SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. D.P.*, 2014 NSSC 29

Date: 20140227
Docket: CRH No. 419290A
Registry: Halifax

Between:

D.P.
(A young person within the meaning of the *Youth Criminal Justice Act* (Canada))

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 110(1) and s. 111(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1

Judge: The Honourable Justice Joshua M. Arnold

Heard: December 4, 2013, in Halifax, Nova Scotia

Counsel: Rickcola Brinton, for the Appellant
John Nisbett, for the Defendant

By the Court:

Overview

[1] On March 13, 2013, the appellant, "D.P.", was charged with alcohol related driving offences.

[2] On June 6, 2013, D.P., pled guilty pursuant to section 253(1)(b) of the **Criminal Code**, R.S.C. 1985, c. C-46. A pre-sentence report was prepared and on July 5, 2013, D.P. proceeded to sentencing. The Crown requested 12 months' probation and a 12-month driving prohibition. Counsel for D.P. requested a conditional discharge with nine months' probation and no driving prohibition. The sentencing judge imposed a disposition of 12 months' probation with conditions along with a 12-month driving prohibition.

[3] D.P. appeals that disposition.

Facts

[4] On March 13, 2012, a motor vehicle was stopped by the police at approximately 2:00 a.m. The police had observed this vehicle speeding on a city street in downtown Dartmouth. The rear driver's side tail light of the vehicle was not working. The police followed the vehicle and observed it crossing the center line twice. The police pulled the vehicle over and commenced a dialogue with the driver, D.P. In addition to D.P., there were three teenaged passengers in the vehicle. The police immediately noted the odor of alcohol emanating from the vehicle and then noticed that D.P.'s eyes were glossy and that his speech was slightly slurred.

[5] D.P. was identified through his driver's license as a newly licensed driver and therefore was prohibited from operating a motor vehicle between the hours of midnight and 5:00 a.m. Additionally, as a newly licensed driver there is zero tolerance for the consumption of alcohol.

[6] The police presented D.P. with the roadside screening device. D.P. failed the roadside test. The police conducted a vehicle search and during that time located two bottles of Captain Morgan Spiced Rum that were partly empty. The

police also seized what appeared to be marijuana and paraphernalia for using marijuana.

[7] D.P. was arrested, provided his right to counsel and eventually gave two samples of his breath at the Lower Sackville RCMP detachment. At 3:35 a.m. D.P.'s first reading was 120 mgs of alcohol per 100 mL of blood; at 3:55 a.m., D.P.'s second reading was 100 mgs of alcohol per 100 mL of blood.

Relevant Legislation

[8] Section 3 of the **Youth Criminal Justice Act**, S.C. 2002, c.1 ("**YCJA**") states:

> 3. (1) The following principles apply in this Act:
>
> (a) the youth criminal justice system is intended to protect the public by
> (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
> (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
> (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
>
> (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
> (i) rehabilitation and reintegration,
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
> (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
> (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
> (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;
>
> (c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
> (i) reinforce respect for societal values,
> (ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) special considerations apply in respect of proceedings against young persons and, in particular,
(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

[9] Section 38 of the **YCJA** states:

38. (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

(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;

(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
(e) subject to paragraph (c), the sentence must
(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and
(f) subject to paragraph (c), the sentence may have the following objectives:
(i) to denounce unlawful conduct, and
(ii) to deter the young person from committing offences.

(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.

[10] Section 42(1) and (2) of the **YCJA** notes in part:

42. (1) A youth justice court shall, before imposing a youth sentence, consider any recommendations submitted under section 41, any pre-sentence report, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person, and any other relevant information before the court.

(2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the Criminal Code, the court shall impose a sanction set out in paragraph (q) or subparagraph (r)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:

…

(c) by order direct that the young person be discharged on any conditions that the court considers appropriate and may require the young person to report to and be supervised by the provincial director;

…

(k) place the young person on probation in accordance with sections 55 and 56 (conditions and other matters related to probation orders) for a specified period not exceeding two years;

…

[11] Section 55 of the **YCJA** notes:

55. (1) The youth justice court shall prescribe, as conditions of an order made under paragraph 42(2) (k) or (l), that the young person
(a) keep the peace and be of good behaviour; and
(b) appear before the youth justice court when required by the court to do so.

(2) A youth justice court may prescribe, as conditions of an order made under paragraph 42(2) (k) or (l), that a young person do one or more of the following that the youth justice court considers appropriate in the circumstances:
(a) report to and be supervised by the provincial director or a person designated by the youth justice court;
(b) notify the clerk of the youth justice court, the provincial director or the youth worker assigned to the case of any change of address or any change in the young person's place of employment, education or training;
(c) remain within the territorial jurisdiction of one or more courts named in the order;
(d) make reasonable efforts to obtain and maintain suitable employment;

(e) attend school or any other place of learning, training or recreation that is appropriate, if the youth justice court is satisfied that a suitable program for the young person is available there;
(f) reside with a parent, or any other adult that the youth justice court considers appropriate, who is willing to provide for the care and maintenance of the young person;
(g) reside at a place that the provincial director may specify;
(h) comply with any other conditions set out in the order that the youth justice court considers appropriate, including conditions for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences; and
(i) not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as authorized by the order.

[12] Section 119(2) and (9) of the **YCJA** note in part:

(2) The period of access referred to in subsection (1) is

(a) if an extrajudicial sanction is used to deal with the young person, the period ending two years after the young person consents to be subject to the sanction in accordance with paragraph 10(2)(c);

(b) if the young person is acquitted of the offence otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, the period ending two months after the expiry of the time allowed for the taking of an appeal or, if an appeal is taken, the period ending three months after all proceedings in respect of the appeal have been completed;

(c) if the charge against the young person is dismissed for any reason other than acquittal, the charge is withdrawn, or the young person is found guilty of the offence and a reprimand is given, the period ending two months after the dismissal, withdrawal, or finding of guilt;

(d) if the charge against the young person is stayed, with no proceedings being taken against the young person for a period of one year, at the end of that period;

(e) if the young person is found guilty of the offence and the youth sentence is an absolute discharge, the period ending one year after the young person is found guilty;

(f) if the young person is found guilty of the offence and the youth sentence is a conditional discharge, the period ending three years after the young person is found guilty;

(g) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is a summary conviction offence, the period ending three years after the youth sentence imposed in respect of the offence has been completed;

(h) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is an indictable offence, the period ending five years after the youth sentence imposed in respect of the offence has been completed;

(i) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an offence punishable on summary conviction committed when he or she was a young person, the latest of

(i) the period calculated in accordance with paragraph (g) or (h), as the case may be, and

(ii) the period ending three years after the youth sentence imposed for that offence has been completed; and

(j) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an indictable offence committed when he or she was a young person, the period ending five years after the sentence imposed for that indictable offence has been completed.

…

(9) If, during the period of access to a record under any of paragraphs (2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult,

(a) section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;

(b) this Part no longer applies to the record and the record shall be dealt with as a record of an adult; and

(c) for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

Standard of Review

[13] In **R. v. Adams,** [2010] NSJ No. 275, 2010 NSCA 42, Bateman J.A. outlined the standard of review in a sentencing appeal when she stated at paras. 15 – 16:

> [15] In fixing sentence a judge is exercising a statutorily authorized discretion under s.718.3 (1) of the **Criminal Code**. As with other discretionary decisions, the standard of review on appeal is a deferential one. This standard has been articulated in a number of ways. As expressed by Macdonald, J.A. of this Court in **R. v. Cormier** (1975), 9 N.S.R. (2d) 687 at p. 694:
>
> > 20 Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.
>
> [16] In **R. v. M.(C.A.),** [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), Lamer, C.J.C., for a unanimous Court, said:
>
> > [90] Put simply, 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 imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code ... (Underlining in original)

Issues

[14] In his Factum, D.P. lists the issues as:

> 1. The Youth Court Judge failed to interpret and apply the sentencing provisions under section 3 and section 38 of the **YCJA**;
>
> 2. That the sentence imposed does not conform to the principles of sentencing under the **YCJA**;

[15] I believe the issues may be more simply stated as:

1. Did the sentencing judge err in failing to impose a conditional discharge instead of probation?

2. Was the driving prohibition necessary and, if so, was the length of the driving prohibition excessive?

Issue #1 - Did the sentencing judge err in failing to impose a conditional discharge instead of probation?

[16] D.P. argues that the sentencing judge did not consider the difference between probation and a conditional discharge as defined in s. 42(2)(c) of the **YCJA** when she rejected D.P.'s request for a conditional discharge. In coming to her decision to impose probation instead of a conditional discharge the sentencing judge stated:

> All right. D.P., you've pled guilty to a drinking and driving matter. The lower reading was 100 so certainly lower than we often see but nevertheless, you know, above the legal limit. It was after midnight, as I recall, and it was dangerous. You had other individuals in the vehicle. Liquor was found in the vehicle, the open bottles of liquor and that's all very aggravating.
>
> What has to be impressed, I think, upon maybe particularly youthful offenders with drinking and driving matters, that drinking and driving is a very serious criminal matter. It brings a lot of people into court that would never otherwise come into a criminal court. They get caught drinking and driving. Otherwise they are law-abiding citizens, hard-working like you are. You've got a great future ahead of you but I don't know that you've really taken a … how serious… I'm not sure how seriously you are taking the issue of alcohol and substance abuse in your life because you are also saying you smoke marijuana a lot and I know it's taken quite … I don't know like a regular thing sometimes I think but marijuana is also a bit of a dangerous drug and in these days a lot stronger than it was, say, 20 odd years ago or in the hippy era of the '60s and things of that nature. It's becoming very, very potent and so you are combining that perhaps with alcohol and you could be setting yourself up for some serious problems in your future. It could affect your career. It could cause you to drink and drive again and I, not so long ago, did sentence … I had to sentence a young fellow to Federal custody because he was in a car accident with friends. He was drinking. His friend got killed, and that's a horrible … probably every judge has had to face that now and again and it's just a very unfortunate set of circumstances

> to say the least and that's something that this young guy is going to live with for the rest of his life.
>
> So you really took a terrible risk and I appreciate your comments of your lawyer. You do have a lot going for you but because of the very serious nature of drinking and driving, I'm going to sentence you, along with the recommendations provided by the Crown. I think it's important under the circumstances.
>
> So you will be placed on a period of Probation for a year. You must notify the Youth Justice Court or your youth worker, in advance, of any change of address, employment or education. You will not take, use or possess alcohol beverages except when legally prescribed by your doctor or any other drug or controlled substance. That's going to be another wake-up call for you. Attend for such assessment and counselling as directed, including but not limited to, mental health assessment, substance abuse assessment, anger management assessment and to participate and co-operate with that assessment, counselling or programming.

[17] At the sentencing hearing the Crown did not argue against a conditional discharge in their submissions to the sentencing judge in D.P.'s case. Instead, the Crown simply requested probation and did not address the issue of a conditional discharge at all. On appeal, the Crown argues against the imposition of a conditional discharge and argues that probation was the appropriate disposition.

[18] At the sentencing hearing, D.P. requested a conditional discharge but did not outline for the Court the difference between a conditional discharge under the **Criminal Code** for an adult and a conditional discharge under the **YCJA** for D.P. Nor did D.P. refer to the difference between a conditional discharge under the **YCJA** and probation.

[19] In **R. v. P.J.S.,** 2008 NSCA 111, Roscoe J.A., speaking for the unanimous court, clarified the unique nature of a conditional discharge as defined by s.42(2)(c) **YCJA** and the difference between a **YCJA** conditional discharge and probation for a youth:

> [15] The main difference between a probation order and a conditional discharge appears to be the length of time that the youth's record is accessible pursuant to s. 119. The **YCJA** provides that the record of a youth sentenced to a conditional discharge is accessible for up to three years after the finding of guilt pursuant to s. 119(2)(f). Section 119(2)(g) however indicates that the record of a youth sentenced to probation is accessible for up to three years after the sentence

is completed. In this case, there is a difference of nine months between the date of the finding of guilt and the date of the completion of sentence. Another difference is that a further youth or adult conviction is immaterial to the length of the period of access in relation to a conditional discharge. However access to a record of a youth sentenced to a probation order is extended if there are further convictions during the period of access (s. 119(2)(i), 119(2)(j)). Of more importance is s. 119(9) which in effect converts a youth record to an adult record if an adult offence is committed during the period of access and the original sentence was not a discharge.

[16] Other than the record, and the period of access to it, the practical differences between a conditional discharge and probation are not that significant, as described by Duncan, J. in **R. v. R.P.,** *supra*,:

> 14 If I am correct in the above conclusion that the discharge test will almost always be met (particularly in the case of conditional discharges), then candidates for non-custodial sanctions such as probation will usually be eligible for a discharge as well. The question then arises as to whether youth sentencing principles provide any guidance to assist the youth court in choosing between a discharge and other non-custodial disposition. Those sentencing principles are set out in section 38 and in turn are to be read in the context of the general principles of youth justice contained in section 3 of the Act. To roughly summarize, those principles call for sentences that are meaningful (38(1); 3(1)(a)(iii)) and proportionate to the offence and the degree of the offender's responsibility (38(2)(c); 38(2)(e)(iii); 3(1)(b)(ii)); that hold the youth accountable (38(1); 3(2) (C)); that repair harm done to others and the community: (38(2)(e)(iii); 3(1)(c)(ii)) that promote the offender's rehabilitation (38(2)(e)(ii); (3(1)(b)(i)) and also protect the public (38(1)).
>
> 15 Dealing with the last point first - rehabilitation and public protection - there is a striking similarity between probation (42(2)(k)) and a discharge on conditions (42(2) (C)). In both cases the offender is out of custody, is under the supervision of the court, is subject to and bound to comply with conditions and is liable to prosecution for breach. Any differences are largely, if not completely, technical. It seems to me that whatever protective, restorative or rehabilitative value is possessed by the one sanction is also shared by the other and there is no distinction between the two sanctions in their ability to serve these principles of youth sentencing. The sentencing court can get where it wants to go with either.
>
> 16 However there are also the principles that a youth sentence be meaningful, proportional and hold the youth accountable. There is a perception that a youth conditional discharge is a significantly more

> lenient disposition than youth probation -- and therefore it might be argued that, in many cases, a discharge would not give effect to these principles. The Crown's frequent opposition to discharges, I think, is based on this perception. The perception of leniency may be fostered by the structure of section 42 of the Act that suggests a hierarchy of sanctions with conditional discharges at the lower end. But I think the perception is mainly caused by judges and lawyers habitually - and wrongly - thinking in adult terms when dealing with youth matters. As discussed above, the "big break" of no criminal record that is the central feature of an adult discharge is not part of the youth scheme. The discharge advantage to an offending youth is miniscule. In my view, it is incorrect to consider that a youth conditional discharge under 42(2) (C) is necessarily a more lenient disposition than a youth probation order under 42(2)(K). Rather, it is the length of the term and the conditions that are imposed that determine the strictness/leniency of the sanction and not the vehicle, - probation or discharge - that is used. The leniency of a conditional discharge per se as compared to probation is largely misperceived and over-stated in youth matters. Properly viewed, there is no reason why the principles of proportionality and accountability cannot be achieved as effectively through a discharge as probation.
>
> 17 In summary, it is my view that there is little to chose between youth probation and discharge on conditions. ...

[20] The pre-sentence report was available to all parties for sentencing and indicates that at the time of sentencing D.P.: had never previously been involved with the criminal justice system; was a high school student with plans to take engineering at Dalhousie University; was regularly employed on a part-time basis; and had been active in athletics.

[21] Additionally, the pre-sentence report explained that D.P.'s parents were divorced and his mother had moved to another country. As a result, D.P. had nominal, if any, contact with his mother over the past number of years. D.P.'s father struggled with depression and alcohol abuse. D.P. began drinking alcohol under age, exhibited some anger issues at home and was a regular user of marijuana. Clearly D.P. is a young person in need of counseling and direction.

[22] As the Nova Scotia Court of Appeal pointed out in **P.J.S.**, *supra,* the main difference between a conditional discharge and probation under the **YCJA** is the additional time for which D.P.'s youth record can be accessed along with the possibility of the youth court record being converted to an adult record in certain

specific circumstances. According to **P.J.S.**, *supra*, other than the period of access to D.P.'s record and related possible consequences, the practical differences between a conditional discharge and probation are insignificant. Therefore, the length of time D.P.'s record can be accessed is a relevant and significant consideration. As noted above, our Court of Appeal adopted the approach taken by the Ontario Court in **R. v. R.P.,** 2004 ONCJ 190, where Duncan J. stated at para. 16:

> 16 However there are also the principles that a youth sentence be meaningful, proportional and hold the youth accountable. There is a perception that a youth conditional discharge is a significantly more lenient disposition than youth probation -- and therefore it might be argued that, in many cases, a discharge would not give effect to these principles. The Crown's frequent opposition to discharges, I think, is based on this perception. The perception of leniency may be fostered by the structure of section 42 of the Act that suggests a hierarchy of sanctions with conditional discharges at the lower end. But I think the perception is mainly caused by judges and lawyers habitually - and wrongly - thinking in adult terms when dealing with youth matters. As discussed above, the "big break" of no criminal record that is the central feature of an adult discharge is not part of the youth scheme. The discharge advantage to an offending youth is miniscule. In my view, it is incorrect to consider that a youth conditional discharge under 42(2)(C) is necessarily a more lenient disposition than a youth probation order under 42(2)(K). Rather, it is the length of the term and the conditions that are imposed that determine the strictness/leniency of the sanction and not the vehicle, - probation or discharge - that is used. The leniency of a conditional discharge per se as compared to probation is largely misperceived and over-stated in youth matters. Properly viewed, there is no reason why the principles of proportionality and accountability cannot be achieved as effectively through a discharge as probation.

[23] In keeping with this philosophy, if the length of probation is the same for D.P. under the terms of a conditional discharge as it is under the terms of probation set by the sentencing judge, then the principles of proportionality and accountability will be similarly achieved based on the facts and circumstances of this specific case.

General and Specific Deterrence

[24] Also included in D.P.'s argument are allegations that the sentencing judge: did not consider the reduced level of maturity in young persons as delineated in the **YCJA**; did not turn her mind to the purpose and principles of sentencing as set out

in the **YCJA**; over emphasized general and specific deterrence and failed to consider clear direction of Parliament to impose the least restrictive sentence that might be capable of achieving the purpose and principles of sentencing as described in the **YCJA**.

[25] The sentencing judge referred to the need to impress on youthful offenders that drinking and driving is a serious criminal matter (emphasizing the need for general deterrence) and the concern that using alcohol and marijuana "could cause you (D.P.) to drink and drive again" (emphasizing the need for specific deterrence). Deterrence is certainly a significant factor when it comes to sentencing an individual for alcohol related driving offences. However, the sentencing judge also stated:

> What has to be impressed, I think, upon maybe particularly youthful offenders with drinking and driving matters, that drinking and driving is a very serious criminal matter. It brings a lot of people into court that would never otherwise come into a criminal court. They get caught drinking and driving. Otherwise they are law-abiding citizens, hard-working like you are…
>
> …
>
> …I, not so long ago, did sentence … I had to sentence a young fellow to Federal custody because he was in a car accident with friends. He was drinking. His friend got killed, and that's a horrible … probably every judge has had to face that now and again and it's just a very unfortunate set of circumstances to say the least and that's something that this young guy is going to live with for the rest of his life.

[26] The sentencing judge made reference to having recently sentenced an individual to a Federal Penitentiary for impaired driving causing death. Since a Federal Penitentiary was involved she likely was not dealing with a youth (like D.P.) but instead presumably was dealing with an adult. Of course, the sentencing judge in D.P.'s case may have just been sending a warning to D.P. as to the potential consequences of drinking and driving, especially with passengers in a vehicle. However, almost immediately after the sentencing judge refers to that adult sentencing, she states:

> So you really took a terrible risk and I appreciate your comments of your lawyer. You do have a lot going for you but because of the very serious nature of drinking and driving, I'm going to sentence you, along with the recommendations provided by the Crown. I think it's important under the circumstances.

[27] Therefore, the sentencing judge referred to what was likely an adult sentencing (where death occurred) and where quite properly deterrence would have been the primary consideration. In sentencing D.P. she made other comments about the need for deterrence immediately prior to and following her comments about that adult sentencing. To have made such references during D.P.'s **YCJA** sentencing (where there was no accident or injury) gives rise to the further inference that the sentencing judge may have overemphasized the need for general and specific deterrence in D.P.'s case.

Fit and Proper Sentence

[28] According to the Nova Scotia Court of Appeal in **P.J.S.,** *supra*, the length of accessibility to the youth record is a significant consideration when sentencing a youth. In D.P.'s case a 12 month period of probation would equal an extra year of accessibility to his record.

[29] Considering Justice Bateman's comments in **Adams**, *supra*, it therefore appears that the sentencing judge failed to consider the following relevant factors:

a) the requirement under the **YCJA** to impose the least restrictive sanction available that is capable of achieving the guiding principles of sentencing as described in the **YCJA**;

b) the need to emphasize rehabilitation and reintegration as noted in the **YCJA**;

c) the reduced maturity of D.P. as a young person as noted in the **YCJA**;

d) the fact that a conditional discharge under the **YCJA** is vastly different than a conditional discharge for an adult;

e) the impact that a longer period of record accessibility may have on a young person who is about to enter university and who is previously of good character;

[30] It also appears that the sentencing judge overemphasized the need for general and specific deterrence, keeping in mind the directions of Parliament as found in the **YCJA** and taking into account D.P.'s personal circumstances.

[31] Considering the direction found in **YCJA**, combined with the facts of this case, D.P.'s background and lack of prior involvement in the criminal justice system and the direction of the Nova Scotia Court of Appeal in **P.J.S.**, *supra*, a conditional discharge as found in s.42(2)(c) of the **YCJA**, with the conditions imposed by the sentencing judge, would have been the fit and proper disposition for D.P.

Issue #2 - Was the driving prohibition necessary and, if so, was the length of the driving prohibition excessive?

[32] In relation to the imposition of a 12-month driving prohibition, the sentencing judge stated:

> Now, with respect to the prohibition, a driving prohibition, I did outline the aggravating factors here. There was alcohol in the car. It was after midnight. You were not even supposed to be driving anyway. You were a … what do you call it, a young … the young drivers, the …
>
> **Mr. Nisbett:** Newly licensed.
>
> **The Court**: Newly licensed drivers, thank you, that's what it is, and in some ways I think the reason that I'm going to impose a driving prohibition for the year is that ... I think that's really required because of your rehabilitation because you need that time to attend for the assessment and counseling as I said at the outset, about re-looking to the issue of whether or not you've got problems with alcohol and drug abuse. You probably think you don't and I ... you might not. I'm not sure but just in case you do, I hope that it would be very much to your benefit that you proceed in this manner and that you really take a lot from such counseling and from that moment on, once this year is over, that you really will never be at risk again of drinking and driving. So it's... I am finding that it would be to your benefit.

[33] The sentencing judge was clear as to why she imposed a driving prohibition and why the driving prohibition was to last 12 months. D.P. has not demonstrated that this aspect of the sentence was unfit in any way.

Disposition

[34] For these reasons I would allow the appeal in part, set aside the probation order and substitute an order that D.P. be subject to a conditional discharge for a

period of 12 months effective July 5, 2013, the date of the sentence imposed by the Youth Court Judge. The terms and conditions of that conditional discharge should mirror the terms of probation imposed by the sentencing judge.

[35] The appeal regarding the imposition and length of the driving prohibition is denied.

Arnold, J.