IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Cite as: R. v. J.T.C., 2013 NSPC 48

Date: June 21, 2013

Docket: 2370912 - 2370915

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

C.(J.T.), a young person

DECISION ON CROWN APPLICATION FOR FINDINGS PURSUANT TO SECTION 36 OF THE *YOUTH CRIMINAL JUSTICE ACT*

JUDGE: The Honourable Anne S. Derrick

HEARD: June 18, 2013

DECISION: June 21, 2013

CHARGES: sections 273(2)(b), 151, 137 x 2, of the *Criminal Code*

COUNSEL: Danielle Bastarche, for the Crown

Megan Longley, for C.(J.T.)

By the Court:

Introduction

[1] This is an application by the Crown for section 36 findings of guilt following guilty pleas by the young person, C.(J.T.). The fundamental issue to be decided can be distilled as follows: does a young person's rejection of the facts recited by the Crown to support findings of guilt under section 36 of the *Youth Criminal Justice Act* mean that findings of guilt cannot be made?

Section 606 of the Criminal Code and section 36 of the YCJA

[2] Answering this question has required me to carefully consider two statutory provisions, section 606 of the *Criminal Code* and section 36 of the *Youth Criminal Justice Act*. Section 606 is the plea inquiry that follows the entering of guilty pleas by both adult accused and young persons. It ensures that the guilty pleas are being entered voluntarily, with an understanding of the nature and consequences of the plea, an admission of the essential elements of the offence, and an appreciation that the sentence is ultimately determined by the judge, even where there may be a joint recommendation. Section 36 only comes into play in the Youth Justice Court and its provisions must be applied before findings of guilt can be made in relation to a young person.

[3] Section 36 provides an additional procedural safeguard for young persons, beyond the protections inherent in section 606. It states:

> **36.** (1) If a young person pleads guilty to an offence charged against the young person and the youth justice court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.
>
> (2) If a young person charged with an offence pleads not guilty to the offence or pleads guilty but the youth justice court is not satisfied that the facts support the charge, the court shall proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be.

Background Facts

[4] On November 16, 2012, C.(J.T.) entered guilty pleas to charges under section 151(b) and section 137 of the *Criminal Code*. He had previously pleaded not guilty and had trial dates set for late January 2013.

[5] Prior to C.(J.T.) changing his pleas, the Crown indicated it was re-electing to proceed summarily and would not be offering any evidence on the remaining two counts. I was informed there had been negotiations leading to a resolution of the case and the guilty pleas.

[6] Upon C.(J.T.) entering his guilty pleas, his counsel, Shawna Hoyt, Q.C., advised me as follows:

> He does so voluntarily, knowing that he is giving up his right to a trial and that any agreement made between myself and the Crown is certainly not binding on this Court…(*Partial Transcript of Proceedings, November 16, 2012, page 3*)

[7] No facts were presented on November 16. The Crown advised the court to expect an agreed statement of facts:

> …We are also going to be proceeding by an agreed statement of facts. I haven't quite worked that out yet. We have started to discuss it but we are not quite there. There may be some points that will be contentious but we're hoping that the essential elements of the offence will be categorized properly, but we would like to have some time to work on that, which is why we are proposing the first day of the trial……(*Partial Transcript of Proceedings, November 16, 2012, page 4*)

[8] Crown and Defence also indicated that they were intending to advance a joint recommendation on sentence, scheduled for January 28, 2013. (*Partial Transcript of Proceedings, November 16, 2012, page 4*)

[9] C.(J.T.)'s sentencing did not proceed on January 28 and was adjourned to March 15. On March 15, Ms. Hoyt appeared with C.(J.T.) and advised that he wished to withdraw his guilty pleas. The Crown was opposed. Ms. Hoyt asked to withdraw as she had represented C.(J.T.) when the pleas were entered. C.(J.T.) was directed to apply to Nova Scotia Legal Aid for new representation.

[10] C.(J.T.) is now represented by Ms. Longley. Through various appearances since Ms. Longley assumed carriage of his case, the approach being taken by C.(J.T.) has come into focus. An application to withdraw the guilty pleas has not been made. I was told C(J.T.) would not be accepting the facts which the Crown intended to recite for the section 36 finding. Ms. Longley advised that C.(J.T.) wished to have trial dates set.

[11] In her brief, Ms. Longley offered some generalized statements about what led to C.(J.T.) pleading guilty on November 16. These submissions would be relevant to an application to withdraw a guilty plea, but not the application I have before me. I have decided it is not appropriate for me to consider what may have influenced C.(J.T.)'s decision-making when he entered his guilty pleas. In any event, I do not find that anything turns on C.(J.T.)'s reasons for pleading guilty, whatever they may have been.

[12] This case has been unfolding over a long period of time. Ms. Bastarache emphasized this point in her submissions. The allegation date for the charges is July 7, 2011. A variety of reasons explain why this case is now nearly two years old. The protracted nature of the proceedings has undoubtedly been very difficult for everyone involved – the complainant, C.(J.T.), and any witnesses. The criminal justice process can be, and in this case has been, complex and unwieldy. This is unfortunate but on this application, it cannot be influential. The charges against C.(J.T.) are very serious and the process for dealing with them must be scrupulously fair, notwithstanding so much water under the bridge.

The Section 36 Application

[13] It was agreed that the hearing of this application would begin with the Crown's recital of the facts it was relying on for the purpose of having the court make section 36 findings of guilt.

[14] As anticipated, the version of the facts presented by Ms. Bastarache was not accepted by C.(J.T.) Ms. Longley indicated that C.(J.T.) did not accept the facts, not as they related to essential elements of the offences nor in relation to more peripheral details of the events.

Position of the Crown and Defence

[15] The Crown takes the position that C.(J.T.)'s rejection of the facts she recited is not relevant to the issue of whether section 36 findings of guilt can now be made. In Ms. Bastarache's submission, at the time of his guilty pleas, C.(J.T.) admitted the essential elements of the offences and that now, at the section 36 stage of the proceedings, it is the court, not the young person, who must be satisfied that the facts support the charges to which guilty pleas have been entered. It is Ms. Bastarache's view that the procedural protection offered by section 36 only ensures the young person has pleaded guilty to the offence disclosed by the facts and not some other, more serious offence that is not made out by the Crown's case. The court is to make this assessment without regard to whether the young person agrees with what the Crown presents as the facts or not. According to Ms. Bastarache, if the facts recited by the Crown are assessed by the court as supporting the charges, that is the end of the matter and findings of guilt are to be entered. That being done, the proceedings move on to the sentencing stage.

[16] Ms. Longley has a different view of section 36. She says the young person's acceptance of the Crown's facts is fundamental to the court's ability to make section 36 findings. She argues that section 36 findings cannot be made if the young person rejects the facts presented. In her submission, section 36 must be applied in accordance with the *Youth Criminal Justice Act*'s express emphasis on "enhanced procedural protection" for young persons to ensure they are "treated fairly" and have their rights protected. (*section 3(1)(iii), YCJA*)

[17] In support of her position that C.(J.T.)'s rejection of the Crown facts makes a trial inevitable, Ms. Longley has referred to Judge Jamie Campbell's decision in *R. v. K.W., [2011] N.S.J. No. 456* where he had the following to say:

> Withdrawal before a section 36 finding: When a young person pleads guilty to an offence, but backs away from the previously agreed upon facts the process appears to come to an abrupt and screeching halt. Without agreement on the facts, the section 36 finding cannot be completed. Where an adult might be held to the plea, the young person simply cannot be sentenced because the section 36 finding cannot be made. The process provides a protection against misunderstandings or misjudgments by

> young people as to what should be agreed. That is the case even when the young person is represented by counsel. *(paragraph 26)*

[18] *K.W.* dealt with circumstances that were different from the ones in this case. The issue in *K.W.* did not call for an examination of why a section 36 finding of guilt cannot be made where a young person disputes the facts presented by the Crown.

What Transpired in This Case

[19] I first must look at the section 606 inquiry that occurred in C.(J.T.)'s case. Most, although not all of the provisions of section 606(1) were explicitly addressed by Ms. Hoyt when C.(J.T.) pleaded guilty. On November 16 I was advised that C.(J.T.) was entering his pleas voluntarily, that he understood he was giving up his right to a trial, and that a joint recommendation on sentence was not binding on the court.

[20] Ms. Hoyt's representations made it apparent that C.(J.T.) understood the nature of his pleas and the consequences of them - that he was forfeiting his right to have a trial on the charges, a right that is guaranteed under the *Charter*. It was not expressly stated that C.(J.T.) understood his pleas were an admission of the essential elements of the offences. The Crown argues that this was implicit in C.(J.T.) pleading guilty and abandoning his right to have the Crown put to the strict proof of the essential elements of the offences.

[21] In any event, whether C.(J.T.) made a section 606 admission of the essential elements of the offences or not, there was no finding of guilt on November 16 as that can only occur pursuant to section 36 of the *YCJA*. In the case of a young person, the acceptance of a plea of guilty by the court following a section 606 inquiry does not lead to a finding of guilt. It leads only to the acceptance of the guilty plea. A finding of guilt is a prerequisite to the case against the young person moving forward to sentencing. (*R. v. H.J.P.N., [2010] N.B.J. No. 158 (C.A.), paragraph 14)*

[22] I have concluded that whether or not the section 606 stage involved an admission by C.(J.T.) of the essential elements of the offences, this is not dispositive. It is apparent that everyone involved – the Crown and Defence, and the court – acted on the assumption that the provisions of section 606 had been satisfied. Strictly speaking, they may not have been. However, even if Ms. Hoyt had expressly indicated on November 16 that C.(J.T.) was admitting the essential elements of the offence, I find that we would still be where we are now: confronting the issue of whether a section 36 finding can be made where the young person disputes the Crown's facts. Compliance with section 606 does not lessen the significance of section 36. Section 36 stands as a final sentinel, safeguarding the young person's rights, and the integrity of the youth criminal justice system, prior to a finding of guilt, whether there has been full, partial, or no compliance with section 606 at the time pleas were entered. The section 36 protections are just as robust whether there have been plea negotiations, as there apparently were here, or not.

[23] Turning to the issue of plea negotiations, I am not persuaded by the Crown's submission that C.(J.T.) should be found to have agreed to the facts of the case in the context of plea negotiations conducted on his behalf by Ms. Hoyt. There are several points to be made in addressing this submission:

> (1) I do not know what facts were discussed in the plea negotiations, agreed to, or not agreed to. It is to be remembered that plea negotiations are subject to a "class privilege", a privilege that cannot be waived by one party alone. (see, *R. v. Cater, [2011] N.S.J. No. 561 (P.C.), paragraphs 15 – 21*)
>
> (2) I find on the record that there was no finalized agreement on the facts on November 16 in any event. Although Ms. Bastarache has said in her brief that the Crown was prepared to proceed to the section 36 finding on November 16, the transcript from November 16 indicates that discussions in relation to the facts were still ongoing at that time. Perhaps Ms. Bastarache would have been able to recite the version of the facts she presented on this application, but that option was not chosen, obviously, it seems to me, because no agreement had been reached yet. Ms. Bastarache stated on

> November 16 that the parties were working to achieve an agreed statement of facts and she explicitly acknowledged there was the potential for contentiousness.
>
> (3) Irrespective of anything else, section 36 always has to be complied with and no findings of guilt can be made in the absence of a section 36 adjudication even in a case where a young person may have agreed to certain facts during plea negotiations.

[24] Section 36 requires the court to assess whether "the facts support the charge" to which the young person has pleaded guilty. This is an "adjudication" requiring the court

> …once so satisfied…to make a finding that the young person is guilty of the offence. If the court remains in a state of indecision on that critical issue, a trial is required. (*R. v. H.J.P.N., paragraph 8*)

[25] The court's task pursuant to section 36 has two critical components: (1) assessing what can be treated as facts; and (2) assessing whether those facts support the charge. What the Crown recites to the court to obtain a section 36 finding of guilt are not, without more, facts for the purposes of section 36. They are allegations. They could be described as the Crown's version of the facts. They could be called the Crown's evidence on the essential elements of the offences. But they are not facts for section 36 purposes unless they are proven or admitted.

[26] The distinction between facts and evidence was discussed by the Supreme Court of Canada in *R. v. MacKenzie, [1993] S.C.J. No. 7*. As noted there,

> …a fact which is not established beyond a reasonable doubt can play no part in the jury's decision to convict, either as a fact on which they rely to find an essential element of the offence, or as a fact used to infer such facts. (*paragraph 4, per Lamer, C.J.*)

[27] It is immaterial that the *MacKenzie* decision dealt with the judge's charge in a jury case. The principles apply universally: a finding of guilt cannot be made where there has been no proof of the Crown's case. As stated in *MacKenzie*:

> …to tell juries to reject factual propositions which the Crown's evidence does not establish beyond a reasonable doubt is to state the law correctly. (*paragraph 5, per Lamer, C.J.*)

[28] The relevance of these principles to a section 36 adjudication is this: the Crown's recital of "facts" is a recital of evidence the Crown has in relation to the charges against the young person. The court has to be satisfied that those "facts" support the charge to which the guilty plea has been entered. If the facts are accepted by the young person, the requirement for the Crown to prove them is removed. The court can then determine whether it is satisfied that the facts support the actual charge in question. If satisfied, a finding of guilt can be made. However if the facts are disputed by the young person, then the Crown will have to prove them, beyond a reasonable doubt, in a trial. No finding of guilt can be made in the absence of either proof or admission. Anything less would neither be fair nor in accordance with the law.

[29] The New Brunswick Court of Appeal in *H.J.P.N.* cited with approval a lengthy excerpt from Professors Nicholas Bala and Sanjeev Anand's text, *Youth Criminal Justice Law, 2nd ed.* (Toronto: Irwin Law Inc., 2009) which includes the following about the section 36 adjudication process:

> If a youth enters a guilty plea, the Crown prosecutor will read a summary of the evidence against the youth. The defence counsel or the youth, if unrepresented, will be asked if he or she agrees with the facts as alleged by the Crown. If there is a substantial disagreement about a significant fact material to the offence, there may have to be a trial; typically, though, minor disagreements are resolved by the Crown amending its statement of the facts. Section 36 of the *YCJA* requires a judge in youth justice court to be satisfied that the facts read by the Crown at the time of a guilty plea support the charge. If the facts do not reveal that all material elements of the offence have been committed, the judge must enter a plea of not guilty and order that the case proceed to trial.

[30] It is apparent the New Brunswick Court of Appeal understood that a section 36 adjudication involves "facts as alleged by the Crown" and the requirement to ask the young person or the young person's counsel if the facts are in dispute. Substantial disagreement leads to a trial. Even where there are only minor disagreements the young person's rights prevail and resolution is achieved by the

Crown "amending its statement of fact." The court cannot simply ride roughshod over the young person's opposition to the facts and make findings of guilt.

[31] There is substantial disagreement in this case. C.(J.T.) does not accept the facts alleged by the Crown on the essential elements of the offences. Without C.(J.T.)'s agreement, there are no facts before me that can be used to make findings of guilt. None of the evidence recited by Ms. Bastarache becomes a fact through mere recital. A section 36 finding of guilt can only be made on the basis of facts. Findings of guilt cannot be made on the basis of allegations or recitals of evidence.

[32] If, following a guilty plea, there are facts that have to be proven because they are not admitted, and if the dispute does not involve an essential element of the offence, this may lead to a contested sentencing hearing where evidence is called to prove an aggravating factor. But here the dispute is with respect to essential elements of the offences. This means there will have to be a trial of the charges against C.(J.T.). It would constitute an error of law for me to make findings of guilt in these circumstances. No such findings can be made and the charges must be set down for trial.