
CANADA / JUDGMENT

R. v. A.D.

2011 BCSC 501

COURT

Supreme Court of British Columbia

DECIDED

20 April 2011

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2011 BCSC 501 R. v. A.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A.D.,

2011 BCSC 501

Date: 20110420

Docket: X073697

Registry: New Westminster

Regina

v.

A.D. and B.G.

Corrected Judgment: The text of the judgment was corrected at paragraphs 56, 57 and 59 on April 26, 2011

Before: The Honourable Madam Justice Stromberg-Stein

Oral Reasons for Sentence

Counsel for the Crown:

G. Baragar

K. M. McIntosh

Counsel for the Defendant, A.D.:

S. S. Nozick

Counsel for the Defendant, B.G.:

C. D. Sicotte

P. Cote

Place and Date of Hearing:

New Westminster, B.C.

April 4 and 5, 2011

Place and Date of Sentencing:

New Westminster, B.C.

April 20, 2011

- [1] On May 28, 2009, a group of teens met to drink and socialize at one of their usual hangouts, the Cloverdale Amphitheatre at 176th Street and 64th Avenue in Surrey, and across the street in the WestWinds Community Church parking lot. B.G. and A.D. were part of this group, along with Joe Andor. An older group, including Matthew Skura and Ryan Opdendries, happened to meet at the Amphitheatre as well.
- [2] A chance encounter between the two groups led to a confrontation, when Joe Andor overheard Matthew Skura yelling at his girlfriend and told him that was no way to treat a girl. Matthew Skura and Ryan Opdendries were both intoxicated and took offence at Joe Andor's comments. Words were exchanged and Ryan Opdendries pushed Joe Andor. Joe Andor crossed the street to the church yelling at his friends that the older group had "beef." A few minutes later the older group crossed the street. There was a confrontation in the church parking lot between a number of teens and Ryan Opdendries.
- [3] Within the space of 8 to 15 seconds, B.G. landed one punch to the head of Ryan Opdendries. The result was instant unconsciousness. B.G. landed another punch to the head of 21 year old Matthew Skura. Knocked to the ground by B.G.'s punch, he was stomped once in the head by A.D. Mr. Skura died from a head injury. The forensic pathologist was unable to say which blow caused his death.
- [4] Although the risk of bodily harm was foreseeable, the tragic consequences of this incident were far outside the realm of what A.D. or B.G., or anyone else present, expected. B.G. and A.D. were found guilty of manslaughter in the death of Matthew Skura. B.G. was found guilty of assault causing bodily harm of Ryan Opdendries.
- [5] My Reasons for Judgment leading to the conviction of A.D. and B.G. for manslaughter and of B.G. for assault causing bodily harm are found at 2010 BCSC 1780.

Position of the Crown

- [6] The Crown is not seeking an adult sentence for either B.G. or A.D. The Crown asks the Court to find manslaughter and assault causing bodily harm are serious violent offences. The Crown seeks the maximum Youth Criminal Justice Act, S.C. 2002, c.1, [YCJA] sentence for manslaughter: a three year custody and supervision order pursuant to s. 42(2)(o) of the YCJA. The Crown also submits, as a consequence of the assault causing bodily harm offence, B.G. should be sentenced to a concurrent three months. The Crown further submits the young persons should be credited for pre-sentence custody time at a ratio of 1:1. The Crown submits B.G. should receive no credit for time spent under strict bail conditions.
- [7] Therefore, it is the position of the Crown A.D. serve an additional 16 months on the maximum 36 month sentence, and B.G. should serve 28 months. The Crown submits two-thirds of the sentence should be served in custody, and the remaining one-third under supervision. The Crown seeks ancillary orders for DNA samples and firearms prohibitions.

Position of A.D.

- [8] In the circumstances of this case, considering the moral blameworthiness of A.D., the mitigating and aggravating factors, his progress in custody, his age at the time of the offence and his sincere remorse, counsel for A.D. submits an appropriate sentence is time served, plus a period of community supervision. Under the YCJA, this can be accomplished with a three year custody and supervision order, crediting A.D. with 30 months of custody, with an additional six month supervision order.

Position of B.G.

- [9] In the circumstances of this case, considering the moral blameworthiness of B.G., the mitigating and aggravating factors, his unblemished record while on bail, his age at the time of the offence and his sincere remorse, counsel for B.G. submits a sentence of time served plus a period of community supervision is appropriate. Under the YCJA, this can be accomplished with a three year custody and supervision order, crediting B.G. with one to two years of custody; or a shorter custody and supervision order, crediting B.G. with less time served; or a shorter custody and supervision order followed by a period of probation.

Sentencing Principles

- [10] Most of the relevant principles set out in s. 3, the Declaration of Principle, are repeated or addressed in s. 38, which sets out the purpose and principles of sentencing. Subsection 38(2) of the Youth Criminal Justice Act provides that 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 s. 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, with the focus on
 - the degree of participation of the young person in the commission of the offence;
 - the harm done to victims and whether it was intentional or reasonably foreseeable.
 - (d) All available sanctions other than custody that are reasonable in the circumstances should be considered for all offenders.
 - (e) The sentence must
 - (i) be the least restrictive sentence that is capable of achieving the purpose and principles of sentencing;
 - (ii) be the one that is most likely to rehabilitate and reintegrate the young person into society; and
 - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to the victims and the community.
- [11] The principles in ss. 3(1)(b)(ii) and (c) deal with matters not explicitly addressed in s. 38.
- [12] Section 3(1)(b)(ii) recognizes the limited accountability of young persons in comparison to adults, in order to reflect their reduced maturity, and provides that the youth justice system must emphasize "fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity."
- [13] Section 3(1)(c), as relevant, provides, 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 [family and] the community ... in the young person's rehabilitation and reintegration.
- [14] Factors relevant in determining a fit sentence include:
- § Time spent in detention.
 - § The degree of participation by the young person in the commission of the offence.

§ The harm done to victims and whether it was intentionally or reasonably foreseeable.

§ Previous findings of guilt of the young person.

§ Any reparation made by the young person to the victim or the community.

§ Any other aggravating or mitigating circumstances.

[15] An overriding factor in the YCJA sentencing regime is that all reasonable non-custodial sanctions must be considered, consistent with the principles in s. 38, before consideration of a custodial sentence.

[16] In order for the court to impose a custodial sentence, at least one of the following four criteria, as set out under s. 39, must be satisfied. One of the criteria is that the young person committed a violent offence. There is no dispute that A.D. and B.G. committed a violent offence.

[17] Even though one of the criteria is met, the court may not impose a custodial sentence unless the court has considered all alternatives to custody and determined there is no reasonable alternative that is in accordance with the purpose and principles of sentencing.

Victim Impact

[18] Victim impact statements were read in court by Matthew Skura's parents. There is no sentence that can assuage the loss of their son. No sentence will bring back Matthew Skura, or relieve the terrible suffering of his family. It is clear these tragic circumstances have deeply affected the family and friends of Matthew Skura.

Circumstances of A.D.

[19] A.D. was very young when his mother fled Sudan. He has been exposed to the impact of the trauma she experienced and her untreated PTSD.

[20] The Crown expresses concern that A.D.'s mother has demonstrated a reluctance to cooperate with authorities in the past and that A.D. has little structure or support in the home he will be released to from custody. A.D. had a substance abuse problem his mother was unaware of. He demonstrated an early pattern of behavioural problems and violence, which got progressively worse in high school, where there is evidence of suspensions, bullying, disobedience, truancy and non compliance with, and disrespect of, school conditions. He demonstrated a strong sense of persecution and anger, making accusations of racism, and feeling targeted, blamed and treated unfairly in the school system. Under that layer, it was felt he was a nice kid. Approximately six months before this offence A.D. was showing benefit from an intensive supervised probation program, and had developed a good relationship with his supervisor.

- [21] While at Burnaby Youth Custody Centre [BYCC] on this charge, he accumulated 11 incident reports for refusing to attend school, threatening a supervisor, throwing food, refusing to follow staff commands, and possession of inappropriate pictures and contraband. Yet, he is described as being polite and well behaved with minimal acting out for his age and length of time in custody, consistently being at or near Level 4, which is the highest level in the token economy system. He participated in the Action Program, anger management counseling and spiritual counseling. He completed forklift and WHMIS training. A.D. completed high school at BYCC receiving As and Bs. One of his goals is to go to university.
- [22] His pattern of behaviour in the past reveals he is out of control every few months. He is described as a follower who is easily influenced by his peers but can do well if his peers are positive. He is determined, once released, to stay away from negative peers. He has been diagnosed with Oppositional Defiance Disorder, and poses a significant risk to re-offend if he hangs out with negatively influencing peers.
- [23] The Crown expresses concern at his lack of insight and minimization of his involvement in the offence. The Crown does not agree with Dr. Janke's opinion A.D. will gain no further benefit from incarceration and has achieved the maximum benefit from all programs in the youth criminal justice system. The Crown asserts there are other factors at play, such as meaningful consequences, promoting responsibility, and acknowledging the harm to the victim and the community, that need be considered.
- [24] I agree with A.D.'s counsel that the A.D. of today is not the A.D. of two years ago. He has grown up, matured, and expresses a desire to move forward. He has flourished in custody. He cooperated in, and completed, all the programs available to him.

Mitigating Factors

- [25] At the time of the offence A.D. was 15; he is now 17 and will be 18 in August. The offence occurred over two years ago, and he is genuinely remorseful of his involvement in it. He provided an apology letter and apologized in court for his actions. If he could, he would take back his impulsive, spontaneous stomp, the consequences of which have brought him to this Court.

Aggravating Factors

Criminal Record

- [26] A.D. has six prior convictions, stretching back to when he was 14 years old. One is for a theft committed with B.G. Two are for failing to comply with court orders to have no contact with B.G. While in custody on this charge, he was sentenced for robbery, having his face disguised with intent to commit a crime, and possession of a weapon for a dangerous purpose.

Role in Offence

[27] A.D. deliberately and forcefully stomped on Matthew Skura's head one time, and then engaged in cheering and celebration. A.D. intended serious bodily harm and would have foreseen there was a risk bodily harm would result from either his own actions, or the actions of someone else in the group. However, as counsel has pointed out, no one expected the result, that a young man would lose his life.

Response to Community Supervision

[28] A.D.'s past performance on community supervision has been poor. At the time of this charge, he was on probation and on a s.31 bail release to his mother. He was in breach of no contact orders with B.G. and Nicholas Storniss-Bliss, and in breach of a curfew.

Reports

[29] The following observations and recommendations were made in the Psychiatric Report by Dr. Janke:

With [A.D.] we have a seventeen-and-a-half-year-old youth who on May 29, 2009, was involved in a physical altercation resulting in the death of the victim. [A.D.] was ultimately convicted along with his co-accused of Manslaughter.

[A.D.'s] history was a pattern of increasing Oppositional Defiant Behaviour and increasing Antisocial Behaviour with increasing aggression directed towards persons in authority and peers until approximately six months prior to the incident of Manslaughter. For reasons that are not at all clear to the assessment team, [A.D.] began manifesting a much more cooperative attitude, particularly with his ISSP Worker and there appeared to have been a reduction in his aggressive acting out in the community; although, there continued to be conflict at home and he continued to associate with an antisocial peer group.

On the night in question, [A.D.] was initially a bystander to a conflict between his co-accused and the victim. The altercation itself was extremely short-lived with [A.D.'s] co-accused delivering one blow to the victim who then fell to the ground. [A.D.] then ran up to the victim and delivered one blow, using his foot, to the victim's head.

[A.D.], up to the time of our assessment of him, has expressed some doubt as to the extent of his contribution to the victim's death; although, he acknowledges that he played a role in the assault, the assault on the victim was unwarranted, and the result to the victim and the victim's family, of course, was extreme.

Prior to this incident [A.D.] had been exposed to general psychological counselling. His participation in the counselling appeared to be extremely limited but he feels that it was a factor in his improvement in functioning and in attitude.

Since coming into custody, [A.D.] has been a full participant in all programming that is being offered, he has demonstrated generally good behaviour and he is not perceived as being a violent or aggressive youth within a peer group that, unfortunately, places value on violent and aggressive behaviour.

Our current assessment of [A.D.] does not reveal any severe or significant psychopathology. There are clear indications that he will suppress negative emotions and then may have a tendency to release them in an uncontrolled fashion. This appears to be the best explanation for his behaviour on the night in question.

The diagnosis for [A.D.] would be one of Conduct Disorder based on his prior history. If one looks at only his time in custody and his current presentation, that diagnosis would not apply. He does have some features of what is often described as over-controlled/under-controlled personality. The assessment team, after much discussion, proposes the following recommendations. Although [A.D.] was involved in what was obviously an extremely violent incident, his presentation, certainly over the last eighteen months does not warrant participation in a Violent Offender Treatment Program and we would not be recommending that at this time, [A.D.] is not likely to respond to general counselling as he has difficulty with psychological understanding. We do recommend, though, that he be referred for counselling with an experienced therapist who has dealt with youth or young adults who have committed violent offences. The ultimate goal would be to address [A.D.'s] pattern of repressing emotions, particularly anger.

The assessment team does not see any benefit to a further period of incarceration. [A.D.] has achieved the maximum benefit from all programming that would be available to him within the Youth Justice System.

Within the community, [A.D.] should be required to reside and abide as by his youth worker. It is presumed that [A.D.] would return to the family home and it would be hoped that probation would provide some additional support to [A.D.'s] mother, in terms of imposing structure and discipline within the home.

[A.D.] has clearly benefitted from his relationship with his ISSP Worker and we strongly recommend that this be continued and we strongly recommend that, if at all possible, he continue with his past worker.

[A.D.] has benefitted greatly from his contact with spiritual counsellors within the custody centre; although, we are not suggesting that it be made part of a probation order, we do recommend that [A.D.] continue to maintain his spiritual connections.

[A.D.] would benefit from further job training and it should be an expectation that he participate in some form of vocational training or a work program when he is in the community.

Given the spontaneous and relatively isolated incident of extreme violence that has brought [A.D.] before the Courts, forming any kind of definitive prognosis is difficult. What can be said is that if [A.D.] maintains his pro-social contacts and develops a pro-social peer group, his prognosis would be considered relatively good. If he were to gravitate towards an antisocial peer group, as he has in the past, prognosis would be extremely guarded if not poor.

[30] The following observations and recommendations were made in the Pre-Sentence Report:

In terms of sentencing, your Honour may wish to consider that [A.D.] has been in remand for a total of 613 days at the Burnaby Youth Custody Center and is reportedly well behaved at the institution. He is involved in vocational and sport programming, completed his high school education and incurred very few incidents despite his long detention. There was a concern that [A.D.] is susceptible to peer influences. On the other hand, the youth has performed poorly on community supervision as he has been breached on two and committed the offense while supervised on three court orders. It is noted his actions have caused significant anguish to the victim's parents, family and friends. Given the seriousness of the offense and the loss of a life, a period of custody is recommended followed by a term of Intensive Support and Supervision Program (ISSP) Order. The court may wish to consider having this young man serve his custodial sentence in an Open setting given his lengthy detention, positive performance in the secure setting and additional opportunities for vocational programming and reintegration back into the community.

A further youth sentencing option available for consideration is the intensive rehabilitative custody and supervision (IRCS) sentence pursuant to section 42(2)(r) of the Youth Criminal Justice Act (YCJA). The specific criteria for the imposition of an IRCS sentence, as set out in section 42(7) of the YCJA, require that:

§ the young person has been found guilty of 1st or 2nd degree murder, manslaughter, attempted murder, aggravated sexual assault, or a third (or fourth etc.) serious violent offence for which an adult is liable for imprisonment for more than 2 years (s. 42(7)(a));

§ the young person suffers from a "mental illness or disorder, a psychological disorder or an emotional disturbance" (s. 42(7)(b));

§ "a plan of treatment and intensive supervision has been developed...and there are reasonable grounds to believe that the plan might reduce the risk of the young person repeating the offence or committing a serious violent offence" (s. 42(7)(c));

§ "the provincial director has determined that an intensive rehabilitative custody and supervision program is available and that the young person's participation in the program is appropriate." (s. 42(7)(d)); and,

§ the young person consents to the components of an IRCS plan that involve "mental health treatment or care" (s.42(8)).

The maximum length of an IRCS sentence is the same as the maximum sentence available under the other sentencing provisions of the YCJA. The primary difference between a regular youth custody and supervision sentence and an IRCS sentence is that, in addition to the program and services available to a youth receiving a regular sentence, the federal government will provide up to \$100,000 per year for additional rehabilitative programs and services for the young person. This additional funding applies to both the custody and the community portions of the sentence. Eligible services include, for example, additional forensic psychiatric treatment, addictions counseling, special education, one-to-one workers, cognitive/behavioural programming, anger management therapy, cultural programming or work training and opportunities with the goal of rehabilitation. The specific services that may be appropriate in this matter would be determined through an integrated case management process involving the youth probation officer, Youth Forensic Psychiatric Services, youth custody services, the youth, his/her parent/guardian, and other relevant professionals and service providers.

If the court wishes to consider the possibility of an IRCS sentence for the youth, a specific assessment and report addressing the above-noted criteria will be completed at the request and direction of the court. In order to allow sufficient time to develop a plan and confirm provincial director approval, a further adjournment of approximately six weeks would be required.

Should a custodial sentence and Intensive Support and Supervision Program Order be imposed, the following conditions are respectfully recommended:

- (1) Report as directed by your Youth Court Worker.
- (2) You are to reside as directed by your Youth Court Worker and you are to follow all the rules and regulations of that residence.
- (3) Not to be in possession of any weapons as defined in the Criminal Code of Canada, including but not limited to any knives, except for the purpose of preparing and consuming food or in the course of employment while at the work site.
- (4) Abstain and not to possess any alcohol or non-prescribed drugs.
- (5) Abide by a daily curfew of 10:00 pm - 6:30 am, unless with the written permission of your Youth Court Worker or while in the presence of your mother, [redacted], and to present yourself at the door of your residence upon demand of a peace officer or curfew monitoring program to determine compliance of this condition.
- (6) Not to be found in one block radius of the Cloverdale Amphitheater unless with the written permission of your Youth Court Worker.
- (7) Not to have direct or indirect contact with [B.G.] unless for the purposes of a Restorative Justice Conference should that be deemed appropriate by the conference facilitator and your Youth Court Worker.

- (8) You are to attend school daily as enrolled, or seek and maintain employment as directed by your Youth Court Worker.
- (9) You must attend, participate and complete any counseling including but not limited to the Violent Offenders Treatment Program and Anger Management counseling, as directed by your Youth Court Worker.
- (10) Attend, participate and successfully complete a Restorative Justice Conference to the satisfaction of the conference facilitator and any conference agreement as directed by your Youth Court Worker.

Circumstances of B.G.

- [31] B.G. was 16 years old at the time the offences were committed. He is now 18 years of age. His upbringing was unstable, as he witnessed verbal and physical abuse of his young mother by his absentee father who had substance abuse problems. He grew up in a home lacking discipline. B.G. has had a number of brushes with the law, was living a marginal lifestyle, and was out of control for three to four years - at school, at home, with substance abuse, "acting the heavy" and engaging in disruptive, anti-social behaviour.
- [32] The recommendations found within the Psychiatric Report are that he attend the Violent Offender Treatment Program, as he represents a risk to re-offend if he carries on as he did. Dr. Riar felt B.G. suffers from a Substance Abuse Disorder, and a mild to moderate Conduct Disorder, Adolescent Onset and he is described as being somewhat grandiose.
- [33] In the past B.G. has demonstrated a lack of commitment to anger management counseling, as he initially had good intentions but lost interest and did not follow through. However, Dr. Riar concluded in his report on B.G. there is a risk for re-offending in a violent manner if he returns to the lifestyle he was living at the time of the offences, hanging out with troubled peers and using drugs and alcohol. If he is able to curb his substance abuse, learn how to regulate his emotions, and engage in pro-social activities, including pursuing school and vocational services, his chances of acting out diminish significantly.
- [34] Dr. Riar found B.G. to be very willing and amenable to treatment. He has abstained from alcohol and drug use since the offence date, and has participated in drug and alcohol counseling at BYCC. He attended several cultural awareness program activities, and anger management counseling. He has demonstrated a positive attitude while in custody, being described as "one of the best behaved residents in custody" and "polite and respectful to staff and other residents." Both in and out of custody, B.G. has pursued his high school education. He has almost completed grade 11 and could graduate by December if he continues at the pace he is going. He plans to take a plumbing or electrical trade. If this does not come to pass, he plans to become a counselor.

Mitigating Factors

- [35] At the time of the offences nearly two years ago, B.G. was 16; he is now 18. He spent 14 months on strict bail without incident, demonstrating an ability to comply with court orders. He has very strong family support, and the Pre-Sentence Report is positive. His time in custody has been well spent, and B.G. has displayed an excellent attitude.
- [36] B.G. has expressed significant remorse for his actions. He wrote an apology letter and apologized in court as well. He is willing to participate in a Restorative Justice Program.

Aggravating Factors

Criminal Record

- [37] B.G. has three prior convictions for offences committed when he was 15 years old. One is for assault. The others are for theft and possession of stolen property; the theft offence was committed with A.D. On May 9, 2009, he was placed on an intensive support and supervision program order. Two conditions were that he have no contact with A.D. and he abstain from alcohol and drugs. On the night of the offence, he was in breach of both conditions, imposed just two weeks prior to these offences.

Role in Offence

- [38] The duration of the entire incident was between 8 and 15 seconds. B.G. was the instigator of the offence; he was itching for a fight. He engaged Ryan Opdendries in a verbal confrontation before knocking him unconscious on his feet. He blindsided Matthew Skura who came to Ryan Opdendries' aid. He left Matthew Skura laying helpless on the ground, effectively unconscious, vulnerable to be stomped on by A.D. After this, he attempted to engage Cody Allen in a fight. When rebuffed, he celebrated his exploits by cheering, high-fiving and chest bumping. B.G. intended serious bodily harm, and would have foreseen there was a risk bodily harm would result from either his own actions or the actions of someone else in the group. As counsel has pointed out, no one expected the result that a young man would lose his life. However, the reality is that is a consequence of violent conduct.

Reports

- [39] The following recommendations were made by Dr. Riar in the Psychiatric Report applicable to the non custodial portion of the sentence:

As far as his social situation is concerned, I believe that he should be allowed to live with his mother, who is able to provide him nurture and support. On the other hand, she should get help to bring structure into [B's] life, which would give him conditions to obey. He needs to reside by the rules of the house and failure to do so should be consequenced right away.

As mentioned earlier, he does not suffer from any psychiatric disorder for which he needs any intervention.

He certainly needs counselling for his drug and alcohol, which can be done on an outpatient basis by seeing a counsellor a regular basis. He also needs intervention and treatment to learn how to express his emotions in pro-social manner as well as, intervention by his grandeur feeling of self-worth and limited ability to empathize. All of these treatments can be addressed by referring him to attend the violent Offender Treatment Program which is offered by Youth Forensic Psychiatric Services.

In order to structure his day even further, he should be ordered to attend school or employment, to stay away from delinquent youths, limit or eliminate his drug and alcohol use and whatever other conditions that Your Honour feels that is necessary.

As far as his risk for re-offending in a similar manner, [it] is [a] concern if he continues to pursue the lifestyle he was living, hanging out with delinquents of subculture and using drugs and alcohol, then his chances of acting violently in the future are quite high. On the other hand, if he is able to curb his substance abuse, learn how to regulate his emotions, as well as engage in pro-social activities including pursuing school and vocational services, his chances of acting out diminish significantly. At this moment, he is very willing and amenable to treatment which I feel should be pursued.

[40] The following recommendations were made in the Pre-Sentence Report upon completion of the custodial portion of the sentence:

Report to a Youth Worker as directed at 15455 Vine Ave. White Rock, BC; and thereafter as directed by your Youth Worker.

Reside as directed and abide by the rules of that residence, and not to change your residence, without the written permission of your Youth Worker.

Attend school daily or maintain employment to the satisfaction of your Youth Worker &/or maintain employment.

Participate in an Intensive Support & Supervision Program as directed by your Youth Worker.

To attend and participate in any counselling as directed by your Youth Worker.

To participate and co-operate with Youth Forensics Psychiatric Services.

You must carry a copy of your order and present it to any Peace officer upon demand.

Not to possess or carry any weapons as defined in the Criminal Code of Canada including firearms, imitations firearms, ammunition, &/or prohibited devices.

You are not to possess any knives, except for the purpose of preparing and consuming food.

To abstain from the possession or consumption of alcohol and/or non-prescription drugs or those drugs that is defined in the Controlled Drugs and Substances Act.

You shall attend and participate in any Full-Time Attendance program, if and as directed by your Youth Worker.

Not to attend within a 100 metre radius of any place of residence, employment or schooling of Cheryl Vinall, Syd Skura, Nicole Skura, Mitchell Skura, unless for the purposes of completing a Restorative Justice Conference or with the written permission of your Youth Worker.

To participate in the Restorative Youth Justice Conference Program under the direction of and to the satisfaction of your Youth Worker and the Conference Facilitator.

Institution Report for B.G. and A.D.

[41] There is an allegation both B.G. and A.D. were involved in staging a fight while at the BYCC. It is alleged B.G. may have been an instigator and used threats to force the combatants to fight. It is alleged A.D. may have kept watch for staff during the fight. Both deny these very serious allegations. The incident reports were not expressed in definitive language, and as such I give the reports little weight in the circumstances.

Appropriate Sentence

[42] Defence counsel do not dispute manslaughter and assault causing bodily harm are serious violent offences. Therefore, I make the finding A.D. and B.G. committed serious violent offences in accord with s.42 (9).

[43] I have considered all other reasonable alternatives to custody, and conclude there are no reasonable alternatives that would achieve the objectives of the YCJA. Both young persons have criminal records which include violent crime, and have a history of committing crimes together, as well as while bound by, and in breach of, court orders.

[44] In this case, a custodial sentence is appropriate having regard to the purpose of sentencing, to hold the young persons accountable for their offence of killing Matthew Skura through the use of just sanctions that:

§ have meaningful consequences;

§ promote rehabilitation and reintegration;

§ thereby contribute to the long-term protection of society;

§ focus on accountability and meaningful consequences along with useful sanctions;

§ recognize long-term protection of the public as the consequence of a just and meaningful sentence;

§ provide accountability consistent with the greater dependency and immaturity of the young persons; and

§ give consideration to proportionality linked to the seriousness of the offence, the degree of responsibility of the young persons for the offence, and be most likely to be rehabilitative and to reintegrate the young person into society.

[45] In determining an appropriate sentence, I am satisfied in this case the appropriate sentence is the maximum allowable custody and supervision order for young persons receiving a youth sentence for manslaughter; that is, three years.

[46] Both A.D. and B.G. should receive the same sentence. With regard to the seriousness of the offence and their degree of responsibility, I conclude this sentence is:

§ the least restrictive as possible;

§ the most likely to rehabilitate and reintegrate the young persons;

§ the most likely to promote a sense of responsibility in the young persons and an acknowledgement of the harm done to victim and community;

§ similar to sentences imposed in similar cases under the YCJA;

§ not more severe than what would be given to an adult; and

§ consistent with the greater dependency of the young persons and their reduced level of maturity.

[47] A custody and supervision order would normally mean that a youth would serve one-third of the specified period under supervision in the community with conditions set at the end of the custodial period. However, it is open to the court sentencing young persons for manslaughter to determine the ratio of custody to supervision.

Credit for Pre-Sentence Custody

[48] There is no hard and fast rule a young person under the YCJA should be given 1.5:1 credit for pre-sentence custody time. However, based on s. 42(n), that principle is often adopted: *R. v. A.E.B.*, 2003 BCPC 446. In varying circumstances, courts have given no credit, some credit, 1:1 credit and 1.5:1 credit. What is clear is the approach depends on the circumstances of each case, as the sentencing judge crafts an appropriate sentence in accordance with the purpose and principles of the YCJA.

[49] A.D. was in custody from July 31, 2009, to the present time (approximately 20 months). He submits he should be credited with 1.5 times his pre-sentence custody time; that is the equivalent of 30 months, which would be six months short of the maximum three year sentence for manslaughter. I agree A.D. should be given credit for some of his pre-sentence custody and I see no reason it not be at a rate of 1.5 in the circumstances of this case. However, on September 3, 2009, while in custody on this charge, A.D. was sentenced (for robbery, disguise face with intent to commit a crime, and possession of a weapon for a dangerous purpose) to a deferred custody and supervision order, consisting of three months

in custody and 12 months community supervision. As there was no practical effect from this sentence, there must be a deduction of at least three months taking this sentence into account. However, in my view, an appropriate sentence in this case is one that imposes a 12 month supervision order. Therefore, A.D. will be given credit only for 24 months pre-sentence custody.

- [50] B.G. was in custody from May 29, 2009, to November 4, 2009, (5 months plus 6 days) and then again from January 5, 2011, to the present (3 months plus 15 days). He submits he should be credited at 1.5 times his pre-sentence custody time: the equivalent of 13 months. It is appropriate that B.G. be given credit at 1.5 times for his pre-sentence custody in the circumstances of this case, amounting to 13 months.
- [51] B.G. seeks some credit, or at least some consideration, for the 14 months he spent under strict house arrest.
- [52] With respect to taking account of time spent on bail, there are a number of adult cases indicating it may be an error not to treat stringent bail conditions as a mitigating factor in determining an appropriate sentence: *R. v. Cuthbert*, 2007 BCCA 585; *R. v. Downes* (2006), 79 O.R. (3d) 321; *R. v. Nghiem*, 2009 BCCA 170; *R. v. Tse*, 2010 BCSC 1273; *R. v. Ansari*, 2009 BCCA 381; *R. v. Hilderman*, 2005 ABCA 249.
- [53] There are no YCJA cases I have been referred to on this issue, and I see no reason to take into consideration the time spent on strict bail conditions in determining the custody and supervision portion of the sentence having regard to the comprehensive sentencing scheme in the YCJA. B.G.'s bail had him abstain from alcohol, move out of town, have no contact with his friends, not be out unsupervised, and to work and go to school. Bail is not jail, and B.G. was free to carry on his life in a relatively normal fashion, with the exception of moving from his home to live with relatives. The conditions imposed were not particularly onerous considering he was a young person who in the ordinary course of life as a young person should be subject to similar parental supervision and control.

Custodial Portion of Sentence

- [54] A.D. and B.G. seek open custody sentences. Whether the sentence is served in open custody is not for me to determine. However, having regard to the recommendations in the reports in evidence before me, I would recommend open custody.

A.D. Sentence

- [55] With regard to the imposition of an ISCR sentence, this option was not sought by counsel. Given the materials before me, I do not find an IRCS sentence would be appropriate in this case.

- [56] In all the circumstances of this case, considering the moral blameworthiness of A.D., the mitigating and aggravating factors, his positive performance in custody, his age at the time of the offence and the progress towards rehabilitation he has already made, a fit sentence for manslaughter under the YCJA is a 3 year custody and supervision order. The sentence should be served two-thirds in custody and one-third out of custody. As I have given A.D. credit for 24 months in custody, he will be released forthwith on a one year supervision order.
- [57] With regard to the conditions of the supervision order, I agree with the recommendations made in the reports. Specifically, in addition to the mandatory conditions reflected in s. 105 of the YCJA, I impose conditions 1-10 as set out in the Pre-Sentence Report, and note the recommendation of Dr. Janke that A.D. be permitted to reside with his mother. The conditions are as follows:
- (1) Report as directed by your Youth Court Worker.
 - (2) You are to reside as directed by your Youth Court Worker and you are to follow all the rules and regulations of that residence.
 - (3) Not to be in possession of any weapons as defined in the Criminal Code of Canada, including but not limited to any knives, except for the purpose of preparing and consuming food or in the course of employment while at the work site.
 - (4) Abstain and not to possess any alcohol or non-prescribed drugs.
 - (5) Abide by a daily curfew of 10:00 pm - 6:30 am, unless with the written permission of your Youth Court Worker or while in the presence of your mother, [redacted], and to present yourself at the door of your residence upon demand of a peace officer or curfew monitoring program to determine compliance of this condition.
 - (6) Not to be found in one block radius of the Cloverdale Amphitheater unless with the written permission of your Youth Court Worker.
 - (7) Not to have direct or indirect contact with [B.G.] unless for the purposes of a Restorative Justice Conference should that be deemed appropriate by the conference facilitator and your Youth Court Worker.
 - (8) You are to attend school daily as enrolled, or seek and maintain employment as directed by your Youth Court Worker.
 - (9) You must attend, participate and complete any counseling including but not limited to the Violent Offenders Treatment Program and Anger Management counseling, as directed by your Youth Court Worker.
 - (10) Attend, participate and successfully complete a Restorative Justice Conference to the satisfaction of the conference facilitator and any conference agreement as directed by your Youth Court Worker.

B.G. Sentence

- [58] In all the circumstances of this case, considering the moral blameworthiness of B.G., the mitigating and aggravating factors, his unblemished record on bail and in custody, his age at the time of the offence and the progress towards rehabilitation already made, a fit sentence for manslaughter under the YCJA is a three year custody and supervision order; and for assault causing bodily harm, three months concurrent. The sentence should be served two-thirds in custody and one-third out of custody. B.G. will be given credit for 13 months pre-sentence custody, leaving 11 months of custodial time remaining. I make the recommendation that an open custody setting is appropriate for B.G. It would be appropriate to consider reducing the custodial portion of his sentence following the completion of the requirements to graduate from high school.
- [59] The conditions recommended in the Pre-Sentence Report are appropriate conditions of the supervision order that will follow the custody portion of the sentence but I will abstain from making such orders at this time as I understand a report will be generated near the expiration of the custodial portion of B.G.'s sentence. I understand one month before the expiration of the custodial portion of the sentence, a report will be produced recommending appropriate conditions at that time and B.G. will appear before me.

Ancillary Orders

- [60] There will be DNA orders for A.D. for manslaughter and B.G. for manslaughter and assault causing bodily harm pursuant to s.487.04(a) and s.487.05(1)(i) of the Criminal Code R.S., 1985, c. C-46, as found in Form 5.03.
- [61] Pursuant to s. 51 of the YCJA and s. 109 of the Criminal Code for both A.D. and B.G. there will be a lifetime prohibition from possessing firearms, ammunition and explosive substances having regard to the convictions for the serious violent offence of manslaughter.
- [62] Reasons for Sentence will be distributed in accordance with the YCJA.

"Stromberg-Stein J."

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