

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. J.J.P, 2009 NSPC 28

Date: July 2, 2009

Docket: 1982610

Registry: Shubenacadie

Her Majesty the Queen

v.

J.J.P.

DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: June 18, 2009 in Shubenacadie Provincial Court

Decision: July 2, 2009

Charges: *Criminal Code* section 344(b)

Counsel: Alison Brown - Crown
Deborah Bowes - Defence

By the Court:

[1] J.J.P, a young person, has pleaded guilty to robbing L.S. on November 13, 2008. He, with two other males, one a youth, the other an adult, attacked and robbed L.S. of percocet medication. L.S. received some cuts, scrapes and bruises from being punched and kicked during the attack.

[2] The facts indicate that L.S. was identified by another young person, H.N., as someone who could supply prescription medication. H.N. made the contact and L.S. was lured out to a meeting that he thought would be with H.N.. Instead, he was ambushed by H.N.'s associates, including J.J.P., who were acting on her direction to take by force the drugs L.S. had on him.

[3] J.J.P. was given up to the police by his adult accomplice and on November 14, 2008 gave a full, inculpatory statement. On March 5, 2009, J.J.P. pleaded guilty. His sentencing hearing was conducted on June 18, 2009 with the benefit of an updated Pre-Sentence Report.

[4] Without reviewing all the submissions of Crown and Defence, I can indicate

that the Crown took the carefully considered position that the appropriate sentence in this case is a lengthy period of probation in the range of 18 - 24 months. Although J.J.P. is eligible for custody pursuant to section 39(1)(a) of the *YCJA* as the robbery of L.S. constitutes a violent offence [*R. v. C.D.K.*, [2005] *S.C.J. No. 79*], the Crown submitted that even a Deferred Custody and Supervision Order was not being sought in view of significant positive factors in J.J.P.'s circumstances. He has no prior record and enjoys family and community support. He is a motivated young man with very positive references from his employment and school. He is succeeding in high school and has serious career aspirations to join the R.C.M.P. or possibly enlist in the Armed Forces. The Crown observed that J.J.P. was under the influence of alcohol on the night of the offence, cooperated with the police and has shown some empathy toward the victim. He has accepted responsibility for his conduct and identified the role alcohol played in his involvement in the robbery. The Defence indicated that J.J.P. has in fact apologized to L.S. and they have made peace between them.

[5] I am satisfied the Crown's position in this case, that a custodial sentence for J.J.P. would not best satisfy the requirements of the *YCJA*, is correct. A consideration, under section 38(2)(d), of all available sanctions other than custody that are reasonable in the circumstances leads to the conclusion that a community-based

sentence with conditions is most appropriate for J.J.P., especially given his circumstances as an aboriginal youth, a factor Parliament has identified as requiring “particular attention”.

[6] The Crown did note that J.J.P. turned 18 less than two weeks after the robbery. Although irrelevant to the principle of parity in sentencing a young person, as the Crown pointed out, it should be instructive to J.J.P. that the adult accomplice (whom I note had a serious prior record) received a Federal penitentiary term for his part in robbing L.S.

[7] H.N., aptly described by the Crown as the ringleader in the robbery of L.S. although not the muscle, is a young person and received a *YCJA* sentence of 18 months probation.

[8] After hearing Crown and Defence submissions on this sentencing I reserved my decision to consider the Defence request that J.J.P. receive a conditional discharge. The Crown opposed the application for a discharge, emphasizing the seriousness of the offence due to the violence perpetrated against L.S. The Crown has submitted that a conditional discharge is simply not appropriate given the gravity of this offence, the

degree of J.J.P.'s responsibility and the requirement for parity with H.N.'s sentence.

[9] The Defence application for a conditional discharge is rooted in the principle under the *YCJA* that requires the sentence be the least restrictive that is capable of achieving the purpose of youth sentencing as set out in section 38(1) of the *YCJA* and the most likely to rehabilitate J.J.P. and reintegrate him into society. (*ss. 38(2)(e)(i)(ii)*) The Defence argues that J.J.P.'s career aspirations may be adversely affected by a *YCJA* record and relates this to the objectives under the *Act* of rehabilitation and reintegration as the basis for seeking a conditional discharge.

[10] The best interests of the young person and the public interest are not prerequisites for a conditional discharge pursuant to section 42(2)(c) of the *YCJA*. (*R. v. P.J.S., [2008] N.S.J. 538 (N.S.C.A.)*) This means that judicial discretion to order a conditional discharge for a young person must be exercised in the context of the general principles found in section 3 of the *Act* and is governed by the sentencing principles in section 38.

[11] The *YCJA* requires me to consider, in the context of section 3, the purpose of sentencing under section 38 and the principles of proportionality and parity. Under

section 38, the purpose of sentencing is to hold a young person accountable for the offence through the imposition of just sanctions that have meaningful consequences and promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. The sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence and it must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances.

[12] The Nova Scotia Court of Appeal in *P.J.S.* has held that the main difference between a probation order and a conditional discharge is the length of time that a youth's record is accessible under section 119 of the *Act*. The three year period during which the record can be accessed runs, where a conditional discharge is ordered, from the date of the finding of guilt, and in the case of probation, from the time the sentence is completed. Access to a record for a young person sentenced to probation is extended if there are further convictions during the period of access. If an adult offence is committed during the period of access, the youth record, "in effect, converts" to an adult record where the original sentence was not a discharge. (*P.J.S.*, *supra* at paragraph 15)

[13] Therefore, although the conditions in a probation order and the conditions attached to a conditional discharge may make the sentences look, for practical purposes, to be the same, there are differences in the consequences that flow from the sentence imposed, in terms of access to the record and what happens if, during the period of access, an adult offence were to be committed. J.J.P. is now eighteen years old so he would be charged as an adult in the event he committed any further criminal offences. This means if he is sentenced to probation and subsequently commits another criminal offence, his youth record for robbery would be included with his adult record.

[14] Determining the appropriate sentence for J.J.P. requires me to calibrate the factors I have identified: meaningful consequences, fair and proportionate accountability, parity, rehabilitation, reintegration and least restrictiveness. The question for me to decide is what sentence best achieves the appropriate balancing of these factors in J.J.P.'s case?

[15] Proportionate accountability and parity do not favour the granting of a conditional discharge to J.J.P. J.J.P. was centrally involved in the violent attack on L.S., notwithstanding that the ambush was not his idea. Nevertheless, without the

“muscle” provided by J.J.P. and his accomplices, H.N.’s plan could not have been executed. And while parity is not an overriding factor in the sentencing of a young person, it is a principle the judge must consider. (*R. v. J.R.L.*, [2007] N.S.J. No. 214 (N.S.C.A.))

[16] Defence counsel for J.J.P. has submitted that a conditional discharge is the appropriate sentence for J.J.P. because it is in his best interests not to have a youth record for robbery. I believe this is what the Defence is getting at in her submission that J.J.P.’s career aspirations may be prejudiced if he does not receive a conditional discharge. This submission would be relevant to an analysis of the conditional discharge sentencing option for an adult offender. It is not relevant in the context of youth criminal justice.

[17] A discharge under the *Criminal Code* is an alternative to the registration of a conviction following a guilty plea or a finding of guilt in relation to an adult offender. There is no such provision in the *YCJA*. The *Criminal Code* provides in section 730(3) that an adult offender who receives a conditional discharge is “deemed not to have been convicted” of the offence. The *YCJA* contains no comparable provision.

[18] Under section 82 of the *YCJA*, all youth sentences operate the same: the young person is “deemed not to have been found guilty or convicted” upon the expiry of the sentence order. In the instance of an absolute discharge, the “deemed not to have been found guilty or convicted” effect is immediate: absolute discharges are “unique...in that they have no duration and, in a sense, terminate as soon as they are made.” (*R. v. R.P.*, [2004] *O.J. No. 3845 at paragraph 9 (Ont. C.J.)*)

[19] A conditional discharge does not result in a young person being “deemed not to have been convicted”. No matter what sentence a young person receives under the *YCJA*, the finding of guilt under section 36 is registered against them for the duration of the sentence order.

[20] J.J.P. also cannot make out his case for a conditional discharge, as he has done, on the basis that probation, but not a conditional discharge, will undermine his plans to apply to the R.C.M.P. or the Canadian Armed Forces. Section 82(3) of the *YCJA* addresses the prejudicial potential of youth criminal justice involvement in the context of employment with federal government bodies. By prohibiting, where the youth sentence has been completed, the posing of “any question [in the relevant application forms] that by its terms requires the applicant to disclose that he or she has been

charged with or found guilty of an offence” under the *YCJA*, section 82(3) provides protection to individuals applying to the R.C.M.P. or Canadian Armed Forces who have completed their youth sentence. Once he has completed his youth sentence, this protection will be available to J.J.P., if he applies to the R.C.M.P. or the Canadian Armed Forces. The *YCJA* prohibition kicks in at the same time whether J.J.P. receives a conditional discharge or probation, that is, at the time he completes his sentence.

[21] In sum, whether J.J.P. is sentenced to a conditional discharge or probation, he will be deemed convicted, his youth record will exist throughout the duration of his sentence, and he will only be protected from questions about his robbery conviction on employment application forms for the R.C.M.P. and Canadian Armed Forces once he has completed either sentence.

[22] All of this takes me back to what constitutes the least restrictive sentence for J.J.P. that achieves the youth criminal justice sentencing objectives of fair and proportionate accountability and meaningful consequences. Plainly, there is nothing to distinguish a conditional discharge from a probation order in terms of rehabilitation and reintegration as these objectives are achieved through the conditions themselves.

[23] The robbery of L.S. was a violent crime perpetrated by a group. It was planned in advance and not spontaneous or impulsive. There is nothing to indicate that J.J.P. was less responsible for the attack on L.S. than his friends. He was almost 18 at the time. H.N. received 18 months probation for her involvement as the architect of the plan. Factoring together the seriousness of the offence, the degree of J.J.P.'s responsibility and the principle of parity, I have concluded that an 18 month probation order is the appropriate sentence to achieve the objectives of holding J.J.P. accountable and subjecting him to meaningful consequences. The promotion of J.J.P.'s rehabilitation and reintegration is served equally well by conditions in either a probation order or a conditional discharge, as I have explained.

[24] I am satisfied that a conditional discharge does not fulfill the requirements of the *YCJA* on the facts of this case. There is no provision in the *YCJA* for a revocation of a conditional discharge. It is a meaningful consequence for J.J.P. that if he commits a criminal offence in the future, this robbery conviction will “be dealt with as a record of an adult” and may be included in the CPIC records system maintained by the RCMP. (*YCJA*, s. 120(6)(a)) In such an event, the finding of guilt under the *YCJA* would be deemed a conviction for the purposes of the *Criminal Records Act*. (*YCJA*, s.120(6)(b)) Even if practically speaking a conditional discharge looks very like a

probation order, it could be seen as a less significant sentence which cannot be justified in this case where parity is an important principle.

[25] J.J.P.'s sentence must promote his rehabilitation and reintegration. Issues identified in the Pre-Sentence Report and the update to that Report such as substance abuse will be addressed in the conditions of the probation order. Taking into account what can be provided to J.J.P. under the conditions of the probation order, J.J.P.'s own skills and motivation, and the support of his family and community, there is good reason to be optimistic about J.J.P.'s future and his ability to put substance abuse and poor judgment, and their role in the violence that has brought him before this court, firmly behind him.

Judge Anne S. Derrick