has become wholly dependent in all aspects of her life. Her world is one where, as she has said, "I have no independence anymore I can't be alone I can't live on my own I need help with everything..." She said of herself,

"…the biggest thing about me was I loved my independence and doing everything myself…" She is acutely aware of what her future does not hold anymore, the option of having her own children, uncomplicated relationships and employment without accommodations for her profound disabilities. Ms. Kearse spoke of feeling as though she has been "imprisoned" in her body for the rest of her life. "I feel like I'm in a nightmare I just want to wake up…I feel like a completely different person and I hate it."

[28] When Ms. Kearse was finished reading her victim impact statement, each of D.(R.), S.(E.), and B.(D.) spoke to her as did members of their families. The family members who spoke, including D.(R.)'s father, were heartfelt in their emotional expressions of grief and sorrow for what happened to Ms. Kearse in particular, and the other victims. Ms. Kearse was urged to believe in herself and the value of her life. The powerful effect of Ms. Kearse's presence and her words resonated in the courtroom.

[29] D.(R.)'s mother was unable to attend on the day Ms. Kearse read her victim impact statement. When she addressed the court at R.(D.)'s sentencing hearing she expressed how sorry she was for what had happened to Ms. Kearse and indicated that she prays for her every night.

The Purpose and Principles of the Youth Criminal Justice System and Sentencing

[30] Parliament has mandated that the youth criminal justice system "must be separate from that of adults" (*section 3(1)(b), YCJA*) which reflects that young persons, even those who commit or are party to violent offences, are not adults and cannot be treated as though they are unless certain presumptions are displaced. The Supreme Court of Canada has held that young persons are entitled to a presumption of diminished moral blameworthiness that reflects - as a consequence of their age - their heightened vulnerability, immaturity, and reduced capacity for moral judgment. (*R. v. D.B., [2008] S.C.J. No. 25, paragraph 41*)

[31] The Declaration of Principle under the *YCJA* indicates that the "…youth criminal justice system is intended to protect the public by holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person" (*section 3(1)(a)(i)* and through "promoting the rehabilitation and reintegration of young persons who have committed offences."*(section 3(1)(a)(ii)*)

[32] The *YCJA* requires that the sentence imposed on D.(R.):

> - Reinforce respect for societal values;
> - Encourage the repair of harm done to victims and the community; and
> - Be meaningful for him given his needs and level of development and, involve parents and extended family, where appropriate, and the community and social or other agencies in his rehabilitation and reintegration. (*subsection 3(1)(c)*)

[33] An underlying premise of the *YCJA* is that "… with some exceptions, young persons who commit crimes can be rehabilitated and successfully reintegrated into society so they commit no further crimes…" (*R. v. T.P.D., [2009] N.S.J. No. 556, paragraph 128 (S.C.))* As is expressed in subsections 3(1)(a)(i) and (ii) of the legislation, the *YCJA* sentencing regime is designed by Parliament 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. (*R. v. B.W.P.,[2006] S.C.J. No. 27; R. v. B.V.N., [2006] S.C.J. No. 27, paragraph 4)*

[34] Section 38(1) of the *YCJA* is the statutory home for these objectives. It states:

> The purpose of sentencing ... 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.

[35] It has been determined by the Supreme Court of Canada that, a "plain reading of s. 38(1)" makes it apparent that:

> …"protection of the public" is expressed, not as an immediate objective of sentencing, but rather as the long-term effect of a successful youth sentence. (*R. v. B.W.P., paragraph 31*)

[36] The relevant sentencing principles referenced in subsections 38(2)(a) through (e) of the *YCJA* include: parity, which I have already mentioned; proportionality -- that the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence; and, subject to the proportionality principle, that the sentence be the least restrictive sentence that is capable of achieving the overall purpose of sentencing; that it be the one most likely to rehabilitate the young person and reintegrate him or her into society; and that it promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

[37] The principles referenced in section 38(2)(e) of the *YCJA* - the least restrictive sentence principle - the requirement for a sentence that is "most likely" to serve rehabilitation and reintegration, and promote a sense of responsibility in the young person and an acknowledgement of the harm caused - are principles that are subject to the requirement for a proportionate sentence, a sentence that reflects the seriousness of the offence and the degree of responsibility of the young person.

[38] That being said, as stated by Judge Campbell (as he then was) in *R. v. Smith*, [2010] N.S.J. No. 461, the *YCJA* "encourages an approach that takes into account the reality that public safety is best served by dealing with problems while there is still time and that strict punishment may not be the best answer in the long run." (*paragraph 110*)

Accountability

[39] The *YCJA* has embedded accountability as the fundamental principle of sentencing. In the words of the Ontario Court of Appeal accountability "drives the entire YCJA sentencing regime." (*R. v. A.O., [2007] O.J. No. 800, paragraph 59*) Accountability for young persons under the *YCJA* must be "fair and proportionate" and "consistent with the greater dependency of young persons and their reduced level of maturity." (*section 3(1)(b)(ii), YCJA*) The consensus is that accountability is to be regarded as having equivalency to "the adult sentencing principle of retribution" discussed by the Supreme Court of Canada:

> Retribution in a criminal context ... represents an objective, reasoned and measured determination of an appropriate

> punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. (*R. v. M.(C.A.), [1996] S.C.J. No. 28, paragraph 80; emphasis in the original*)

[40] In *A.O.*, the Ontario Court of Appeal recognized rehabilitation as one of the important factors that must be considered in determining what constitutes accountability for the particular young person, "…one, but only one…" is how the Court characterized it. (*R. v. A.O., paragraph 57*) The Manitoba Court of Appeal has agreed with this analysis, holding that its Ontario counterpart,

> …correctly realized that both proportionality and rehabilitation concerns have to be considered when determining accountability under the *YCJA*, reaffirming that the "meaningful consequences" aspect of accountability looks toward proportionality…(*R. v. A.A.Z., [2013] M.J. No. 130, paragraph 57*)

[41] In its decision in *A.A.Z.*, the Manitoba Court of Appeal observed that "…where serious offences have been committed, the concepts of proportionality, meaningful consequences and retribution may take precedence over rehabilitation and can result in significant custodial sentences." (*paragraph 65*) This is reflected in a decision from our Youth Justice Court where Judge Campbell noted that while a young person's rehabilitation and reintegration are "important considerations", they "have not driven measured and legally restrained punishment from the field." (*R. v. A.S., [2012] N.S.J. No. 634, paragraph 95*)

[42] As I said in *E.S.* and *D.B.*, the British Columbia Court of Appeal decision of *R. v. S.N.J.S.*, [2013] B.C.J. No. 1847 is the most recent appellate decision I have been able to find that discusses the meaning of accountability in the context of a youth sentence. In *S.N.J.S.*, the Court held that a youth sentence must satisfy the requirements of proportionality, stating that, "…to the extent there is any hierarchy within the principles laid down in s. 38(2) [of the *YCJA*], it is (c) [the proportionality principle] which is at the top of that hierarchy…" (*R. v. S.N.J.S., paragraph 27*) The Court went on to talk about accountability which it said:

> …must be understood in part to be concerned with the severity of the sentence in relationship to the seriousness of the offence. Holding a young person "accountable" must also be understood to include consideration of whether the sentence meets the goal of ensuring a person is rehabilitated and reintegrated into society...This notion of accountability includes consideration of the seriousness of the offence and requires a sentencing judge to balance and match the rehabilitative needs of the young person, with the other purposes and principles of sentencing… (*paragraph 29*)

The Factors to be Taken into Account in Youth Sentencing: Section 38(3) of the YCJA

[43] Fashioning a "just sanction" for a young person is accomplished by applying specific principles I identified previously - the section 38(2) principles - and taking into account the factors enumerated in section 38(3) of the *YCJA*:

> (a) The degree of participation by the young person in the commission of the offence;
> (b) The harm done to the 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 or mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in section 38.

[44] I will now discuss these factors in relation to D.(R.).

D.(R.)'s Degree of Participation in the Commission of the Offence

[45] Like S.(E.) and B.(D.), D.(R.) was an active participant in everything that happened on November 30 at [… Drive] except the shooting. Although not the

shooter he was fully participant in a home invasion-type robbery that was on an escalated footing from the previous robbery. D.(R.) knew he was participating in a break and enter and robbery that carried a heightened risk over the earlier one. What he signed on for was fraught with risk: breaking into an occupied dwelling as a masked intruder with three other accomplices. The occupants could have armed themselves after the earlier robbery. One of D.(R.)'s accomplices could have been armed – and in fact was. It is not uncommon for such robberies to go wrong. D.(R.) went along as a committed member of the group, breaking into the home to commit robbery, a robbery which culminated in his adult accomplice shooting the witnesses.

[46] D.(R.) is caught by section 21(2) of the *Criminal Code*, the common unlawful purpose provision. It imposes a broad liability:

> …It applies where one person commits an offence beyond the one which the parties had originally planned to assist one another. It imposes liability on the other person if that person knew or ought to have known that the offence committed would be a probable consequence of carrying out the original common unlawful purpose. The Supreme Court explained in *R. v. Logan* [*cite omitted*] that the objective of s. 21(2) "is to deter joint criminal enterprises and to encourage persons who do participate to ensure that their accomplices do not commit offences beyond the planned and unlawful purpose." (*R. v. Cadeddu, [2013] O.J. No. 5523, paragraph 50 (C.A.)*)

[47] D.(R.)'s moral culpability for his participation in the [… Drive] robbery anchors the accountability assessment that must be done in his case. In closing submissions, Ms. Madhur for D.(R.) spoke to the issue of accountability for D.(R.) against the backdrop of my having articulated the legal framework of accountability in *E.S.* and *D.B.* Ms. Madhur referred me to *R. v. A.S.*, [2013] O.J. No. 5580, a decision of the Ontario Court of Justice in which the point is made that an assessment of accountability must "factor in the differing bases of liability" between co-accused. As Bloomenfeld, J. stated in *A.S.*, the accountability assessment must accord with the basis upon which the young person being sentenced admitted liability. (*paragraph 80*)

[48] I do not find anything to distinguish the roles played by D.(R.), S.(E.) and B.(D.) in the November 30 robbery. There are some differences in the facts that

describe their roles but I find these differences do not produce different degrees of culpability. S.(E.) alone has admitted to being present in the bedroom when the gunman produced the gun. B.(D.)'s entry through the rear door of the house after S.(E.) and D.(R.) went through the unlocked front door took care of a possible escape route for the occupants. D.(R.), like B.(D.), does not admit to seeing the gun before the shooting. D.(R.) was found to have a very small amount of GSR (gunshot residue) on his hands, but is explicit in his Agreed Statement of Facts that he "was never in possession of a gun while inside the residence." (*Exhibit 1, paragraphs 32 and 51*) As in *A.S.*, where the moral culpability of three of the four young persons was "essentially equivalent to one another", any differences between D.(R.), S.(E.), and B.(D.) "balance out." (*A.S., paragraph 95*) Indeed, the balancing is negligible as each of them participated in this common enterprise in comparable ways.

[49] In Ms. Madhur's submission care must be taken not to focus the accountability analysis for D.(R.) on the devastating consequences suffered by Ms. Kearse. I agree that the focus must be on what D.(R.) was found liable for, which, according to the Agreed Statement of Facts D.(R.) signed, was assisting in the commission of a robbery where he ought to have known that an assault by one of his co-perpetrators was a probable consequence. (*Exhibit 1, paragraph 53*) But the fact that D.(R.) did not fire the gun, indeed did not know it was present, does not mean Ms. Kearse's injuries are irrelevant to the assessment of his moral culpability. The home invasion-style robbery that D.(R.) participated in left Ms. Kearse paralyzed. That was the consequence of the intentional risk-taking engaged in by D.(R.), S.(E.) and B.(D.).

[50] Ms. Madhur also made the submission that there is "an awkward relationship" between section 21(2) party liability and the governing principles of the *YCJA* sentencing regime that acknowledge the heightened vulnerability, immaturity, and reduced capacity for moral judgment of young persons. She observed that what is reasonably foreseeable for an adult is different from what is reasonably foreseeable for a young person. I take this point to be an articulation of what the *YCJA* recognizes: a young person's ability to reasonably foresee what might happen and its consequences will be less well developed than that of an adult.

[51] It is relevant to D.(R.)'s culpability that he did not do the shooting. And he has to be held accountable only to the extent of his moral culpability for the events

of November 30, 2014. But he has admitted that he ought to have known an assault could occur in the course of the robbery. In *A.O.*, the Ontario Court of Appeal identified how moral culpability is to be assessed: "…having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct." (*paragraph 47*) It was on this basis that I determined the sentences for S.(E.) and B.(D.), holding them accountable only to the extent of their moral culpability, moral culpability that is the equivalent of D.(R.)'s moral culpability.

[52] As with S.(E.) and B.(D.), D.(R.)'s moral culpability for the [… Drive] robbery is significant. It involved planning and preparation and obvious risks. He has admitted this. He engaged with three other masked accomplices in a common enterprise that left three teenage victims with gunshot wounds and in Ms. Kearse's case, paralysis as a result. That consequential harm was caused by a co-perpetrator but had no one been injured this still would have been a very serious offence aggravated by the fact of the earlier robbery. The normative character of the offence – participation in a home invasion-style robbery - is very serious.

[53] In *R. v. J.S.*, [2006] O.J. No. 2654, the Ontario Court of Appeal substituted a 15-month CSO for a two-year CSO in a case of a home invasion-type robbery. J.S.'s sentence was reduced because the Court of Appeal found the sentencing judge had "ignored [the *YCJA*] and focused almost entirely on the gravity of the crime and the need to protect the public." (*paragraph 19*) But the Court spoke approvingly of the judge's description of the offence saying he had been "completely justified in characterizing the home invasion as "an horrendous crime" and underscoring its gravity." (*paragraph 39*) J.S. had been one of three males who forced their way into an occupied townhouse in search of valuables. No one was physically injured although J.S. was armed with a machete and one of his accomplices was carrying a shotgun. The Court of Appeal viewed the offence as "so serious that nothing less than a custodial sentence would suffice" *even taking into account* the greater dependency of young persons and their reduced level of maturity. (*paragraph 49*) (my emphasis)

[54] I find there is no tension in D.(R.)'s case between the *YCJA* and his common unlawful enterprise liability. The *YCJA* rests on the principle that a young person's immaturity and reduced capacity for moral judgment is to be taken into account in sentencing. Notwithstanding D.(R.)'s cognitive limitations as revealed by the section 34 assessment, the facts to which he has admitted indicate a conscious

decision to take part in a very serious and objectively high-risk offence. Section 21(2) liability applies to young persons like D.(R.) and his co-accused. The *YCJA* ensures they are sentenced for such liability in accordance with their vulnerabilities as young persons. Young persons are "differently accountable", not less accountable. (*R. v. D.B., [2008] S.C.J. No. 25, paragraph 93*)

The Harm Done to the Victims and Whether it Was Intentional or Reasonably Foreseeable

[55] D.(R.) has acknowledged that the [… Drive] victims were seriously harmed. They were badly shot up, a horrifying experience. It is reasonable to infer that the psychological effects experienced by L.S. and J.L. have not resolved as readily as their physical wounds.

[56] The Agreed Statement of Facts describe L.S.'s gunshot entry and exit wounds: two holes in the right side of his face; a wound in the right front chest, with right upper and lower back wounds; wounds to his right upper leg and right forearm. A chest tube had to be inserted at the hospital to drain fluid as a collapsed lung was suspected. He was discharged from hospital several days later with oral pain medication.

[57] J.L. sustained gunshot wounds to his right finger and was diagnosed at the hospital with a skull fracture caused by a ricocheting bullet. He was discharged from hospital on December 1.

[58] As I have already noted, Ms. Kearse was catastrophically injured. She experienced a complete spinal cord injury and has been permanently disabled by quadriplegia. The Agreed Statement of Facts documents that she required a number of interventions that are typical for a spinal injury patient including a tracheostomy, a urinary catheter insertion and a feeding tube. Transferred in January 2015 to the Rehabilitation Centre, she developed pneumonia and sepsis and was urgently transferred back to Intensive Care in March. She is susceptible to numerous types of complications that are very common with spinal cord injuries. Her specialist is quoted in the Agreed Statement of Facts: "…the likelihood of meaningful motor recovery at this time is extremely unlikely." (*Exhibit 1, paragraph 62*) She has a reduced life expectancy.

[59] D.(R.) did not intend for anyone to get hurt on November 30 but he has admitted he ought to have known that someone being assaulted by one of his co-perpetrators was a probable consequence of the robbery. He and B.(D.) had

assaulted L.S. during the prior robbery. He had brandished a bong at L.S. when it was determined that L.S. had lied about there being nothing to steal. B.(D.) had held a knife to L.S.'s throat for a few seconds. An assault of some kind was readily foreseeable on November 30. It is fair to repeat: D.(R.), S.(E.) and B.(D.) being unaware of the presence of the gun did not know the simple robbery they had planned would end in a horrific shooting.

Time Spent in Detention as a Result of the Offence

[60] D.(R.) has been detained for the November 30 offences for just over a year – one week longer than a year to be exact. Both Crown and Defence view this as a lengthy period of custody for a young person. The Crown took it into account in abandoning its application for an adult sentence.

[61] S.(E.) and B.(D.) submitted that the year in detention is the equivalent of 18 months in custody, calculated on a 1.5 to 1 ratio. I did not take their time in detention into account on this basis. I view D.(R.)'s time in custody the same way I did in *E.S.* and *D.B.*, a significant loss of liberty that is relevant to the accountability assessment, but not as

> …a mere number to be mechanically backed out of a sentencing equation. The search for a proper sentence is necessarily more dynamic than what is permitted by a simple arithmetic calculation. (*R. v. J.E.O., [2013] S.J. No. 484, paragraph 39 (C.A.)*)

[62] As I explained in my reasons in *E.S.* and *D.B.*, I am satisfied I have a broad discretion when it comes to taking pre-sentence detention into account in the crafting of an appropriate sentence under the *YCJA*. I base this view on the flexible discretion endorsed by our Court of Appeal in *R. v. J.R.L.* [2007] N.S.J. No. 214, and what appears to me to have been the approach taken by the Supreme Court of Canada in *R. v. D.B.*, [2008] S.C.J. No. 25 where the Court upheld a maximum sentence that had been imposed on top of a significant amount of remand time.

[63] The Manitoba Court of Appeal in *R. v. A.A.Z.* examined how appellate courts in Canada have treated pre-sentence detention in reviewing youth sentences. (*paragraphs 144 to 149*) There appears to be a wide acceptance of the flexible approach endorsed in *J.R.L.* which does not require that actual credit be given for the time a young person has spent in detention. There are other ways of taking this

time "into account." In *J.R.L.*, Roscoe, J.A., after discussing conflicting appellate decisions, reached the conclusion that 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. (*J.R.L., paragraph 47*)

Previous Findings of Guilt

[64] As of November 30, 2014 the only sentence that had been imposed on D.(R.) was for possession of marijuana. A finding of guilt had been made pursuant to section 36 of the *YCJA* on June 12, 2014. D.(R.) received an absolute discharge on November 27, 2014. The first [… Drive] robbery, which by November 30, 2014 had not been reported yet, did not result in findings of guilt for D.(R.), S.(E.) and B.(D.) until April 2015.

Aggravating Factors

[65] The prior robbery in early November 2014 is an aggravating factor in this sentencing. The November 30 robbery targeted the same home and the same victim. D.(R.), S.(E.) and B.(D.) all knew L.S. who lived at the […. Drive] residence. L.S. acknowledged in his evidence at their trial for the first robbery that his home had become known in the neighbourhood as a "drug house." He smoked and sometimes sold marijuana. It is reasonable to infer that when D.(R.), S.(E.) and B.(D.) robbed L.S. in early November of $220 and a few grams of marijuana that they located in his bedroom, they got what they had come for.

[66] During the first robbery D.(R.), S.(E.) and B.(D.) did not have their faces covered. L.S. recognized them all and his evidence led to the convictions. Judge Lenehan noted in his oral decision that L.S. did not disclose the first robbery to the police until after the November 30 robbery because not much was stolen and no one got hurt. That changed when L.S., J.L. and Ms. Kearse were shot. L.S. testified

before Judge Lenehan that he was then prepared to do whatever it took to get justice for Ms. Kearse.

[67] The November 30 robbery was an escalated drug "rip". There were four perpetrators this time – D.(R.), S.(E.) and B.(D.) and the gunman. They sought to hide their identities with bandanas and this time came with weapons – the Agreed Statement of Facts indicates that J.L. saw three cans of bear spray during the course of the robbery. (*Exhibit 1, paragraph 20*) And there was the gun although its presence was unknown to D.(R.), S.(E.) and B.(D.) until the robbery was well underway.

[68] I found in *E.S.* and *D.B.* that the success of the first robbery fueled the decision to return. S.(E.) and B.(D.) acknowledged this in their respective section 34 assessments. (*E.S., paragraph 62* and *D.B., paragraph 59*) The victims were seen as easy targets to be picked over again with impunity. There was very little likelihood that the police would be called. Everything had gone smoothly and there had been no consequences.

[69] In his section 34 assessment, D.(R.) indicated the November 30 robbery had a retaliatory aspect related to him being defrauded in a drug purchase. (*Exhibit 18, page 13*) If this was a primary or contributing impetus for his involvement in the robbery I do not find it makes any difference: what is relevant is that [… Drive] was the target of a second robbery. Why the second robbery happened is less important than the fact that it happened.

[70] The context in which the November 30 offences occurred is aggravating. The aggravated assaults and robbery were perpetrated in L.S.'s home. D.(R.) and the other perpetrators knew the house would be occupied. They came prepared for it, wearing masks and carrying bear spray. L.S. and his teenaged friends – J.L. and Ms. Kearse – were having a quiet night, minding their own business in comfort and safety, so they thought. Their peace and security was violently disrupted by four masked intruders. These facts accord with what is often referred to as a "home invasion." Even if that term had not been coined, the gravity of such a break and enter would be the same. The victims were entitled to feel and be safe at L.S.'s house. Instead they were subjected to a harrowing encounter with robbers dressed in black and wearing bandanas. It is a truism of ancient lineage that a person's home is their sanctuary and refuge. The law reflects this principle by making break and enter by an adult into a dwelling house punishable by life imprisonment.

[71] Other features of the November 30 offences are aggravating but have been addressed already – the presence of the bear spray and the injuries to the victims.

Mitigating Factors

[72] It is mitigating that D.(R.) pleaded guilty to very serious charges, sparing the state from having to put him on trial and the victims the anguish and stress of testifying. Re-living the traumatic events of November 30, their injuries and medical treatments, would undoubtedly have exacted a significant psychological toll on each of L.S., J.L. and Ms. Kearse. Giving evidence would also have placed significant physical demands on Ms. Kearse.

[73] In addition to the acknowledgement of responsibility his guilty pleas represent, I accept that D.(R.) is genuinely remorseful for his role in what happened on November 30. This has been apparent from statements he has made in court and what he said when interviewed for the section 34 assessment and the pre-sentence report. Given the opportunity to address Ms. Kearse after she delivered her victim impact statement in court on November 12, D.(R.) said he was "sorry for what happened." He expressed his wish that he could have changed things. It was obvious from what he said that he appreciates the terrible harm suffered by Ms. Kearse in particular.

[74] D.(R.) also expressed sincere remorse at the end of his sentencing hearing on December 2 when he read from a written statement he had prepared. He said he was "truly sorry for all the harm caused to the victims and their families." He specifically mentioned Ms. Kearse and said: "I never wanted anyone to be hurt."

[75] D.(R.) shared his feelings of remorse with Dr. Kayfitz during the preparation of the section 34 assessment. He told her he thinks about Ms. Kearse every day and feels remorse and guilt for what happened to her. He said he wanted Ms. Kearse to know he has not forgotten about her and wishes he "had never been there that night." (*Exhibit 18, page 21*) He is described as showing "genuine empathy" for Ms. Kearse. (*Exhibit 18, page 18*) Similar observations are made in the pre-sentence report update of November 2, 2015. (*Exhibit 19, page 2*)

Denunciation

[76] I discussed the principle of denunciation in *E.S.* and *D.B.* and will make some abbreviated comments about it here. Amendments to the *YCJA* in 2012 permit, although do not mandate, the objectives of a youth sentence to now include denunciation and specific deterrence, again subject to the proportionality principle.

It, and the objective of specific deterrence, exist now on a discretionary basis – the sentence imposed "may" have denunciation and specific deterrence as objectives. (*section 38(2)(f)(i) and (ii)*) While it was the Crown's submission in the sentencings of S.(E.) and B.(D.) that I should exercise my discretion to factor denunciation into the sentencing mix for these cases, I determined that denunciation added nothing to the sentencing analysis.

[77] Denunciation was not referenced by the Crown in its submissions on D.(R.)'s sentence undoubtedly because of what I had to say in *E.S.* and *D.B.* My reasoning on the issue of denunciation as a free-standing objective in youth sentencing is found in those decisions as follows: *R. v. E.S.*, paragraphs 40 - 45 and *R. v. D.B.*, paragraphs 39 - 44. I concluded that nothing useful has been achieved by introducing denunciation into the youth sentence mix. It is my view that its inclusion in the *YCJA* has the potential to disrupt the balance of sentencing principles in the legislation. Young persons who commit serious offences are held accountable for violating societal norms and their sentences are intended to "reinforce respect for societal values." (*section 3(1)(c)(i), YCJA*) Although framed for compatibility with the "differently accountable" ethos of the youth criminal justice system, this is in keeping with the notion of punishment for encroachment "on our society's basic code of values as enshrined within our substantive criminal law." (*R. v. C.A.M., paragraph 81*) It is not as though the framers of the *YCJA* forgot to reference society's collective concern that, within the youth sentencing regime, fundamental shared values are to be respected.

Accountability and Rehabilitation and Reintegration

[78] As I noted earlier in these reasons, assessing accountability requires consideration of the rehabilitative needs of the young person. The sentence cannot focus exclusively on the seriousness of the offence and ignore rehabilitation and reintegration. The sentences I imposed on S.(E.) and B.(D.) reflected my balancing of the various principles and objectives articulated by the *YCJA*.

[79] Ms. Hoyte submits that the same balancing in D.(R.)'s case will produce a disproportionate sentence because D.(R.)'s rehabilitative needs are not similar to S.(E.) and B.(D.) due to his unique circumstances as the victim of an attempted murder, a victim who is now locked up in the same youth facility as his perpetrator. The place to start my analysis of this aspect of D.(R.)'s sentencing is D.(R.)'s background.

D.(R.)'s Background

[80] The section 34 psychological assessment indicates D.(R.) grew up in a close, loving family with both parents and a number of siblings. The family home was in North Preston. D.(R.)'s parents are known to have insisted on rules and structure and to have emphasized the importance of politeness and respect for family values. (*Exhibit 18, page 6*) D.(R.)'s mother described him in the pre-sentence report as a "loving child" and a "happy boy." She indicated that their family was close-knit and cared deeply for each other. (*Exhibit 15, page 3*)

[81] D.(R.) took up boxing at age 9 and it was a major focus for him until he was 15. (*Exhibit 15, pre-sentence report, page 3*) It provided structure, focus and discipline. Boxing was a casualty of D.(R.) being shot. He did not return to it after that. (*page 4*) As D.(R.)'s mother told the author of the *Gladue* Report, "everything changed after he got shot, everything." (*Exhibit 14, page 28*)

[82] The section 34 assessment describes it as "noteworthy" that, before he was shot, "despite being on the periphery of antisocial influences, [D.(R.)]'s focus, commitment, and dedication to boxing never wavered, and that he remained faithful to his training program." (*Exhibit 18, page 30*)

[83] When he was shot, D.(R.) and his family had been living in […] because the family home had been damaged in an electrical fire. (*page 5*) They did not move back to North Preston because of fears for D.(R.)'s safety. (*Exhibit 18, page 7*)

[84] D.(R.) struggled throughout in school. He had to contend with escalating conflict with his cousin who bullied him. This cousin would eventually try to kill him. The section 34 assessment also attributes D.(R.)'s behavioural issues to difficulties he experienced with learning. His "disruptive classroom behaviours" are described in the context of "his extensive learning struggles." As the section 34 assessment notes: "Children who have difficulties succeeding academically are typically aware of their struggles, and experience frustration because of their implicit learning challenges." (*Exhibit 18, page 9*)

[85] D.(R.)'s learning difficulties caused him to be placed on an Individual Program Plan (IPP) in Grade 2. He remained on an IPP throughout the time he was in school. (*Exhibit 18, page 8*) Overall reading, written language, listening and comprehension and mathematics functioning were identified as challenges by a psychoeducational assessment completed when D.(R.) was in Grade 5. (*Exhibit 18, page 9*) D.(R.) made a good effort in the interventions he participated in following the assessment. (*Exhibit 18, page 10*)

[86] Looming over D.(R.)'s life were the tensions with his cousin. Their altercations led to D.(R.) being suspended at various times in junior high. It appears that underlying the conflict D.(R.) experienced with his cousin was resentment and hostility possibly related to his boxing abilities. (*Exhibit 18, page 7*) The problems followed D.(R.) into high school where there were behavioural incidents that resulted in his being suspended. (*Exhibit 18, page 10*) In one instance, D.(R.)'s parents successfully appealed a decision to suspend him in September 2013 from school for remainder of the year. D.(R.) was in Grade 11. The suspension was reversed after D.(R.)'s parents insisted upon security footage being reviewed which supported D.(R.)'s claims that he had not been physically aggressive during a confrontation by an associate of his cousin. (*Exhibit 18, page 11*)

[87] D.(R.)'s parents told the section 34 assessor they were very "hurt" by the fact that school staff had claimed to witness D.(R.) being physically aggressive when video surveillance established this had not been the case. When pressed, D.(R.)'s father referred to the potential that racism may have influenced how the altercation was viewed and said he "could not help but feel that effort was not made to understand the origin of the conflicts" that led to the incident and it being assumed that D.(R.) was a troublemaker from North Preston. (*Exhibit 18, page 12*)

[88] However D.(R.) did not make it through his Grade 11 year. He was suspended in March 2014 for being in possession of marijuana at the school. (*Exhibit 18, page 12*) This incident was dealt with through Restorative Justice and, as I noted earlier, D.(R.) received an absolute discharge. According to the section 34 assessment, the suspension was based on D.(R.)'s "repeated pattern of severely disruptive behaviour with multiple staff members through his time" in high school. (*Exhibit 18, page 12*) The suspension and D.[R.]'s withdrawal from boxing after he was shot left him with a very considerable amount of unstructured free time. (*Exhibit 18, page 30*)

Racial and Cultural Factors

[89] D.(R.) is of both African Nova Scotian and Aboriginal heritage. The *Gladue* Report notes that D.(R.)'s family believes that his paternal great-great-grandmother was Mi'kmaq. Although the authenticity of this claim cannot be established, the *Gladue* Report views it as likely accurate. (*Exhibit 14, page 4*)

[90] D.(R.) only recently found about his Mi'kmaq heritage and has expressed an interest in learning about Mi'kmaq culture. For the past two to three months, he

has been participating weekly in cultural programming for Mi'kmaq youth at the NSYF. (*Exhibit 18, section 34 assessment, page 6*)

[91] Although unlike B.(D.)'s section 34 assessment, race and culture are not expressly referenced in D.(R.)'s section 34 assessment, in response to questions I put to Dr. Kayfitz at D.(R.)'s sentencing hearing, she indicated that the methodology she employed in assessing D.(R.) incorporated the same approach. In B.(D.)'s section 34 assessment the methodological approach is described in a section entitled: "Methodological Approach for a Culturally Informed Assessment." (*R. v. D.B., paragraph 97*) Dr. Kayfitz advised me that she is familiar with this methodology and the Cultural Formulation Interview (CFI) and employed it in preparing D.(R.)'s assessment. I wouldn't have known this had I not had the opportunity to ask Dr. Kayfitz about what I had seen in B.(D.)'s assessment. In B.(D.)'s assessment it is noted: "Research has indicated that cultural evaluations in forensics remain poorly understood and neglected despite culture, race and ethnicity being shown to have a significant effect on young people's interaction with the legal system." (*R. v. D.B., paragraph 97*)

[92] B.(D.)'s section 34 assessment also usefully describes North Preston, the community where D.(R.) also grew up: "one of Canada's largest and most historic Afro-Canadian communities." It developed "relatively independently from other non-black communities…for reasons of geographical isolation, constraints placed upon the residents and systemic discrimination and racism." As D.(R.)'s section 34 assessment indicates, the close ties that maintained the community have gradually eroded. Information about the community was obtained for D.(R.)'s section 34 assessment from "first voices" of the African Nova Scotian community members "most proximal to [R.(D.)]" allowing them to "recount the narrative of the evolution of these factors as they relate to him." (*Exhibit 18, page 25*)

[93] According to D.(R.)'s mother, violence and materialism have seeped into North Preston and people in the community have become "more fearful and apprehensive, which strained the social cohesion enjoyed in previous years." (*Exhibit 18, page 26*) As I noted in my decisions in *E.S.* and *D.B.*, North Preston has, in recent years, "…gained notoriety as a location of increased gun violence and as the home of individuals who participate in criminal activity." (*R. v. E.S., paragraph 110; R. v. D.B., paragraph 98*)

[94] As with S.(E.) and B.(D.), D.(R.) became exposed to these negative influences. Like S.(E.) and B.(D.) he also experienced racism and was subject to

racist assumptions. Not only were there shootings in his neighbourhood - three on his street alone when he was in Grades 5 or 6 - (*Exhibit 18, page 26*), in April 2013 he became a victim of violence in North Preston, shot by his cousin "X" who was able to get his hands on a .300 calibre hunting rifle. After he was shot, D.(R.) became more vulnerable to influences he had previously avoided through his engagement with boxing. Boxing had formed the basis for D.(R.)'s identity as a young man and he had ambitions to box professionally. The attempt on his life oriented D.(R.) away from the pro-social focus he had been maintaining. (*Exhibit 18, page 28*)

[95] As I found in relation to S.(E.) and B.(D.), D.(R.)'s moral culpability and his rehabilitation and reintegration must be examined through the lens of his racialization and his experiences as a member of a community where criminal activity has been, to some extent, normalized for him. The normalization of criminal activity and association was heightened by D.(R.)'s experience as a victim of violence in his community. As the section 34 assessment observes:

> …D.(R.)'s increased association with procriminal peers and his involvement in antisocial behaviours…may have been precipitated by a desire to demonstrate toughness and connection with individuals who would be loyal to him in a dispute…(*Exhibit 18, page 31*)

[96] Race and culture are relevant considerations in sentencing, as I noted in *R. v. "X"*, [2014] N.S.J. No. 609:

> [195] The Ontario Court of Appeal has recognized, in the context of sentencing an adult offender, that the sentencing principles,
>
> … generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offense and the values of the community from which the offender comes. (*R. v. Q.B., [2003] O.J. No. 354, paragraph 32 (C.A.))*

[97] The *YCJA* expressly states that: "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences

should…respect gender, ethnic, cultural and linguistic differences…" (*section 3(1)(c)(iv),YCJA)* What I said in sentencing S.(E.) and B.(D.) is equally valid here. The emphasis on accountability is not diminished by considerations of D.(R.)'s experience as a racialized youth drawn into the orbit of criminally-inclined peers. It is informed by this reality. The Supreme Court of Canada in *R. v. B.W.P.* has recognized the individualized nature of youth sentencing:

> …the means of promoting the long-term protection of the public describe an individualized process by focusing on underlying causes, rehabilitation, reintegration and meaningful consequences *for the offender*. (*paragraph 31, emphasis in the original*)

[98] Later, in the same judgment, the Court stated: "A consideration of all relevant factors about the offence and the offender forms part of the sentencing process." (*R. v. B.W.P., paragraph 38*)

The Attempt on D.(R.)'s Life and the Evidence of Trauma

[99] D.(R.) was 15 when he was shot. He sustained life-threatening internal injuries and spent two weeks in hospital. (*R. v. "X", [2013] N.S.J. No. 1, paragraph 1*) As the section 34 assessment notes: "This incident precipitated a cascade of changes in [D.(R.)]'s life." (*Exhibit 18, page 30*) Although both Dr. Mejia and Dr. Kayfitz testified that, in their respective opinions, D.(R.) does not presently meet all the criteria for a diagnosis of Post-traumatic Stress Disorder (PTSD), that does not mean he would not have suffered PTSD following the shooting. Dr. Mejia acknowledged that a thorough assessment of D.(R.) for PTSD has not been done. Dr. Kayfitz made the following comments in the section 34 assessment:

> …Although [D.(R.)] largely disavowed many current symptoms consistent with PTSD, it is possible that his account during the present assessment is an under-report of his true symptomatology. Careful attention to diagnostic considerations in this regard is recommended. (*Exhibit 18, page 33*)

[100] Dr. Kayfitz diagnosed D.(R.) with Adjustment Disorder with Disturbance in Conduct, Query Post-traumatic stress disorder (PTSD). (*Exhibit 18, page 21*) In her testimony, she said that D.(R.) played down his emotional symptoms, either intentionally or perhaps because he did not recognize them in himself. On cross-

examination she testified that in her opinion D.(R.) "has many traumatic symptoms" although he does not meet the criteria for a PTSD diagnosis. I understood from her evidence that if D.(R.) forged a therapeutic alliance with a treatment provider and was not so motivated to downplay his symptoms, a different profile tending toward PTSD might emerge.

[101] Unsurprisingly then, the evidence before me indicates that the serious attempt on D.[R.]'s life has had a significant traumatizing effect on him. Dr. Kayfitz notes the following in the section 34 assessment:

> [Collateral sources] suggest that [D.(R.)] experienced persisting effects of trauma secondary to the attack on his life, and that this contributed to changes in his behaviour, and in his attitudes and view of the world. At interview, [D.(R.)] remarked that he became a "different person."…(*Exhibit 18, page 28*)

D.(R.)'s Behaviour and Progress in the Nova Scotia Youth Facility

[102] It is apparent that D.(R.) has been making a sincere effort in school and programming during his time at the NSYF. I accept what he told me at his sentencing hearing, that while in custody he has been trying to better himself. The assessment of what is required to hold him accountable must acknowledge that.

[103] The pre-sentence report update indicates that D.(R.) is "an active participant" in the programs offered at the NSYF. (*page 2*) He is described in the section 34 assessment as having "excellent attendance and participation" in the programming available at the institution. (*Exhibit 18, page 6*) As of the date of the update, D.(R.) was close to completing the Substance Abuse program and had completed the CALM (Controlling Anger and Learning to Manage It) program. He attends the school program daily and meets with the career counsellor. He lives on a unit that employs the Restorative Practices model which he responds to well and actively participates in. (*Exhibit 19, page 2*) D.(R.) gets high marks for being respectful and polite to both staff and youth at the NSYF. He is noted by NSYF staff as "standing out" in this regard. (*Exhibit 18, page 6*)

[104] D.(R.)'s conduct in the school program at the NSYF has been very good. His teacher described him in the section 34 assessment as "well behaved and engaged" and highlighted the fact that D.(R.) stood out as a student who was "genuinely committed" to his schoolwork. His learning difficulties continue to present challenges for him and his verbal skills are superior to his written work. His

teacher notes that D.(R.) "demonstrates minimal frustration despite his struggles, and has developed several adaptive strategies…" to compensate. (*Exhibit 18, page 13*)

[105] Testing of D.(R.) conducted for the section 34 assessment confirms the learning difficulties identified in the course of his schooling and at the NSYF. Verbal and non-verbal reasoning, reading, sentence comprehension and mathematics continue to be areas of difficulty. (*Exhibit 18, page 14*) His learning difficulties, what Dr. Kayfitz has diagnosed as borderline intellectual functioning, present challenges for D.(R.) in relation to abstract thinking and executive functioning, and are relevant to the issue of providing him with effective therapeutic interventions. (*Exhibit 18, page 16*)

[106] The section 34 assessment views a "structured and disciplined environment" with clear expectations and external controls, i.e. the NSYF, as having had a "positive impact" on D.(R.)'s behavioural functioning. (*Exhibit 18, page 15*) The assessment notes that according to reports from the NSYF, D.(R.)'s coping strategies for dealing with academic and social challenges have included him relying "a lot" on B.(D.), his co-accused. (*Exhibit 18, pages 12 and 16*)

[107] D.(R.) has been working with the career counsellor at the NSYF on his resume, and is eager for any training available. He will continue to be supported in developing job application skills and training certifications. (*Exhibit 19, page 2*)

[108] Although according to the pre-sentence report update, D.(R.) has not identified any specific therapeutic goals he does "check in" with the clinical social worker for the IWK Youth Forensic Services on a monthly basis. (*Exhibit 19, page 2*) Dr. Kayfitz testified that to this point D.(R.)'s engagement with the social worker has been "minimal" and he has "declined to discuss criminogenic factors." D.(R.) has not formed a therapeutic alliance with any treatment providers and will have understood that his interactions with Dr. Mejia and Dr. Kayfitz have been for the purpose of getting the assessments prepared for his sentencing. He told Dr. Kayfitz that participation in the assessment was stressful for him, that he wanted to be cooperative but did not want to discuss certain topics. (*Exhibit 18, page 18*) And while he acknowledged "the utility of counselling to address his criminogenic needs", he would "feel more comfortable with somebody who would understand him", saying that he would "rather talk to a Black person." (*Exhibit 18, page 19*) The section 34 assessment recognizes this "more guarded disposition" as a

"common, non-pathological presentation of African American individuals being seen in medical and mental health milieus." (*Exhibit 18, page 20*)

[109] The pre-sentence report update indicates that D.(R.) "seems to have an understanding of what areas he must continue to develop and improve upon to reintegrate back into the community." As with the section 34 assessment, criminally-inclined associates are identified as a risk factor for D.(R.) Re-establishing such relationships is viewed as placing him at risk of further conflict with the law. (*pre-sentence report update, page 3*)

Risk Assessment, Rehabilitation and Reintegration

[110] The section 34 assessment has assessed D.[R.] as having an overall risk for general criminal recidivism, if no interventions are undertaken, at the low end of the moderate range. His risk factors are identified as peer relations with "delinquent acquaintances and friends", occasional drug use and failure to seek help and intervention. (*Exhibit 18, page 23*) His overall risk for violent recidivism in the absence of interventions to manage his risk is assessed as falling within the moderate range. (*Exhibit 18, page 24*) The section 34 assessment enumerates social/contextual and individual/clinical factors that are amenable to change "over time if addressed through treatment or by altering the environment." (*Exhibit 18, page 24*) Protective factors indicate the consistently strong source of support D.(R.)'s parents, family and other pro-social adults have been.

[111] Another protective factor identified by the section 34 assessment is D.(R.)'s commitment to being a father to his young daughter and a partner to the child's mother. (*Exhibit 18, pages 31 – 32*) Both the section 34 assessment and D.(R.)'s mother who testified at his sentencing hearing point to the significance that being a father has for D.(R.). He is "saddened greatly that he is missing important milestones" in his daughter's life. His mother indicated that D.(R.) has shown an intuitive understanding of how to interact with his daughter. (*Exhibit 18, page 8*) She takes the little girl to visit D.(R.) at the NSYF although the facility is not equipped to permit quality visits for young children with their young parents. D.(R.) wants to try and raise his daughter in an intact family once he returns to the community. (*Exhibit 18, page 8*)

[112] The section 34 assessment concludes with a "sentence-specific" recommendation for a Deferred Custody and Supervision Order (DCSO) with possible conditions of curfew, a weapons prohibition, no substance use, compliance with treatment recommendations, and attendance at school. The

section 34 assessment recommends a DCSO so that D.(R.) can reintegrate into the community, build on the gains he has made in custody, and be subject to "immediate consequences" should he violate his conditions. (*Exhibit 18, page 32*)

[113] Section 42(5) of the *YCJA* precludes a Deferred Custody and Supervision Order ("DCSO") on a conviction for aggravated assault. Even without evaluating its suitability in any particular case, it is statutorily unavailable here.

[114] The section 34 assessment also makes a number of very concrete "risk-management" recommendations with an "overarching principle" of emphasizing structure and discipline. The assessment notes that D.(R.) "does very well in a structured environment with clear expectations and…the consistent application of rewards and consequences." (*Exhibit 18, page 33*) Trauma informed and culturally compatible treatment is recommended and Dr. Kayfitz testified that D.(R.) should be able to become "more masterful" at applying the skills that will "optimize his treatment outcomes."

[115] Dr. Kayfitz testified that rehabilitation can happen "very well in a youth facility" with transition planning. Skills learned in custody are then practiced on release. She explained that the anxiety experienced in response to a past traumatic event can provide the opportunity for applying coping strategies to control such symptoms. The triggering of a response caused by a past trauma does not preclude "a positive therapeutic outcome." It was her evidence that it is important to help a person learn coping skills in a controlled environment. Dr. Kayfitz testified that ultimately rehabilitation is optimized in the community provided that risk can be managed. She noted that D.(R.) intends not to repeat the bad choices he has made in the past but says it would benefit him to look at his risk factors and learn from his mistakes. This would need to occur in a therapeutic relationship which appears to be more likely to develop once these sentencing proceedings are concluded.

Determining the Appropriate Sentence for D.(R.)

[116] The Crown submits that accountability and parity are dispositive of the sentence for D.(R.) He should receive the same sentence as his co-accused, S.(E.) and B.(D.). There is nothing that distinguishes their roles in the [… Drive] robbery and their circumstances and individual characteristics are comparable.

[117] Like S.(E.) and B.(D.), D.(R.) has a high degree of responsibility for the events of November 30. But, like them, he was not the shooter and did not intend or try to injure anyone. Although he should have foreseen the probability of the

victims being assaulted, he did not foresee that there would be an attempt to murder them.

[118] There are many similarities between D.(R.) and his two co-accused, S.(E.) and B.(D.) that are relevant to the accountability assessment:

- D.(R.) too has a high degree of responsibility for the events of November 30, 2014;
- Like S.(E.) and B.(D.), he was not the shooter and did not intend or try to injure anyone;
- Although he should have foreseen the probability of the victims being assaulted, he did not foresee that there would be an attempt to murder them;
- His accountability is not starting with the sentence I am imposing. His time in detention is already a significant loss of liberty;
- D.(R.) is the same age as his co-accused and a year in detention is a long time in the life of a teenager;
- He is genuinely remorseful.

[119] Like S.(E.) and B.(D.), D.(R.) has made good use of his time at the NSYF. He has been committed to rehabilitative goals and achieved noteworthy results. He has worked hard to make progress and while it has not been easy he has stayed on course. The fact that his therapeutic engagement has been minimal is understandable in all the circumstances as I have discussed them but it does indicate there is work still to be done. According to the pre-sentence report update, at his last meeting with the clinical social worker, they had "some meaningful conversation which she viewed as a positive to build on for the next appointment." (*Exhibit 19, page 2*)

[120] The similarities between D.(R.) and S.(E.) and B.(D.) - their individual circumstances and the circumstances of their offences - brings the principle of parity into sharp focus. The application of parity should subject them to the same sentence: but determining D.(R.)'s sentence requires me to consider whether, as Ms. Hoyte says it should, the trauma that D.(R.) has suffered as a victim himself of a violent offence trumps the parity that would otherwise be applicable.

[121] Parity was a consideration in sentencing S.(E.) and B.(D.) where the Crown presented cases in support of their submissions that the young persons involved in the [… Drive] robbery should receive 2 to 3 years of custody on top of the time

they have already spent at the NSYF. I discussed some of those cases in my reasons in *R. v. E.S.* at paragraphs 121 – 127 and in *R. v. D.B.* at paragraphs 104 – 106. It was my conclusion that the Crown's cases were most useful in supporting its position that accountability for young persons in home invasion-type robbery cases requires a significant loss of liberty. I found they were otherwise distinguishable.

[122] The Crown submits there are now two cases that can't be distinguished - my decisions in *R. v. E.S.* and *R. v. D.B.* In Ms. Hoyte's submission D.(R.)'s trauma is a significant distinguishing factor that undermines the application of parity in sentencing him. I understand Ms. Hoyte to be saying that D.(R.) needs to be released into the community so he can work on his rehabilitation without the ongoing trauma of being in custody with the young man who almost succeeded in killing him, and his associates.

[123] I have considered the evidence carefully in relation to the submission being made by Ms. Hoyte. I find it does not enable me to make an unequivocal finding that D.(R.)'s rehabilitation is being frustrated by the presence at the NSYF of his perpetrator. The section 34 assessment indicates that D.(R.) and "X" have not had direct contact since D.(R.) arrived at the institution (*Exhibit 18, page 18*) and states that staff "have implemented strict security measures to ensure the two young men do not cross paths." (*Exhibit 18, page 17*) Dr. Kayfitz testified that D.(R.) had said he felt the NSYF was doing a good job preventing any interaction.

[124] It is unclear to me if D.(R.)'s trauma from being shot is triggered at the NSYF. Nightmares and sleeplessness suggested to Dr. Kayfitz that "previously-resolved post-traumatic symptoms are being triggered." (*Exhibit 18, page 17*) R.(D.)'s past trauma is contributing, along with other unrelated anxieties, to Dr. Kayfitz assessing him as having "a significantly above average amount of stress compared to other adolescents his age, coupled with a relatively impoverished repertoire of coping strategies." (*Exhibit 18, page 20*) His mother testified that being housed in the same institution as "X" is causing D.(R.) stress. She also said he is "more secluded."

[125] D.(R.) is described as continuing to be "hypervigilant" about his surroundings although he indicated to Dr. Kayfitz that this was "less intense at present." As I noted earlier in these reasons, D.(R.) does not meet the criteria for a diagnosis of PTSD. He has had to contend with verbal harassment from allies of

"X" which has caused D.(R.) to be "attentive to cues suggestive of hostile intent on the part of others." (*Exhibit 18, page 17*)

[126] And although in Dr. Mejia's opinion D.(R.) has not been affected "that much" by close proximity to "X" and his allies, there are the references in the section 34 assessment that D.(R.) may be downplaying symptoms associated with trauma or not fully able to recognize them. Dr. Mejia agreed in direct examination that young people will posture so as not to appear weak.

[127] D.(R.)'s performance in programming at the NSYF indicates he has been coping. Dr. Kayfitz testified that staff report he has been able to concentrate and focus. Dr. Mejia also assessed D.(R.) as having the capacity to deal with the trauma of "X" being at the NSYF. Indeed, D.(R.) deserves to be commended for how he has conducted himself over the past year.

[128] I accept that D.(R.)'s trauma, as compared to the traumas experienced by S.(E.) and B.(D.), is unique, but I am not satisfied that the sentence to be imposed on D.(R.) should be different from the sentences imposed on S.(E.) and B.(D.) Section 38(2)(b) mandates that a 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. This is the principle of parity and I find it has not been displaced in D.(R.)'s case.

[129] D.(R.) should receive the same sentence as S.(E.) and B.(D.) on the basis of the same reasoning I employed in their cases. These young persons are all similarly situated, both before and after the [… Drive] robbery. D.(R.) arrived at the NSYF having drifted into associating with an anti-social peer group which included his co-accused. His community was struggling with the effects of racialization and criminality. Like S.(E.) and B.(D.), maladaptive and criminal choices were becoming normalized for him. He too was struggling as a racialized teen in the conflicted dimensions of his existence – his pro-social family and his troubled community with its criminalizing influences. I acknowledge that D.(R.) has been carrying the additional burden of trauma from the attempt on his life. Being the victim of a violent crime himself directly contributed to his involvement in victimizing others. Understanding this context matters in the sentencing exercise but it does not lead me to conclude that D.(R.) should serve no further time in custody. Accountability for D.(R.) should be assessed as it was for S.(E.) and B.(D.).

[130] As I said in sentencing S.(E.) and B.(D.), it is to be remembered that sentencing is not about matching the sentence to the victim's loss. Nothing can restore Ms. Kearse to who she was in the moments before she was shot and paralyzed. Holding D.(R.) to account for his role in what happened inside [… Drive] on November 30, 2014 must reflect his level of responsibility for a home-invasion style robbery gone terribly wrong but it must do so with restraint. His sentence needs to balance accountability with his rehabilitation and reintegration by not delaying too long his return to his family and pro-social community supports. The recommendation in the section 34 assessment for a DCSO speaks to the importance of D.(R.)'s reintegration and the utility of his rehabilitation continuing in the community.

[131] My conclusion about D.(R.)'s sentence means he will be continuing his rehabilitation at the NSYF. This will, in due course, include reintegration programming. I described such programming in my decision in *R. v. "X"* at paragraphs 213 – 215. Although I received no evidence on what effect the presence of "X" at the NSYF may have on the programming and activities the institution is able to make available to D.(R.) for his rehabilitation and reintegration, Ms. Hoyte in her submissions said that D.(R.) will not be able to attend the 24-7 education program, cannot attend church and is restricted from working in the kitchen and doing maintenance. According to Ms. Hoyte, D.(R.) will not have equal opportunities for reintegration. This submission suggests that D.(R.) will be in a disadvantaged position relative to his co-accused.

[132] I am concerned by Ms. Hoyte's submissions. In addition, there is the possibility as suggested by Dr. Kayfitz's evidence that D.(R.), who has been diagnosed as having compromised coping skills, may be experiencing PTSD. These unique circumstances may justify a section 94 review of D.(R.)'s sentence if it is the case that his access to rehabilitation and reintegration opportunities will be restricted. Section 94(4) of the *YCJA* provides that "The young person may be brought before the youth justice court at any time, with the leave of the youth justice court judge." Under section 94(5), if the youth justice court is satisfied "that there are grounds for review under subsection (6), the court shall review the youth sentence." The Provincial Director is required by section 94(9) of the *YCJA* to have a "progress report" prepared for submission to the court for the review. Otherwise, the grounds under section 94(6) would have to be made out on the basis of evidence, not merely counsel's submissions. The outcome of a section 94 sentence

review is determined by the court pursuant to section 94(19) "having regard to the needs of the young person and the interests of society."

[133] A section 19 conference could also be convened in relation to a section 94 sentence review as the mandate of a conference includes "the review of sentences".

[134] It will be for D.(R.)'s counsel to determine whether there is a basis that would justify invoking sections 94 and 19 of the *YCJA* at some point.

[135] I am sentencing D.(R.) to a Custody and Supervision Order of 260 days. He will serve two-thirds of the CSO – 173 days - in the NSYF, with a release date of May 28, 2016. He will then serve the remaining one-third of the CSO – 87 days - in the community under conditions set by the Provincial Director which if breached can result in his immediate return to custody. This will be followed by 12 months of probation with conditions I will detail shortly. As with S.(E.) and B.(D.), D.(R.)'s sentence will support his reconnection with pro-social values and institutions and will test him in the community, before too much time has passed and too much institutionalization has set in.

[136] I recognize that additional time in custody will be hard on D.(R.) especially as it will involve a continued separation from his young daughter. This painful separation is an experience that S.(E.) and B.(D.) do not share with D.(R.). I can see that D.(R.) has been trying very hard on a consistent and sincere basis to benefit from what the NSYF can offer him. It is essential that he continue to do so: his daughter will also ultimately benefit if D.(R.) is successful in his efforts at rehabilitation. I hope he will now take advantage of building some therapeutic alliances and working on issues he has not felt comfortable addressing.

[137] I want to make a final comment: information in the materials before me about D.(R.) being shot was not provided by D.(R.) It was supplied by collateral sources interviewed for the various reports and assessments and, as I have indicated, from my own familiarity with the facts as the trial and sentencing judge in *R. v. "X"*.

[138] The probationary terms that D.(R.) will be subject to will include:

- A keep the peace and be of good behaviour clause;
- A requirement to appear before the Youth Justice Court when required to do so;

- Reporting to a youth worker within two days of the start of the probation order and thereafter as required;
- A positive residence requirement with the ability of D.(R.)'s youth worker to approve a change of residence;
- A requirement that D.(R.) make his best efforts to enroll in an education or training program or make reasonable efforts to locate and maintain suitable employment;
- A daily curfew between 9 p.m. and 6 a.m. except when in the company of his mother or father or an adult approved by his youth worker or with the prior approval of his youth worker;
- The curfew to be reviewed after six months;
- No direct or indirect contact with the victims at any time for any reason and remain away from the [… Drive] residence;
- A non-association clause naming D.(R.)'s co-accused and M.J.D., except as incidental to school, work or counselling, or, in relation to B.(D.), with the permission of his youth worker; (I have indicated this in light of Ms. Hoyte's indication that D.(R.) and B.(D.) are related.)
- Attendance for counselling, treatment or programming as directed by his youth worker;
- A clause requiring D.(R.) to participate in and cooperate with the counselling, treatment or programming as directed by his youth worker;
- A weapons prohibition clause;
- Not to take, use or possess drugs;
- 100 hours of community service work, a feature of the sentence that falls under the accountability column even if it also serves the objectives of rehabilitation and reintegration. I do want to note that I would not like to see D.(R.)'s role as a young father be compromised by the community service work requirement. If these dual obligations cannot be satisfactorily reconciled that may also be an issue for a section 94 review.
- A compliance condition for the curfew.

[139] I will hear submissions from counsel if there are any changes or additional conditions that I should consider and will adjust or add to the wording of the probationary conditions accordingly.

[140] There will also be a DNA order and a section 109(2) *Criminal Code*/section 51 *YCJA* weapons prohibition order for 10 years.