IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Best, 2005 NSSC 208

Date: 20050629
Docket: CRSK 236764
Registry: Kentville

Between:

Her Majesty The Queen

Plaintiff

v.

Adam Devon Best

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	At Kentville, N.S. on May 2, 3, 4, 5, 6, 9,10 and 11, 2005 Sentenced on June 29,2005.
Written Release of Oral Decision:	August 23, 2005
Counsel:	Shane Parker, Esq., counsel for the Crown
	Donald Fraser, Esq., counsel for the Defence

By the Court:

[1] This decision constitutes the sentencing of Adam Best following conviction by a jury for an aggravated assault, four break and enters, and possession of stolen goods. I would like to make it clear at this point that it is not my job, and I do not feel morally or otherwise it is my job, to judge Adam Best. It is my job to fulfill a function that in a civilized society is required with regards to these events. I am not sure there is any person who has the right to judge others and yet I am in the unenviable position, as far as I am concerned, of making a decision where there is no winner. It is particularly difficult because, no matter what I do, Mr. Best has already indicated just before the break that he feels he was wrongly convicted; he will therefore not accept whatever function I carry out.

[2] I will be referring to a quantity of rough notes, and as a result, this decision is not going to be articulately stated today. I therefore reserve the right and responsibility of adding to and editing these words in writing, in order to make my reasons more clear and articulate. You will have to be patient because there is important background that has to be stated for the record. It was important for everyone who is listening to this to understand the reasons for the sentence, whether or not everyone accepts it.

[3] On May 11 of this year a jury convicted Adam Best of the following six offences:

> 1. That at or near Aldersville, Lunenburg County, he did wound James Stuart Eustace, thereby committing an aggravated assault contrary to s. 268(2) of the **Criminal Code**.;
>
> 2. That at the same place and time he did break and enter the dwelling of James Stuart Eustace and did commit therein an indictable offence of theft contrary to s. 348(1)(d) of the **Criminal;**
>
> 3. That at the same time and place he did break and enter the shed of Brian MacNutt and commit therein the indictable offence of theft contrary to s. 348(1)(e) of the **Criminal Code;**
>
> 4. Later on the same day (several hours later) at Berwick, Kings County, he did break and enter the dwelling house of Dorothy Benedict and did commit therein an indictable offence, contrary to s. 348(1)(e) of the **Criminal Code**;

5. On the same day, at Waterville, Kings County, he did break and enter the dwelling house of Roger Quirk, and did commit an indictable offence of theft, contrary to s. 348(1)(e) of the **Criminal Code**; and

6. On the same day in Kings County, he had in his possession property of a value not exceeding five thousand dollars knowing that it had been obtained by the commission in Canada of an indictable offence punishable by indictment contrary to s. 355(b)(i) of the **Criminal Code.**

[4] For reasons which both lawyers will understand, because he was convicted of all four break and enters and thefts, it would be contrary to the law to also convict him of having possession of those goods. It would be like a double conviction for the same thing. For that reason it is recommended by the Crown in its memorandum, and agreed to by Mr. Fraser on behalf of Mr. Best, that I stay the conviction for possession. I therefore stay that conviction.

[5] The maximum sentence for aggravated assault is 14 years. A maximum sentence for break and enter into a dwelling is life imprisonment. The maximum

sentence for the break and enter of the shed is ten years. Both counsel addressed the Court with regards to what facts the Court is entitled to base its decision on.

[6] There is a special provision in the **Criminal Code** that deals with sentencing that follows convictions by juries because juries do not give reasons for their verdicts. They simply find the accused guilty or not guilty.

[7] Section 724(1) and (2) of the **Criminal Code** say the following:

> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
>
> (2) Where the court is composed of a judge and jury, the court
>
> (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
>
> (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[8] Both parties have made it clear, although they said it differently, that, pursuant to the **Tempelaar** decision of the Supreme Court of Canada in 1995 and

the **Brown** decision of 1991, the trial judge is entitled to make up his own mind on disputed questions of fact that are relevant to sentencing. There are other cases that set this out but I do not think it is necessary today to recite them.

Facts

[9] My notes as to what facts were established at trial are as follows. Some of them I was obligated to find because they are essential facts necessary to prove the offence. Others are facts which, while I listened to the evidence, I was absolutely satisfied were proven. I am only sentencing on facts that I am satisfied were proven beyond a reasonable doubt and no others.

[10] On October 11, 2004, Adam Devon Best went to the home of Grace Parker to see if she would help him cash some cheques. She would not assist him. They both then went to the residence of Joseph States where they met Stephen Pinch and he was asked to help cash the same cheques. There may have been some consumption of crack cocaine at that time by Pinch and Best and possibly Parker. They went to a bank to try to cash the cheques, but did not do it; then the three of them went back to Parker's residence. While at the residence there was a

discussion between Mr. Best and Mr. Pinch about ways to get money for more drugs. There was the consumption of more crack cocaine. The amount or effects, this court is not certain of.

[11] Sometime early in the morning of October 12th, all three left Parker's residence in her car with Pinch driving and Best in the back seat giving directions. Best directed Pinch where to stop the car, actually Pinch went past the place and had to back up to a road with a gate across it. They went through the gate. It was off Highway 12 at Aldersville. They went down the roadway through the woods to a cottage with two sheds. They backed up to one shed; this was at the directions of Best. Best got out and subsequently asked Pinch to help him; from the garage in the middle of the woods they took a generator, tools and other items. The shed belonged to Brian McNutt. Mr. Best was convicted and Mr. Pinch pleaded guilty to breaking and entering the shed and having stolen the items from the shed. The three returned to Kentville where Best arranged for the disposal of the generator and the tools.

[12] They then returned to Aldersville, and parked at a church parking lot where Mr. Best directed. Mr. Best and Mr. Pinch got out to cross the street to go up a

woods road. Mr. Best returned to the car and took a metal pipe from the vehicle and left again. They went up the dirt road to a small residence. The residence was that of Mr. Eustace. Obviously a television and lights were on in the house. I accept that when Mr. Best tried to push one of the doors in, an outside light came on and Mr. Eustace came out the door . Mr. Eustace lives alone in this two room, one bathroom house. Mr. Eustace is a mentally disabled person who, despite his shortcomings, was gainfully employed as a farm labourer. When Mr. Eustace came out the door, I am satisfied on the evidence of Mr. Pinch (who I may not believe was as uninvolved as he said, but whose description of the activity of Mr. Best, I accept as honest, straightforward and truthful) that Mr. Best confronted Mr. Eustace with the words “Come here you ..... retard” and thereupon bludgeoned him twice in the head and twice in the back with the conduit pipe. Eustace fell under the kitchen table in a pool of blood and apparently unconscious. He suffered a fractured skull that required emergency surgery - his skull was driven into his brain. Both Pinch and Best continued to rifle his home and took goods and left, careless as to whether Mr. Eustace would ever wake up, and uncaring as to whether he would ever wake up. They went back to the Parker vehicle where I accept that Mr. Best was excited and bragged about how many times he had struck Mr. Eustace, the man he had called a retard.

[13] The three went back to Kentville. Mr. Best, and it doesn't really matter who, tried to get rid of the goods and was having trouble. They sat around for the morning and maybe smoked some more cocaine, or whatever it is you do with cocaine. In the afternoon Best and Pinch borrowed Parker's car, drove to Berwick and to Waterville, and, randomly, in open daylight, broke into the houses of Dorothy Benedict and Roger Quirk, rifled them, stole goods and left. At about 4:30 p.m., I suspect while going to try to pawn the goods, they were in a car accident; Mr. Best left the scene by way a good Samaritan. Mr Pinch stayed and was taken to the hospital. Later, all of the information came together that resulted in their arrest and the charges of which Mr. Best was convicted.

[14] Those are the facts on which I am sentencing Mr. Best.

Principles of sentencing

[15] The purposes and principles of sentencing are set out in s. 718 of the **Criminal Code**. Sentencing requires the Court to be concerned with the specific circumstances of the offence and the offender. The **Code** sets out the fundamental

purpose of sentencing as contributing to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objects:

> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and others'
>
> (c) to separate offenders from society where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims;
>
> (f) to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[16] Section 718.1 of the **Criminal Code** also says that "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[17] Section 718.2 contains additional requirements. It requires the Court, in imposing a sentence, to consider the following principles:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .

Secondly, “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”. Thirdly, “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh”. Fourth, “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”. Finally, “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”

[18] I am going to highlight briefly four of those principles. One of them is called proportionality; the second is called parity; the third is restraint, and the fourth is totality.

Proportionality

[19] Section 718.1 of the **Criminal Code** says the sentence must be proportionate to the gravity of the offence and the responsibility of the offender. The Supreme Court of Canada in **R. v. Proulx** says the proportionality principle in this section requires that full consideration be given to both the gravity of the offence and the moral blameworthiness of the offender. One of the criminal writers who is sometimes cited by courts added the following:

> It is because the principle embodies or seems to embody notions of justice, that people have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not.

[20] Justice Marc Rosenburg of the Ontario Court of Appeal, in **R. v. Priest**, raised important questions about sentencing of young offenders for what are apparently prevalent crimes. He relied on fairness as the underpinning of proportionality and was careful to point out that this ensured that an individual is not sacrificed for the sake of the common good.

[21] Proportionality is a relative concept that has two dimensions, both of which measure the seriousness of the offence. First, the sentence must properly reflect the relation, in terms of gravity, that this offence has generally to other offences. By definition some offences are more blameworthy than others. In this respect an

individual's sentence can be placed on a scale of punishments at a point where it is in close proximity to offences of similar blameworthiness and distant from those that are more, or less, blameworthy.

[22] The second dimension is that the sentence must reflect the various stages of seriousness that might apply to the range of conduct covered by the offence. This includes the quantum of harm caused or potentially caused and the degree of participation of the offender. Harm caused or at least risked is a factor in determining gravity.

Parity

[23] I said the second principle was parity, sometimes called uniformity; that is, a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. This simply restates the traditional rule which is an attempt to bring the Rule of Law into sentencing. Offenders who are equally blameworthy ought to receive approximately the same punishment. Punishments cannot be identical but only approximately the same, given the fact that in each case there are not identical circumstances one with the other.

[24] Parity does not mean that all sentences have to be uniform. Courts do recognize that in fact all sentences cannot be the same because all circumstances are not the same. The Chief Justice of Canada, in **R. v. M. (C.A.)**, a 1996 decision of the Supreme Court, said:

> Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of an din the particular community where the crime occurred.

Restraint

[25] The third principle was the principle of restraint. Section 718.2(d) provides that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate. It requires a sentencing judge to consider all available sanctions other than imprisonment that are reasonable in the circumstances. These provisions exist to discourage imprisonment when another less onerous sanction will also satisfy the relevant sentencing principles. Restraint means that prison is the sanction of last resort. Restraint also means that sentencing courts should seek

the least intrusive sentence and the least quantum that will achieve the overall purpose of being appropriate and just.

[26] Recently the principle of restraint was further modified by the introduction of a section of the **Code** that allows for conditional sentences, that is, incarceration in the community. I am not going to say any more about that because both counsel acknowledge that this is a sentence for which the Court must sentence for more than two years, which takes it out of the range of conditional sentencing.

Totality

[27] The fourth principle is totality. The bottom line on this principle is that whatever sentences individually the charges against the accused may merit - for example, if the five offences taken separately would merit an accumulative sentence that is massive, then the Court has to modify those total individual sentences to recognize the fact that it would be unjust and unfair to treat the five offences that happened approximately together, as if they happened at five different times, or five different places.

Starting point approach

[28] One of the helpful tools that judges use in order to do determine the sentence, which I have told you is extremely difficult to determine, is the use of the approach that was expressed by the Alberta Court of Appeal in a case called **R. v. Sandercock,** as the "starting point" approach. It is a 1985 decision. A summary of this approach is that the Court determines the appropriate sentence for a typical offence of the kind that was committed by the offender. The Court then determines whether the sentence to be imposed in the case should be increased or decreased because of the particular circumstances of the offence and the offender, and give reasons why they would depart from the typical sentence. Not all courts agree with that approach, but the Supreme Court of Canada, in a 1997 case called **R. v. M(T.E.)** also known as **R. v. McDonnell**, per Sopinka, J., concluded that the starting point approach was a valid approach - but not the only approach, and a failure to apply it was not an error. He went on to comment that the "starting point" approach is not intended to be a rigid tariff; I take that to mean it is only a starting point. Both counsel, while not necessarily referring to the same case, have taken the approach that if there is a range, or a suggested standard starting point, for sentencing with regards to a particular type of offence, the Court then has the

obligation to weigh all of the factors that may suggest the sentence should be heavier or lighter. What I have just read is not any different than what counsel have stated already.

[29] Initially I indicated that sentencing is individual to the offence and the offender. There are a series of factors that Courts always take into consideration when determining when to go above or below the mid point or norm and they are called aggravating or mitigating circumstances. Some circumstances are mitigating because they permit the courts to decrease what would otherwise be an appropriate sentence. Other factors are called aggravating when they suggest the norm is not enough.

[30] One of the textbooks that I have access to lists factors that may be either aggravating or mitigating and I am going to begin by listing some of the ones they suggest are relevant to the offence itself.

Aggravating and mitigating factors

[31] One of the factors is the actual consequences of the offences that were committed, or the potential consequences of the offences that were committed.

[32] The second one is the gravity of the offence itself. Not all offences are the same.

[33] The third factor is specifically listed in the **Code**; that is, whether the motivation for the offence is bias, prejudice or hatred based on the mental or physical disability of the victim. That section of the **Code** is most often used with racial crimes, or sexual crimes, or religious crimes. Section 718.2(a)(1) specifically includes such conduct against people who are mentally or physically disabled, and this section is relevant to this sentencing.

[34] Another factor related to the offence is whether the offence constituted what is called by courts a “home invasion”. Section 348.1 of the **Code** was added fairly recently and says that where an accused has been convicted of forcible confinement or robbery, or extortion, or breaking and entering a dwelling house, the fact that the house was occupied is an aggravating factor in sentencing if the

accused knew the house was occupied or was reckless in that regard, and used violence or threats of violence to the people in or on the property.

[35] The next factor related to the offence is the number of offences committed.

[36] Pre-meditation, that is, planning and organization, is relevant to sentencing. Surrounding circumstances are relevant.

[37] The effect on the victim is relevant and the degree of violence is relevant. Courts have held that offences involving violence are extremely serious offences. In sentencing, a primary principle to be considered is the protection of the public and the deterrence of others. If violence is involved, the offender will be sentenced to a period of incarceration even in a situation where he or she is young and it is a first offence.

[38] The textbook goes on to list factors relevant to the offender himself. First, is his age. The principle is that a young person or a first offender should not be sent to jail.

[39] The second factor related to the individual is whether or not they are a person of aboriginal descent; that is not relevant to this case.

[40] The third one is the attitude of the offender since the offence was committed. This reflects to some degree the efforts that the accused makes to rehabilitate himself before sentencing occurs; the prospect of rehabilitation is an assessment that a Court is required to make when sentencing. Usually the prospect of young people rehabilitating is greater than for old codgers and so conduct after the offence is relevant.

[41] The background of the offender is very relevant to sentencing, as is the character of the offender. Evidence of good character goes to mitigate the sentence. The criminal record, or young offender's record, is relevant. Whether the offence is the first offence is relevant. Those are relevant as mitigating factors, not as aggravating factors. Similarly, pleading guilty is a mitigating factor but that cannot be used to add to a sentence.

[42] Whether a person has physical or mental disorders is a factor that is considered in sentencing. Time spent in custody awaiting trial or sentence is a factor.

Consecutive sentences

[43] For the record I am going to review the law with regard to consecutive sentences for multiple offences. The Crown has asked the Court to address, for each of the five crimes committed, s. 725 and s. 728 of the Code which read as follows:

> 725(1) In determining the sentence, a court
>
> > (a) shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences;
>
> 728. Where one sentence is passed on a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence.

[44] There is case law that the Crown has directed the Court's attention to which says it is preferable that each count have its own sentence. The Crown has

submitted that in this case there should be a consecutive sentence distinguishing the acts that occurred during the night time (with Mr. Pinch and Ms. Parker present in Aldersville , that is, the break in of Mr. Eustace's house and the assault on him, and the break in of the shed) from the random break-ins in Berwick and Waterville of the Benedict and Quirk residences, which happened several hours later and after a break in the action. This request is on the basis of **R. v. Chisholm**, a 1965 case of the Ontario Court of Appeal, which basically said that there would be no deterrence to a person committing one crime from making it a spree, if there were no greater consequence for making it a spree. For that reason the Crown has asked that I make sentences with regards to the Benedict and Quirk matter consecutive to the sentence for the aggravated assault and break and enter of Mr. Eustace.

Credit for pretrial detention

[45] The Crown has also asked the Court not to give Mr. Best the benefit of the time he spent in prison since October, by reason of the fact that he had a warrant outstanding against him that had not been exercised yet.

[46] On the other side, Mr. Fraser points the Court to a case of the Supreme Court of Canada called **R. v. Wust**, wherein the Supreme Court recognized that when you are awaiting sentence you are not getting the benefit of remission time and sometimes you do not have the benefit of some of the services and facilities that are available in a Federal penitentiary so it is considered to be harder time. Because it is harder time and you are not getting the remission time earned, you should get some of that back by getting a multiple of the actual number of months that you have spent waiting to be sentenced. The **Wust** case applied a multiple of two months of credit for every one month served. The case indicated this was not a rule, but just a suggestion - maybe a starting point to borrow the words from my earlier analysis.

[47] I have already indicated in describing the factors, that sentencing for a home invasion, which a break and enter and aggravated assault constitute, was specifically highlighted in the **Criminal Code** as being an aggravating factor that did not apply before the turn of this century.

Caselaw

[48] Finally, the Court has received from both counsel cases, and considered other decisions, that were helpful in deciding what is appropriate for carrying out the impossible task of fixing a sentence for what has happened. The Crown relies primarily on a 2000 case, **R. v. Harris,** which is the most recent decision of our Court of Appeal, in which the Chief Justice of the Province imposed a sentence, on a 19 year old offender with a record and who pleaded guilty, of fifteen years. It was a home invasion of two elderly people; it involved an 80 year old man being struck with his own cane and being left disabled; it destroyed their lives. They did not die. In imposing a sentence of 15 years, Chief Justice Glube said that the range for that kind of offence, a home invasion, was eight to ten years. I take it that she was, in effect, referring to what I called the starting point approach.

[49] Prior decisions of our Court of Appeal include **R. v. Fraser**, **R. v. Stephenson**, and **R. v. Foster**. In those cases the sentence was less than fifteen years; they were, in fact, six years; in all these cases, there were quite significant mitigating factors including pleas of guilty, in one case no record, and in another case a very favourable pre-sentence report.

[50] The Crown asked the Court to find similar aggravating factors in the case at bar as were found by the Court in the **Harris** case, and submitted that the only mitigating factor in favour of Mr. Best is his age. In the **Harris** case, even though the accused got a much higher sentence than what the Chief Justice said the norm should be, he had co-operated with the police by giving a statement when he was arrested, he had entered early pleas of guilty and he did not have a record for violence. I accept Mr. Fraser's observation that Mr. Best's record is for break and enters, and possession, and other things, but not for crimes of violence. In the **Harris** case, the accused had an unfortunate childhood and expressed remorse. I will not quote more from the case; you have all heard Crown counsel.

[51] The Crown also referred this Court to several Court of Appeal sentencing decisions, made in or after the year 2000 for home invasion-type offences, which sentences varied from nine and one-half to ten years, in one case eight years plus pre-trial custody of nineteen months, and in another case twelve years. This indicates that the decision of Chief Justice Glube in the **Harris** case is not inconsistent with what Courts of Appeal in other provinces have decided.

[52] The defence has brought to the Court's attention the case of **R. v. Bernier** of the British Columbia Court of Appeal. Counsel quoted sections of the decision that would suggest that ranges are not meant to be rules but only suggestions; he directed my attention to the very fair analysis made in the decision.

[53] Crown counsel, on the other hand, point out that **Bernier**, in their view, supports their case. In the **Bernier** decision a twenty-one year old youth was not present during a home invasion but apparently had organized and directed it and benefited from it. He went to trial, was found guilty, and the trial court imposed a fourteen year sentence. The Court of Appeal said that was unfair; they pointed out that a key consideration was his age and that he was an aboriginal offender who is given special status in some cases by the Court. In paragraph 107 of that decision the Court differentiated between being a party to the offence, that is, not being present but being involved, and being a principal. The Court in that case said:

> He was not found to be a principal but a party. A sentence of fourteen years or even more might well be appropriate for an offender with a long record who actually takes part in the break and enter, who uses a weapon to terrorize or assaults the occupants of the home and shows no remorse.

The Crown says, if anything, the circumstances of **Bernier** are not the circumstances here; if our circumstances were those described in paragraph 107, the British Columbia Court of Appeal's analysis would support, if not increase, the range, or the starting point, that the Nova Scotia Court of Appeal says I should be guided by.

Analysis

[54] I now apply those general principles to Mr. Best. I have given you the background so that you will understand what I think my obligation is. As I said earlier, it is not my job to judge the morals of Mr. Best. I do not accept that all young people are undisciplined or uneducated, or immoral or adrift, or that they are all dominated in their lifestyle by drugs, or that they are all into gratuitous violence. Some of those elements are present on the facts of this case.

[55] The first principle that I read was that the sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. I accept the Nova Scotia Court of Appeal decision in **R. v. Harris** that the starting point, in terms of the gravity of the offence, is a sentence of between eight and ten

years for crimes that constitute “home invasions”; by that I am including both the break and enter and the aggravated assault. As to the degree of responsibility, I accept, as indicated in my summary of events, that with regards to the offences involving Mr. Eustace and the offence involving the McNutt shed, that Mr. Best clearly was the planner and leader of a premeditated action. In addition, he was the one who took the metal pipe, he was the one who used it on Mr. Eustace and left him, as far as I am concerned, for dead. He bragged to his associates about about his feat.

[56] The second factor that I am required, by s. 718.2, to consider are aggravating and mitigating circumstances. The following is a list of what I think might have been mitigating circumstances for some accused but not for this accused: that he was a first time offender; that he had no record; that he had prior good character - clearly the pre-sentence report on Mr. Best says otherwise; that he plead guilty and had remorse; that he had a good employment record; that there was an indirect or collateral loss that he would suffer; that efforts after conviction to rehabilitate himself had taken place; that acts of reparation or compensation to the victims had taken place; that he had acted under provocation or duress ; that there had been a lengthy delay in the prosecution of the offence; or that there had been a long gap in

his criminal record, in other words, that it was dated; or that he came from a disadvantaged background such as one filled with abuse. I will stop right there and say this - the pre-sentence report says that Mr. Best had the benefit of a loving father, a loving mother, a loving grandmother, and clearly the support of his extended family. I have been somewhat mystified by how someone so young could be involved in so much crime when they do not come from an abusive background, which the pre-sentence report says is not an element of Mr. Best's circumstances. It has bothered me and I wish I understood. Another possible mitigating circumstance, not present in this case, is that the charges laid against him were new offences - like he was a test case for a new law - sometimes that can be a mitigating factor. Sometime it is that the accused had a mistaken belief that what he was doing was legal as opposed to illegal, even though a mistake in law is technically no excuse. None of those mitigating factors are present here.

[57] One mitigating factor that is present here is his age. The other one, raised by Mr. Fraser, is that his prior record is not one of violence. So there are two mitigating circumstances.

[58] What about the possible aggravating factors? The Crown in its brief had an extensive list of aggravating factors. I am not sure I agree with them all as I pointed that out during Mr. Fraser's oral representations. It probably took more time to tell him that I agreed with him than if he had made his point without my interruption, and I apologize Mr. Fraser for interrupting his flow at that point. I do accept the aggravating factors in the Crown's brief as applicable, except those addressed during Mr. Fraser's submissions.

[59] As an aggravating factor Mr. Best has a long record of contempt for the rights of others and for failing to understand that he is not an island unto himself. It is an aggravating factor that he used a weapon and committed a violent offence. Before my time or maybe when I and the counsel here were probably newborns, people went to jail as much for theft and for offences against property as they did for offences against people or violence. It is only during our generation that the justice system has recognized that stealing a pen, or stealing a car, is a lot less serious than beating a person, or spouse, or child, or mother, or neighbour. It is an aggravating factor that an act of violence was committed.

[60] I considered very seriously restricting Mr. Best's eligibility for parole, as requested by the Crown, for the following reason, which instead I will use as a factor setting the length of sentence. One of the things that we say in our country is that we are civilized, and civilized people protect the weak. In the animal kingdom the strong survive and the weak die off and that is considered good or natural; that is the way it is supposed to be in the animal kingdom. Our civilization says no; we protect the weak and the defenceless and the vulnerable. We protect them more than we protect those who can protect themselves. It is not proper for the strong to beat the weak. The victim in this case, in the most serious of the crimes, was Mr. James Eustace, a man who was mentally challenged. I believe that Mr. Best, when he called out to Mr. Eustace: "Come here you ..... retard", knew he was picking on the weak and defenceless. That is what would make our society, if we do not recognize this problem, no better than the animal kingdom. You do not pick on the weak. I almost used this factor to grant the Crown's request for a restriction on his eligibility for parole to fifty percent of his sentence. The mentally challenged, children, the elderly and the weak, require more protection than those who can go into the ring and fight with Adam Best and handle themselves. In my view that is one of the most aggravating factors with regards to these offences.

[61] There were multiple incidents; I am going to deal with that factor later.

[62] I accept, as an aggravating factor, that the break and enter and theft that took place at the McNutt shed, and the break and enter and aggravated assault that took place at Mr. Eustace's residence, were well planned and organized. Mr. Best lived part time in the Aldersville area with his girlfriend. He was working there in the woods. He was familiar with this very small community. He did not have a vehicle; he needed a vehicle, and he got one by involving Ms. Parker.

[63] The consequences on the victim are an aggravating factor. Fortunately Mr. Eustace lived. Fortunately he is recovering physically somewhat. People who have their house invaded sometimes are afraid to sleep at night or sleep alone at night, and it changes their life. For people who have been beaten as badly as Mr. Eustace was, one cannot say that they do not suffer for the rest of their life, any less than an abused wife or an abused child suffers.

[64] I have already indicated that it is not aggravating that he did not plead guilty; it is not aggravating that he did not show remorse; and it is not aggravating that he did not co-operate with the authorities. These are non-factors.

[65] The second principle that I described at the beginning was parity or uniformity, or a comparison of offences and offenders. I would like to review how I put the Pinch sentence into perspective with the sentence that I intend to impose this afternoon.

[66] Mr. Pinch pleaded guilty to the same four break and enters that the accused was convicted of. I, like the defence, am not sure why there is no mention of the break and enters in the Pinch sentencing decision. It causes me some concern. With regards to the aggravated assault, by far the most serious of the offences, I would like to say this - Mr. Pinch pleaded guilty to being a party to unlawfully causing bodily harm - not the same offence that the accused was found guilty of. The maximum sentence for the Pinch offence is ten years. The maximum sentence for the offence for aggravated assault is fourteen years. They are not comparable offences.

[67] Secondly, the role that Mr. Pinch and Mr. Best played in the offence were very different. Whether or not I accept that Mr. Pinch knew that Mr. Eustace was going to be there - and I do not see why he would have pleaded guilty to being a party to that event if he did not know, I accept completely that the violence and the leadership came from Mr. Best. That is a huge distinction respecting the most serious of the offences before the Court. Even though Mr. Pinch pleaded guilty to an offence for which the maximum sentence is only sixty-five percent or so of the maximum penalty for which Mr. Best can be sentenced, Mr. Justice Hall, in the Pinch sentencing, used a "starting point" of eight years. It was a lesser offence on paper, a lesser involvement, and his starting point was eight years, which is within the range that Chief Justice Glube set out, in **Harris**, for home invasions. He then reduced the sentence to six years because Pinch gave a statement - I think very shortly after his arrest, and he pleaded guilty. Those are important mitigating factors that are not present here. Mitigating factors reduce, they don't add to the sentence. So the Court started at eight years and reduced the sentence to six years and gave Pinch credit for the time served at the **Wust** level - twice the time that he actually served. That was the explanation given by Mr. Justice Hall. He accepted that Mr. Pinch had an involvement in the assault on Mr. Eustace or he wouldn't have accepted the guilty plea. He sentenced him based on his involvement.

[68] Mr. Justice Hall, in sentencing Mr. Pinch, noted that his pre-sentence report showed that he, unlike Mr. Best, did have a disadvantaged background. This was a mitigating factor, which is not present here. I think he noted, or the Crown has noted in this case, that Pinch's criminal record was shorter. I do not treat that as a distinguishing feature. He is a little bit older and that would offset the fact that he had fewer convictions. It does not, however, put Mr. Best in a better light. Having a record as extensive as his, from the age of fourteen, and being involved with drugs, as he says he was, from the age of eight, is not a mitigating factor.

[69] The principle of parity or uniformity requires me to compare the circumstances of the two accused with regards to the offences. Mr Pinch pleaded guilty to a much lesser offence and his involvement was substantially less. Mr. Pinch gave a statement early on, co-operated, pleaded guilty and had a disadvantaged background. None of those mitigating circumstances are present here. The only factor that is similar is age.

[70] What does this mean for Mr. Best?

[71] I take the starting point as being between eight and ten years, and because it says eight to ten, I am going to use nine. I then have the obligation to weigh the aggravating circumstances that would increase that figure against the mitigating circumstances that would decrease it. There is very little on the mitigating side. I have reviewed many aggravating factors; the one that almost caused me to restrict his access to parole was picking on someone who could not go into the ring with him. That shows a lack of any sense of responsibility. It shows an undisciplined person, involved in gratuitous violence. I add to the nine years, for the offence of aggravated assault, three years, to make the sentence twelve years.

[72] Because I do not accept the Crown's position as to his pretrial detention being under the existing warrant, I am prepared to give him the credit that **R. v. Wust** suggests is the norm of two months for every one month that he was incarcerated before now. He will have credit for the eighteen months served against the twelve year sentence.

[73] The Crown asked that the Court treat the offences as consecutive, or at least two sets of consecutives, by reason of the fact that someone should not be able to commit four offences or five offences, and, in effect, be sentenced only for one. I

accept that the last two break and enters took place in different circumstances, and not as part of one continuing offence. They happened within two-thirds of a day, but there was a clear break between the two sets of offences. The Crown has asked that the accused be sentenced to three years imprisonment for the break and enters of Benedict and Quirk, which the Crown says is the normal sentence. That may be so, but in my view, when I apply the third and fourth principles that I spoke about earlier, restraint and totality, the result, in my opinion, would be an excessive sentence. I do not accept that request. I am prepared to add one year consecutive to the first three counts. For those - the Benedict and Quirk break-ins, he will receive one year each; these will be concurrent with each other, but consecutive to the aggravated assault, and Eustace and MacNutt break-ins.

[74] The sentence for the break and enter of Mr. Eustace's house will be three years but it will be concurrent with the aggravated assault on Mr. Eustace. The sentence for the break and enter of the McNutt shed will be one year. It will be concurrent with the aggravated assault on Mr. Eustace.

[75] The total sentence is thirteen years, less eighteen months credit for pre-sentence detention.

[76] I am not prepared to grant the Crown's request, as stated earlier, for a restriction on Mr. Best's eligibility for parole. I have taken the aggravating circumstances into account in the sentence itself. The parole system is intended to encourage people, who enter the institutions that Mr. Best is to enter, to rehabilitate themselves. If I take away the incentive for someone nineteen years old to, first, own up to his responsibilities and, secondly, to get on the path to changing his life around, then in my view I destroy part of the purpose for going there. I am not prepared to restrict his eligibility for parole. Rehabilitation starts with the admission, and goes from there. If he does not own up to his deeds, he is going to have a hard time. If he does, I do not want anything to stand in the way of this nineteen year old man’s rehabilitation. I do not accept that he is a boy. He has a long history of survival, as he sees it, without regard for the rights of others; he is not an innocent youth; he passed that stage a long time ago. That was a factor in the determination of the sentence.

[77] The Crown requests, but they and defence have not made oral representations respecting, a DNA order. I find under all of the circumstances that

an order should be issued. Mr. Best is someone who has not yet owned up to his acts and situation.

[78] Respecting a firearms prohibition, I am not sure what the length of time can be, but I would make it for as long as I am allowed. I have not issued a prohibition yet, but my sense is that he should not own firearms, period. That is my sense from the pre-sentence report. If there is a possibility of changing that through reformation and rehabilitation, that may be an additional goal or incentive to him; but, at this moment, the pre-sentence report is not encouraging; it appears that he has no cause to blame his family for anything. I know someone can explain why people act the way they do, but I do not know why in this case; I just do not understand it; it doesn't make sense. It makes sense when you hear about abusive situations or neglect. The only thing in the pre-sentence report that indicated he had any conflicts, was a reference to a conflict with his mother when she tried to control his conduct and he did not accept it; that may explain why he is undisciplined. I feel so bad about that - for him as well as for those around him and those he comes in contact with.

[79] I am not sure if there is anything else I am suppose to be doing at this point. The DNA order and the Firearms order have been handed to me. Have you seen these Mr. Fraser? I would like you to take a look at them. I am presuming they are in the standard form but I would like you to review them. Is there a requirement that I sign them right this minute?

Mr. Parker: The firearms prohibition is not urgent, however, the DNA would be.

The Court: Well, why don't you take a look at the DNA order right now, Mr. Fraser. We can take a break for five minutes so that you can take a look at the DNA one at least.

Mr. Fraser: There is no problem with the DNA one.

The Court: Okay, well I am prepared to sign that one then. If the other one doesn't have to be done right now I would rather you take a look at it and make sure that there is nothing that - I take it that it is a standard form - it does not contain discretionary paragraphs or sentences it - that it is a standard form. Are you satisfied with that Mr. Fraser.

Mr. Fraser: Yes.

The Court: Then I will sign it.

J.