IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. D.R.L., 2005 NSSC 333

Date: 20051220
Docket: CR. AM. No. 244914
Registry: Amherst, NS

Between:

Her Majesty the Queen
by the Attorney General of Nova Scotia

Appellant

v.

D. R. L.

Respondent

Restriction on Publication: Sections 110 and 111 of the *Youth Criminal Justice Act* apply and may require editing of this Judgment or its heading before publication. See details on page 2 of this decision.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: September 16th , 2005 in Amherst, Nova Scotia

Written Release of Decision: December 20th, 2005

Counsel: Michelle D. James for the Appellant Her Majesty the Queen
Paul Drysdale for the Respondent D. R. L.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE that Sections 110 and 111 of the ***Youth Criminal Justice Act*** apply and may require editing of this Judgment or its heading before publication. Sections 110 and 111 provide:

> **"110 (1)** Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> **(2)** Subsection (1) does not apply
>
> **(a)** in a case where the information relates to a young person who has received an adult sentence;
>
> **(b)** subject to sections 65 (young person not liable to adult sentence) and 75 (youth sentence imposed despite presumptive offence), in a case where the information relates to a young person who has received a youth sentence for an offence set out in paragraph (a) of the definition "presumptive offence" in subsection 2(1), or an offence set out in paragraph (b) of that definition for which the Attorney General has given notice under subsection 64(2) (intention to seek adult sentence); and
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> **(c)** in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.
>
> **(3)** A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.
>
> **(4)** A youth justice court judge shall, on the *ex parte* application of a peace officer, make an order permitting any person to publish information that identifies a young person as having committed or allegedly committed an indictable offence, if the judge is satisfied that
>
> **(a)** there is reason to believe that the young person is a danger to others; and
> **(b)** publication of the information is necessary to assist in apprehending the young person.
>
> **(5)** An order made under subsection (4) ceases to have effect five days after it is made.
>
> **(6)** The youth justice court may, on the application of a young person referred to in subsection (1), make an order permitting the young

person to publish information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, if the court is satisfied that the publication would not be contrary to the young persons's best interests or the public interest.

111 **(1)** Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

(2) Information that would serve to identify a child or young person referred to in subsection (1) as having been a victim or a witness may be published, or caused to be published, by

(a) that child or young person after he or she attains the age of eighteen years or before that age with the consent of his or her parents; or

(b) the parents of that child or young person if he or she is deceased.

(3) The youth justice court may, on the application of a child or a young person referred to in subsection (1), make an order permitting the child or young person to publish information that would identify him or her as having been a victim or a witness if the court is satisfied that the publication would not be contrary to his or her best interests or the public interest."

By the Court:

[1] This is an appeal by the Crown of a sentence passed by the Honourable Judge Carole A. Beaton in relation to D. R. L. who was born on August [...], 1988.

[2] On March 23rd, 2005 D. L. appeared in the Youth Justice Court of Nova Scotia and pleaded guilty to four counts of theft under $5,000.00 contrary to s. 334(b) of the *Criminal Code* of Canada and one count of possession of property obtained by crime valued under $5,000.00 pursuant to s. 355(b) of the *Criminal Code* of Canada. All of the charges were proceeded with on a summary conviction basis. Following the pleas the Crown withdrew three additional charges under s. 355(b) of the *Criminal Code*.

[3] The charges referred to above related to two different offence dates. The facts presented to the Court indicated that on March 6th, 2005 shortly after 5 a.m. D. L. and a co-accused committed several offences of theft from vehicles in the town of Amherst in the province of Nova Scotia. The trial judge was advised that the items stolen during these offences included "a cassette or CD adapter with a power cord", a "silver ring with three stones in it" as well as some "automotive paperwork".

[4] Mr. L. was found carrying a kit bag at the time of arrest. This bag was searched incident to arrest and was found to contain a quantity of loose change totalling $29.93, the automotive paperwork, CD adapter and ring referred to above, as well as a quantity of CD's.

[5] The facts also disclosed that on or about March 22nd, 2005 D. L. and a co-accused broke into another vehicle. At the time of arrest a cellular telephone was found on the ground. This telephone was identified as having been taken from the vehicle in question. Again, Mr. L. was searched incident to arrest. During this search a wallet was found that had cheques in it. The cheques belonged to an individual by the name of A. L. and had been reported stolen to the Amherst police. Judge Beaton was not given any evidence as to the amount of these cheques.

[6] According to the factum filed by the Crown, prior to these offences D. L. had two prior convictions for theft, two prior convictions for possessing property obtained by crime, two prior convictions for break and enter, six prior convictions for breaches of undertaking/recognizance, one prior conviction for obstructing a peace officer, two prior convictions for mischief, three prior convictions for assault, one prior conviction for possessing a controlled substance, six prior convictions for breach of

probation under s. 137 of the *Youth Criminal Justice Act* and two prior convictions for the same offence under s. 26 of the *Young Offenders Act.*

[7] The trial judge was not given complete details concerning the sentences that this young person had received in the past although she was advised of the following:

> (a) on previous occasions Mr. L. had been sentenced to various periods of probation;
>
> (b) on July 29th, 2003 he was sentenced to "a period of custody" for a mischief offence;
>
> (c) on November 25th, 2003 he was sentenced to eight months in open custody for a mischief conviction, two assault charges and a break and enter charge;
>
> (d) on November 10th, 2004 he was sentenced to 80 days in open custody for breach of an undertaking, possession of stolen property and resisting arrest; and
>
> (e) on November 29th, 2004 Mr. L. received a reprimand for a theft conviction for an offence that occurred on October 31st, 2004. There is a suggestion on the record that this conviction may have related to the theft of a box of potato chips on Halloween.

[8] Counsel for the Crown and defence appeared in Court on March 23rd, 2005 in relation to the five new charges this youth was pleading guilty to (four counts of theft under $5,000.00 and one count of possession of property obtained by crime valued

under $5,000.00). Before accepting the pleas the judge advised Mr. L. that she was not bound to give him any sentence that he may have talked about with his lawyer and confirmed that he was not pleading guilty because he thought he may receive a certain sentence (see s. 606 (1.1) of the *Criminal Code* of Canada). Thereafter, counsel put forth a joint recommendation for a six month Custody and Supervision Order. Ms. Severns (who was counsel for Mr. L. at the time) acknowledged that this youth's record was "something which Mr. L. must contend with in terms of his sentencing options" but went on to point out that this was a young person who has not had a great deal of stability in his life and who was in the care of Family and Children's Services.

[9] The trial judge expressed concern about the joint recommendation that had been made by counsel. She indicated that she was extremely reluctant not to follow a joint recommendation and understood and accepted that a custodial sentence was appropriate in the circumstances. However, she was concerned about the length of custody that had been recommended by counsel. In her decision, Judge Beaton stated at ¶ 1:

> ".....I'm extremely reluctant to go behind a joint recommendation but I'm concerned about.....I don't have any difficulty understanding the recommendation

> for custody, but I'm concerned about the length of time, because certainly Mr. L. has a record. It's not the longest youth court record that's ever been before the court. And under section 42(2)(n), the maximum custodial period that he could receive would be two years, other than for certain specific offences where it's three years, but generally speaking we think of a two year outer limit. And the recommendation is for six months, which is a quarter of that time, and the offences themselves are essentially, when you take into account the principles of sentencing, over and above what's enunciated in the YCJA, which obviously applies. You have three thefts during one rash of breaking into cars on one evening, and then you have the theft and possession on another evening, within a couple of weeks. And the crown acknowledges that these offences are on the low end of the scale."

[10] Judge Beaton then referred to s. 38(3) of the *Youth Criminal Justice Act* which reads as follows:

> "**38.**(3) In determining a youth sentence, the youth justice court shall take into account
>
> *(a)* the degree of participation by the young person in the commission of the offence;
>
> *(b)* the harm done to victims and whether it was intentional or reasonably foreseeable;
>
> *(c)* any reparation made by the young person to the victim or the community;
>
> *(d)* the time spent in detention by the young person as a result of the offence;
>
> *(e)* the previous findings of guilt of the young person; and
>
> *(f)* any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section."

[11] The trial judge found that the mitigating circumstance in this case was the early guilty plea entered by the youth. She went on to find that the aggravating circumstance was the youth's prior record. The trial judge then stated at ¶ 3-5:

> ".....I recognize that in making a joint submission, there are factors which are properly not before the court and needn't, indeed shouldn't be before the court. But when I look at the situation I say, I have to ask myself as the sentencing judge, is it a proper application of the principles of the YCJA to sentence somebody to six months in custody for rifling through some vehicles. I'm not sure that an adult with a record like Mr. L.'s would attract a sentence of six months. And all of the discussion since, prior to, in contemplation of the coming into force of the YCJA and since, have reminded sentencing judges time and time again that six months means something entirely different to a 17 year old than it does to an adult, and the *Act* specifically directs the court to take that into account.
>
> .....I don't want to reject a joint submission, and I don't question them lightly, but at the end of the day when the sentence is imposed, the court has to be comfortable as well that the appropriate thing has been done.
>
> There are youth with records much longer than Mr. L.'s who have committed offences more serious than this.....and I'm not, I'm not downplaying that he has committed a criminal offence.....but they don't attract sentences of six months in custody, and so that is my concern....."

[12] In accordance with the decision in **R. v. G.P.** (2004), 229 N.S.R. (2d) 61(C.A.) the trial judge then adjourned the proceeding to allow counsel an opportunity to consider her comments and make further representations.

[13] In response to Judge Beaton's concerns, Crown counsel noted that there were two separate Informations before the Court relating to two separate offence dates. She also noted this young person's extensive involvement with the criminal law system since 2002 and pointed out that in November of 2004 this young person was sentenced to a Custody and Supervision Order of 80 days. The record indicates that

Mr. L. was sentenced at that time for possession of stolen property, resisting arrest and breach of an undertaking. The Crown suggested to the trial judge that since an 80 day Custody and Supervision Order was insufficient to deter this young person from involving himself in further "similar offences" - a period of custody in excess of this amount was warranted.

[14] Counsel representing Mr. L. indicated that she found herself in a difficult position in that the submissions relating to sentence had been a joint recommendation. Having said that, defence counsel indicated that she appreciated the judge's concerns and accepted that the judge had a discretion whether or not to accept the joint recommendation put forward by counsel.

[15] After hearing these additional submissions, Judge Beaton reiterated that she was satisfied that a period of custody was appropriate. However, she was not satisfied that the circumstances warranted the passing of a six month Custody and Supervision Order. She referred to the sentencing principles set out in s. 38(2) of the *Youth Criminal Justice Act* and made specific reference to ss. 38(2)(a) and (c) which provide as follows:

> "**38.(**2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:
>
> (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
>
> .....
>
> (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
>
> ....."

[16] She also referred to a number of the principles set out in s. 3 of the *Youth Criminal Justice Act* (the "Declaration of Principle" section).

[17] During the course of her decision the sentencing judge made specific reference to the Court of Appeal decisions in **R. v. Porter** (1994), 132 N.S.R. (2d) 107 (C.A.) and **R. v. MacIvor** (2003), 215 N.S.R. (2d) 344 (C.A.). She stated that she recognized that the Court should not "blithely or lightly interfere with a joint submission", however, she concluded that the provisions of the *Youth Criminal Justice Act,* if properly applied, would not permit a six month Custody and

Supervision Order for the offences Mr. L. pleaded guilty to. The sentencing judge concluded at ¶ 17 of her decision:

> "There are many youths, even with a record like Mr. L.'s, who might well receive a disposition of something much less than custody, but I've outlined the reasons why I'm satisfied custody is appropriate in this particular instance. I don't see that the appropriate message is sent to Mr. L., I don't see how it is that a 17 year old is supposed to make the appropriate connection by having him in custody for six months for stealing some items from some cars on one night and then doing the same thing a couple of weeks later. Yes, he needs to get a message. Yes, he needs to understand. But I'm not convinced that because he served a period of 80 days custody in November and he's back before the court that that necessarily, in and of itself, can justify the imposition of more time than 80 days. There may well be circumstances when it could, but I'm not convinced that this is one of them. As I said before the break, looking at the, the big picture here, I am extremely uncomfortable with the suggestion...with the greatest of respect to counsel, who I know worked hard to craft a joint submission...but I, I can't see that somebody steals, rifles through some vehicles, steals property, all of which is recovered, and then spends six months in custody. And so I am, with the greatest of reluctance, but in order to do properly the job and carry out the function that the court must, I am going to reject that submission."

[18] The trial judge sentenced Mr. L. to 15 days in custody (10 days under the care of the Provincial Director in a custodial facility and 5 days under supervision in the community) to be served concurrently for each of the three offences that occurred on March 6th, 2005. In addition, she sentenced Mr. L. to 15 additional days in custody (10 days under the care of the Provincial Director in a custodial facility and 5 days under supervision in the community) to be served concurrently for each of the two offences that occurred on or about March 22nd, 2005. The sentences passed in

relation to the March 22nd, 2005 offences were to be served consecutive to the sentences passed in relation to the March 6th , 2005 offences. Therefore, the total amount of time imposed was 30 days (20 days in custody followed by 10 days under supervision with conditions).

[19] The Crown has appealed these sentences on the grounds that

> (1) the learned sentencing Judge erred in rejecting the joint submission of counsel;
>
> (2) the sentence imposed is demonstrably unfit; and
>
> (3) such other grounds as might become apparent from the transcript and that this Honourable Court might allow.

[20] At the commencement of the appeal hearing both counsel advised the Court that they agreed that the appeal should be allowed. The Respondent's agreement in this regard was inconsistent with the position that had been advanced in the factum filed on his behalf. In the Respondent's factum he disputed the suggestion that the trial judge had erred and supported the trial judge's decision not to accept the joint submission put forward by counsel. Upon further questioning, the Court was advised that Mr. L. was once again in custody (in relation to other charges). An agreement had

been reached between counsel that if this appeal was allowed by consent, Mr. L. would not have to spend any additional time in custody in relation to these offences even though the jointly recommended sentence would otherwise have resulted in such.

[21] The Court indicated a concern about the appropriateness of issuing an Order allowing an appeal when no judicial finding had been made that the trial judge had actually erred. In light of this concern, the Court elected to proceed with the appeal, reserving on the issue of whether the appeal should be allowed by consent.

[22] Counsel for the Crown (quite rightly in my view) then agreed that if the Court determined that the trial judge had erred and the appeal should be allowed, any additional sentence that this Court may impose on Mr. L. should not exceed his most recent sentence which apparently concluded on November 20th, 2005. In other words, this young person would not be prejudiced by the Court's decision to hear the appeal.

[23] I have considered the question of the Court's obligation to issue a Consent Order in these circumstances and have concluded that while the Court may elect to issue a Consent Order without hearing an appeal, it is not obliged to do so (see

Tanaka v. Inoue, [1997] O.J. No. 150 (Ont. C.A.); **Nethery v. Lindsey Morden Claims Services Ltd.**, [1999] B.C.J. No. 1322 (B.C.C.A.) and **Johnson v. Cowichan Valley (Regional District)**, [1999] B.C.J. No. 1683 (B.C.C.A.)). In the circumstances of this case, I have concluded that it is appropriate for the Court to determine the appeal on its merits despite the fact that both counsel were prepared to agree to the appeal by consent.

[24] I should also indicate that in the factum filed on behalf of the Crown reference was made to an application to introduce fresh evidence of Mr. L.'s subsequent convictions after his appearance before Judge Beaton on March 23rd, 2005. This application was withdrawn by the Crown at the time of the appeal and I have not taken any such evidence into account when rendering this decision.

DID THE LEARNED TRIAL JUDGE ERR IN REJECTING THE JOINT SUBMISSIONS OF COUNSEL AT THE TIME OF SENTENCING MR. L.?

[25] The issue of the Court's obligation to follow a joint recommendation on sentence has been considered by the Nova Scotia Court of Appeal on a number of occasions in recent years. The balance between the Court's duty to give such

recommendations "very serious consideration" and the principle that sentencing remains the prerogative of the trial judge is evident in a number of cases.

[26] In **R. v. Porter***, supra,* Chipman, J.A. stated at ¶ 43:

> "....While in general a joint submission should be entitled to great weight a judge must, in no way, feel bound by it. It is the prerogative and duty of the judge at trial to impose the sentence he or she considers fit in accordance with the principles of sentencing. See *R. v. Lai* (1988), 69 Nfld. & P.E.I.R. 297 at 301; *R. v. Morrison* (1981), 49 N.S.R. (2d) 473 at 477; *R. v. Atwood* (1983), 60 N.S.R. (2d) 245 at 252 and *R. v. Merenick* (1991), 117 A.R. 368 at 369...."

[27] In that same case, Matthews J.A. (in a dissenting opinion) stated at ¶ 78:

> "Sentencing is the prerogative of a trial judge. The judge need not accept a joint submission. Such submissions are normally determined after discussions and negotiations between counsel who are in possession of all of the relevant facts. More often than not the complete reasons for reaching a submission are not disclosed to the court. Joint submissions are to be of value for they tend to shorten argument and the length of hearings. Full regard should be given to them. In my opinion such submissions should only be rejected in unusual circumstances ....
>
> While a joint submission is not binding on the trial judge or this Court, nonetheless it is an important factor to keep in mind in considering a fit sentence."

[28] In **R. v. MacIvor***, supra,* Cromwell, J.A. stated at ¶ 31-32:

> "... It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the

> sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., *R. v. Thomas* (2000), 153 Man. R. (2d) 98 (Man. C.A.) at para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it: see, for example, *R. v. MacDonald* (2001), 191 N.S.R. (2d) 399, [2001] N.S.J. No. 51 (N.S. C.A.); *R. v. Tkachuk* (2001), 159 C.C.C. (3d) 434 (Alta. C.A.) at para. 32; *R. v. C. (G.W.)* (2000), 150 C.C.C. (3d) 513 (Alta. C.A.) at paras. 17-18; *R. v. Bezdan*, [2001] B.C.J. No. 808 (B.C. C.A.) at paras. 14-15; *R. v. Thomas, supra,* at paras. 5-6; *R. v. B. (B.)*, 2002 CarswellNWT 17 (N.W.T. C.A.) at para. 3; *R. v. Webster* (2001), 207 Sask. R. 257 (Sask. C.A.) at para. 7.
>
> Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

[29] Cromwell, J.A. went on to approve the following comment by Fish, J.A. (as he then was) in **R. c. Verdi-Douglas** (2002), 162 C.C.C. (3d) 37 (Que. C.A.):

> ... the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.

[30] In the recent case of **R. v. Cromwell**, 2005 NSCA 137, Bateman, J.A. referred to **R. v. MacIvor,** *supra,* and stated at ¶ 20:

> Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution is contrary to the public interest, would bring the

administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission *(***R. v. Cerasuolo** (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); **R. v. Dorsey** (1999), 123 O.A.C. 342 (C.A.); **R. v. C. (G.W.)** (2000), 150 C.C.C. (3d) 513 (Alta. C.A.)).

[31] These authorities establish the following principles:

(1) A joint submission resulting from a plea bargain is not binding on the Court (**R. v. MacIvor,** *supra*, at ¶ 31.)

(2) Nevertheless, such a submission should be given very serious consideration by the Court. This requires the sentencing judge to do more than assess whether it is a sentence that he or she would have imposed absent the joint submission. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it (**R. v. MacIvor**, *supra*, at ¶ 31.)

(3) Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation (**R. v. MacIvor**, *supra*, at ¶ 32.)

(4) The interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - - provided that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted (**R. c. Verdi-Douglas**, *supra,* as approved and adopted in **R. v. MacIvor**, *supra*, at ¶ 34.)

(5) If the sentencing judge is considering departing from a jointly recommended sentence she should advise counsel of this fact in order to provide them with an opportunity to make further submissions justifying their proposal (**R. v. G.P.**, *supra*, at ¶ 19.)

> (6) While joint sentence submissions arriving from a negotiated guilty plea are generally respected by the sentencing judge, ultimately, the judge is a guardian of the public interest and must preserve the reputation of the administration of justice. Where the joint recommendation is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission (**R. v. Cromwell**, *supra*, at ¶ 20.)

[32] I am satisfied that in the case at bar the trial judge was not convinced that the recommended sentence was within the appropriate range of sentences for this crime. The trial judge was clearly of the view that in light of the minor nature of these offences a joint recommendation of a six month Custody and Supervision Order was excessive despite this young person's previous record. I am not persuaded that the trial judge erred in reaching this conclusion.

[33] The purpose of sentencing under the *Youth Criminal Justice Act* is to hold young people accountable for their actions through the imposition of just sanctions that have meaningful consequences for the young person and which will promote his/her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public (see s. 38(1) of the *Act*). Holding a young person accountable must be done in accordance with the sentencing principles set out in sections 3 and 38(2) of the *Act* and the restrictions on custody set out in s. 39 of the *Act*. It is clear from a review of the *Youth Criminal Justice Act* that the use of custody

is a restricted option (s. 39) and, *inter alia*, the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence (s. 38(2)(c)).

[34] Judge Beaton recognized that Mr. L.'s previous record was an aggravating circumstance that should be taken into account during sentencing. Nevertheless, she was not satisfied that a six month Custody and Supervision Order was proportionate to the seriousness of these offences.

[35] The trial judge was not provided with any case law dealing with the appropriate range of sentences for these offences. Similarly, the factum filed on behalf of the Crown does not refer to any such authorities. In the factum filed on behalf of the Respondent, reference is made to the case of **R. v. T(J.D.V.)** (1996), 152 N.S.R. (2d) 98 where the Court of Appeal upheld a sentence of probation, community service and restitution for a young offender who pleaded guilty to sixteen offences committed within a period of six months, including multiple break and enters, theft and mischief. In that case, the young person had no previous record.

[36] While not totally analogous to the case at bar, the cases of **R. v. T.M.D.**, [2003] N.S.J. No. 488 (C.A.) and **R. v. M.J.S.**, [2004] N.S.J. No. 64 (N.S.S.C.) do provide some guidance to the Court.

[37] In **R. v. T.M.D.**, *supra*, the Crown appealed the sentence of a youth who had pleaded guilty to assault, two counts of theft, possession of stolen property, seven counts of breach of undertaking, uttering of threats and attempted break and enter. The youth had no prior criminal record. The trial judge sentenced the youth to one year's probation, confirmed the 78 days the youth had spent on remand but declined to impose any further custody. Fichaud, J.A. writing for the Court of Appeal agreed with the Crown's submission that the "real sentence" was one year's probation and the trial judge's reference to "time served on remand" just acknowledged the past reality. The Court, after extensive review of the purpose and principles of sentencing under the *Youth Criminal Justice Act*, upheld the trial judge's sentence. While the youth in that case had no previous criminal record (and thus the case is distinguishable from the case at bar) - it is to be noted that the youth had pleaded guilty to assault, uttering of threats and attempted break and enter in addition to theft and possession of stolen property charges. Nevertheless, in light of the purpose and

sentencing principles of the *Youth Criminal Justice Act* the Court of Appeal was satisfied with the trial judges' decision to place the youth on probation.

[38] In **R. v. M.J.S.**, *supra*, the accused young person appealed a sentence of 90 days open custody for theft of a piece of pepperoni and failure to keep the peace. It appears that she had also pleaded guilty to six charges of failure to abide by conditions of release including curfew, one count of failure to attend school and a charge of failing to reside where directed by the Provincial Director. The extent of this young person's previous record is unclear from the decision although she did have a previous conviction for assault. In overturning the sentence of the Provincial Court Judge, Scanlan, J. of the Nova Scotia Supreme Court noted that the young person had already spent a month to five weeks on remand. He focussed on the need for the sentence to be proportionate to the seriousness of the offence and stated at ¶ 24:

> The trial judge did not go on to elaborate what she considered to be exceptional and aggravating circumstances in this case which warranted custody. She also failed to consider the fact the offence was not indictable. I refer again to the fact that this entire series of events started with the primary offence where this troubled young person took a piece of pepperoni. All other subsequent charges involve breach of curfew, failing to live where directed or to go to school. Keeping in mind the primary offence and what had occurred subsequent to the initial charge it is difficult to understand how in terms of applying the principles set out in the Youth Criminal

> Justice Act an additional period of incarceration is warranted in the circumstances of this case ....

[39] In addition to the case law referred to above, consideration must be given to the sentencing principles set out in the *Youth Criminal Justice Act.* In addition to the principles referred to previously, reference should be made to s. 3(1)(b) (ii) which reads as follows:

> **3.**(1) (b) the criminal justice system for young persons must be separate from that of adults and emphasize the following:
>
> .....
>
> (ii) Fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> .....

[40] Taking into account the sentencing principles set out in the *Youth Criminal Justice Act* and the authorities referred to above, I am not persuaded that the trial judge erred in finding that the recommended sentence of six months custody and supervision fell outside the acceptable range of sentences for these offences and this accused.

[41] It is clear to me from the transcript of the proceeding that in keeping with the Honourable Justice Cromwell's comments in **R. v. MacIvor**, *supra*, the trial judge gave the joint recommendation very serious consideration but, nevertheless, concluded that it was not an appropriate sentence to pass in the circumstance of this case and substituted therefore an alternate sentence. In my view, she did not err in this regard.

[42] The Crown has referred to the fact that on November 10th, 2004 Mr. L. was sentenced to 80 days in open custody for breach of an undertaking, possession of stolen property and resisting arrest. Ms. James suggests that since this sentence was insufficient to deter this young person from involving himself in further "similar offences" a period of custody in excess of 80 days was warranted.

[43] As a preliminary matter, deterrence does not appear to be a significant factor in the sentencing principles set out in the *Youth Criminal Justice Act* (see the comments of Lynch, J. in **R. v. K.D.**, [2003] N.S.J. No. 165 at ¶ 14). In this regard, it is notable that s. 50 of the *Youth Criminal Justice Act* indicates that the principles for sentencing adults that are found in ss. 718 to 718.2 of the *Criminal Code* (which include general and specific deterrence) do not apply to sentencing under the *Youth*

Criminal Justice Act except for s. 718.2(e) which calls for restraint in the use of imprisonment particularly with aboriginal offenders. Accordingly, the trial judge was correct not to place undue focus on the issue of deterrence.

[44] In any event, the trial judge was not informed about the circumstances and gravity of the previous offences for which the youth received a sentence of 80 days in open custody. On that previous occasion, the youth's convictions included the offence of resisting arrest. Presumably, a sentence of 80 days in open custody was warranted based on the circumstances of those offences. It does not mean, however, that future convictions for theft and possession of property obtained by crime will necessarily result in a sentence in excess of 80 days. In deciding the appropriate sentence, the trial judge must take into account a number of factors including the young person's previous record *and* the seriousness of the present offences. I am satisfied that Judge Beaton properly took both of these matters into account when sentencing Mr. L..

[45] In the factum filed on behalf of the Crown it is suggested that Mr. L. was the subject of a Custody and Supervision Order at the time that these offences occurred. This information was not brought to the attention of the trial judge at the time of

sentencing. In addition, I note that Mr. L. was not charged with breaching an Order at the time these offences occurred. Accordingly, I have not taken this fact into account when rendering my decision.

[46] The Crown has also suggested that Judge Beaton misapplied s. 38(3)(a) of the *Youth Criminal Justice Act* which indicates that in determining a youth sentence the Court shall take into account the degree of participation by the young person in the commission of the offence. It does not appear, from a review of the decision, that the trial judge's consideration of this section of the *Act* was a major factor in her decision. I am not satisfied that the appeal should be allowed on this basis.

WAS THE SENTENCE IMPOSED BY THE TRIAL JUDGE DEMONSTRABLY UNFIT?

[47] In **R. v. MacIvor**, *supra*, the Court of Appeal discussed the applicable standard of review in a sentencing appeal. The Court stated at ¶ 18:

> The applicable standard of review is well known. As stated in *R. v. L. (J.F.),* **supra** at para. 20:

> ¶ 20 A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in *R. v. Proulx* (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at [paragraph] 123-126.

[48] The Crown has not satisfied me that the sentence imposed by Judge Beaton is demonstrably unfit particularly when one takes into account the purpose and principles of sentencing under the *Youth Criminal Justice Act.* Accordingly, the appeal on this ground is also dismissed.

Deborah K. Smith, A.C.J.