
CANADA / JUDGMENT

R. v. J.F.

2012 BCSC 780

COURT

Supreme Court of British Columbia

DECIDED

29 May 2012

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2012 BCSC 780 R. v. J.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.F.,

2012 BCSC 780

Date: 20120529

Docket: 8381-2

Registry: Kamloops

Regina

v.

J.F.

Before: The Honourable Mr. Justice Powers

Reasons for Judgment re Sentencing

Counsel for the Crown:

D. Mann

Counsel for the Accused:

R. Kaiser

Place and Date of Hearing:

Kamloops, B.C.

April 18 and 19,

May 2 and 3, 2012

Place and Date of Judgment:

Kamloops, B.C.

May 29, 2012

[1] J.F. was found guilty on all five counts in an Indictment arising from a home invasion. He was found guilty of:

- robbery;
- unlawful confinement;
- break and enter a place and committing an indictable offence therein;
- using an imitation firearm while committing or attempting to commit the indictable offence of robbery, and
- committing an indictable offence with his face masked.

[2] Counsel and I discussed the complicated issue of how the decision in *R. v. Kienapple*, [1975] 1 S.C.R. 729 against multiple convictions should be applied in this particular case. I thank both counsel for their efforts in dealing with a very complicated issue. Ultimately the Crown requested, and the defence agreed, that I enter a conditional stay of proceedings on Count 1, the robbery. Crown directed a stay of proceedings with regard to Count 4, the use of an imitation firearm while committing the indictable offence of robbery. In the event that it was not possible, after a finding of guilty, but before a conviction, I would, at the request of Crown, enter a conditional stay of Count 4 that relates to the use of the imitation firearm.

[3] I have directed that convictions be entered with regard to Count 2, unlawful confinement; Count 3, break and enter to commit an indictable offence therein; and Count 5, to commit an indictable offence while having his face masked.

[4] The unlawful confinement carries a maximum sentence for an adult of ten years; the break and enter to commit an indictable offence carries a maximum sentence for an adult of life, and committing an indictable offence while having his face masked carries a maximum sentence for an adult of ten years.

[5] The circumstances of the offence are contained in my decision dated December 14, 2011: *R. v. Frank*, 2011 BCSC 1716. In summary, on August 9, 2010, J.F., in the company of three others, including a person who was apparently an adult, broke into a residence in the middle of the night yelling "RCMP." They went into the bedroom where the couple were sleeping. The large man, who I assumed was an adult, was carrying a club. The couple sat up in bed and the man was knocked to the floor and bound. The woman was also bound with tape and some wire. There was also some form of rope used. One of the offenders pointed what appeared to be a sawed off shotgun or an imitation sawed off shotgun at the couple.

The man was assaulted, and the offenders demanded money and guns. They did assault the woman, but stopped when requested to do so. However, when the man requested they stop assaulting the woman, they simply increased the assaults upon him. To the credit of one of the offenders, although the woman did not have any clothes on, they did cover her with a blanket to at least give her some comfort. She began to have problems with her asthma and they gave her a puff from her puffer to deal with her asthma. They ransacked the house and the couple's car and took some money.

- [6] I find that these were serious, violent offences as defined in s. 42(9) of the Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA]. The Crown has applied, pursuant to s. 64(1) of the YCJA, for an order that J.F. be liable to an adult sentence. The sentencing hearing was pursuant to s. 71 of the YCJA. J.F.'s father was present for part of the application.
- [7] I heard evidence from Ms. Ann Kimmitt, a youth justice consultant with the Ministry of Children and Family Development (the "Ministry"). She provides support to managers and frontline producers regarding program services and legislation for youth justice. She explained the workings of the YCJA and the Canadian Criminal Code (the "Code") and how sentences are administered. I heard evidence from Michelle Doherty from Corrections Canada. She is a regional programs manager. She explained the programs which are available in the federal institutions if a youth is sentenced to an adult sentence, or serves a youth sentence in a federal institution. I heard evidence from Darcy Kaban. He is a corrections officer at Kamloops Regional Correctional Centre. He is the assistant deputy warden of programs. He explained the intake process and programs available in the provincial corrections facilities. I also heard evidence from Lindsay Gordon, a local manager of adult community corrections. She explained the way in which probation would be dealt with for a youth who had become an adult, and who was subject to a probation order either as an adult or pursuant to a youth sentence.
- [8] I have reviewed all of exhibit "1" on the sentencing hearing, which included victim impact statements, a conviction summary report about J.F., and reasons for judgment and sentence relating to J.F. in a similar incident which occurred approximately a month after this offence, a Gladue report dated January 26, 2011, two letters of support from a woman who adopted one of J.F.'s sisters, and has known J.F. since he was born, a pre-sentence report, a psychiatric report, a psychiatric assessment, and a psychosocial assessment. Exhibit "1" also contains a summary of the YCJA placement and community supervision provisions prepared by Ms. Kimmitt. There is also a Ministry Youth Custody Service Centre Descriptions, British Columbia correctional facilities program materials, and Correctional Services Canada Integrated Correctional Programs.
- [9] Section 72 of the YCJA tells the court how to proceed on an application such as this:

Test -- adult sentences

72. (1) In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and
- (a) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and
 - (b) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.

Onus

- (2) The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is with the applicant.

Pre-sentence reports

- (3) In making its decision, the youth justice court shall consider a pre-sentence report.

Court to state reasons

- (4) When the youth justice court makes an order under this section, it shall state the reasons for its decision.

Appeals

- (5) For the purposes of an appeal in accordance with section 37, an order under subsection (1) is part of the sentence.
- [10] I must determine whether a youth sentence would be a sufficient length to hold J.F. accountable for his conduct. The youth sentence is one which would be imposed in accordance with the purposes and principles set out in s. 3.(1)(b)(ii) and s. 38 of the YCJA.
- [11] The Crown accepts that the onus is on them to satisfy the court that a youth sentence would not be of sufficient length to hold J.F. accountable. The Crown agrees that s. 3.(1)(b) of the YCJA confirms that the criminal justice system for young persons must be separate from adults, and emphasized:
- (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

[12] Section 38 must also be considered, and it provides:

Purpose

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.

Sentencing principles

- (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; and
 - (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.

Factors to be considered

- (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.
- [13] The Crown acknowledges that the approaches the courts have taken in determining what the appropriate youth sentence to consider for s. 72 are not always consistent. The approach suggested by the Crown is to first try and determine what might be an appropriate youth sentence, and if that is not of sufficient length to hold the youth accountable, ask whether the maximum sentence that could be imposed pursuant to the terms of the YCJA would be sufficient, and if not, then to sentence the youth to an adult sentence, but as well remember that although the youth is being sentenced as an adult, the sentence is still a sentence under the YCJA and that the court must consider the factors in s. 3.(1)(b)(ii) and s. 38 in determining the length of the adult sentence.
- [14] The Crown agrees that there is presumption of diminished moral culpability when somebody is a youth: *R. v. D.B.*, [2008] 2 S.C.R. 3 at para. 41. This presumption of diminished moral culpability, heightened vulnerability, less maturity and reduced capacity for moral judgments, has resulted in the entire youth sentencing scheme and a unique approach to punishment. However, it is rebuttable [para. 45]: *R. v. B.W.P.*; *R. v. B.V.N.*, [2006] 1 S.C.R. 941. General deterrence and specific deterrence are not principles in a youth sentence [para. 4]. The most serious sentence is reserved for the most serious offence [para. 35].
- [15] Sentencing of a youth is "offender-centric" [*R. v. A.O.*, 2007 ONCA 144, para. 43]. The onus on the Crown to "satisfy the court" should not be categorized in terms of civil or criminal standards of proof:

The question rather is whether one is satisfied after weighing and balancing all the relevant considerations that the case should be transferred to ordinary court. [para. 33]

...

It is important that a youth justice court bear in mind the very serious consequences of an adult sentence for the young person so as to only order an adult sentence when necessary to fill the objectives of the YCJA. [para. 38]

- [16] Accountability is the equivalent of an adult sentencing principle of retribution [para. 46]. However, this is retribution in the legal sense as being:

... an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. [para. 46, citing *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at paras. 80-81].

[17] Retribution does not include denunciation:

... the sentence should be long enough to reflect the seriousness of the offence and the offender's role in it, and long enough to provide reasonable assurance of the offender's rehabilitation to the point where he can be safely reintegrated into society [para. 50]

[18] Rehabilitation as an important principle under s. 718 of the Code is enhanced in the sentencing of a young person: *R. v. Pratt*, 2007 BCCA 2006 at paras. 55 and 58 and *R. v. Nguyen*, 2008 BCCA 252 at para. 34. However, s. 38 of the YCJA does not apply if a youth is sentenced to an adult sentence: *R. v. Kentworthy*, 2009 BCCA 197 at para. 13.

[19] The Crown referred to *R. v. Wellwood*, 2011 BCSC 690, not for the similarity of facts (it is considerably different), but just as an example of an application of the test under s. 72 of the YCJA.

[20] Defence counsel agreed with the Crown's position on the law.

[21] Crown then reviewed the factors contained in s. 38(3) of the YCJA:

(a) the degree of participation by the young person in the commission of the offence;

[22] J.F. was not the principal in this home invasion, but he certainly was an active participant. In the pre-sentence reports he denies that he was the person that held the imitation firearm, but it was obvious from the evidence that he was one of the participants that bound the victims with the duct tape. The leader of the home invasion appears to have been the larger adult. The psychological assessments deal with J.F.'s maturity and his cognitive abilities. I am satisfied that he was a follower influenced by his peers.

(b) the harm done to victims and whether it was intentional or reasonably foreseeable;

[23] This was clearly a very frightening and traumatic experience for the victims. It would be frightening for anyone. Four violent individuals entered their home in the middle of the night and there was no opportunity of help. They were naked, bound, beaten, and threatened. The sense of helplessness would be humiliating. They suffered physical injuries and it has had an ongoing emotional impact upon them.

(c) any reparation made by the young person to the victim or the community;

[24] There is no evidence of any reparation made to the victims or the community.

(d) the time spent in detention by the young person as a result of the offence;

[25] Crown and defence agree that by an appropriate calculation, J.F. has, as of May 3, 2012, spent 186 days in detention. He has been in custody since December 11, 2010 on this matter and on another offence which occurred approximately a month after this offence, as well as time relating to a breach. From December 11, 2010, the time that relates to this offence is 186 days or approximately six months. As of May 29, 2012, the total is approximately 209 days.

- [26] The pre-sentence custody is a factor to be considered, but does not prevent the court from imposing the maximum sentence under the YCJA, which including all sanctions, cannot exceed three years. In other words, the maximum sentence is not three years less the time served, but it can be three years in addition to the time served: R. v. R.R.J., 2009 BCCA 580 at paras. 48, 49 & 57.
- (e) the previous findings of guilt of the young person;
- [27] J.F.'s conviction summary report is part of exhibit "1". In 2008, when he was approximately 15 years old, he was convicted of taking or occupying a vehicle or vessel without the consent of the owner, he has a conviction for mischief under \$5,000.00, and possessing a weapon for a dangerous purpose. On the same date, October 16, 2008, the court dealt with two breaches of undertakings. J.F. immediately had problems with complying with the terms of his sentence. There were a number of failures to comply with his sentences. On some occasions, it was determined that he did have reasonable grounds not to comply, but on a number he did not have reasonable grounds and was found guilty of failing to comply.
- [28] His next offence, other than failing to comply with his sentence, occurred December 5, 2009, when he was 17 years of age. This was dealt with on December 9, 2009, and was a charge of wilfully resisting or obstructing a peace officer. On February 28, 2011, he had two counts of failing to comply which were dealt with on March 2, 2011.
- [29] In August of 2010, he committed the offences I am dealing with, and on September 25, 2010, he was convicted of a robbery in Williams Lake, and that was dealt with on August 8, 2011. Also arising out of the September 25, 2010 offence was a possession of a controlled substance and disguising his face with intent to commit an offence. Again, those were dealt with on August 8, 2011. The September 2010 offence was similar to ours in the sense that J.F., in the company of others, committed what was virtually a home invasion. J.F. was a participant. In sentencing him, the court found that, based on the psychological reports, because of his difficulty empathizing with others, he had the potential to be a dangerous person.
- [30] I note that some of the offences of failing to comply with the sentence arose during the time that J.F. was being supervised by a probation officer who was subsequently fired from his position for cocaine addiction and inappropriate conduct. The actions of that person contributed significantly to J.F.'s failures to comply on some occasions.
- (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.
- [31] The aggravating factors, of course, are the seriousness of the offence. It appears that the victims' home was simply chosen at random. J.F. was not the ring leader, but certainly an active participant in what was a planned and premeditated home invasion with violence. The additional aggravating factors could be considered to be J.F.'s record, but that has already been considered in (e) above.

- [32] The mitigating factors are J.F.'s very troubled and traumatic upbringing.
- [33] Crown then reviewed the factors contained in s. 72 of the YCJA: These factors overlap somewhat with s. 38, and include:
- 1) seriousness and circumstances of the offence, which I have related above;
 - 2) the age, maturity, character and background of J.F.;
 - 3) previous record of J.F. which I have dealt with above; and
 - 4) any other factors the court considers relevant.
- [34] The age maturity, character and background of J.F. are reviewed at length in the psychiatric and psychosocial assessments, the pre-sentence report, and the Gladue reports.
- [35] The Crown points out that when the offence was committed, J.F. was only three and a half months short of his 18th birthday. If this offence had occurred four months later he would simply be sentenced as an adult. The Crown argues that the level of maturity and diminished moral culpability, which is presumed under the YCJA, operates on a sliding scale. The closer a person is to being an adult the less impact that presumption has: *R. v. D.B.* at para. 62.
- [36] The Crown points out that this offence appears to be fairly well planned and that the offenders disguised their faces, except for the large adult, and this shows some level of sophistication, not immaturity. However, J.F., I am satisfied was largely a follower; although an active one, not a planner.
- [37] The Crown points out that J.F. is now 19 years of age and will probably be transferred to an adult institution whether he is serving a youth sentence or an adult sentence, when he becomes 20 in approximately seven months. The Crown recognizes that the psychological assessments indicate that J.F. is at a lower intellectual level than his age would indicate. The Crown points out that he had problems in the past in his foster homes and in school dealing with aggression. He also had some substance abuse issues, and started to consume alcohol when he was 16. He also had some negative peer group influence.
- [38] The Crown points out their concerns about whether J.F. will participate in any programs, because he has shown a reluctance to do so in the past. He appears to be guarded about his emotions and, as pointed out in the psychiatric reports, may have difficulty empathizing with others.
- [39] Crown recognizes the very difficult background and upbringing of J.F., including exposure to violence and substance abuse. The Crown also recognizes that he has done better recently while in custody, but points to some background difficulties while in custody. The Crown is concerned that the psychological reports indicate some deeply engrained psychological problems and trauma, and it may take some time for these to be dealt with. J.F. would clearly benefit from violent offenders' treatment and monitoring over a period of

time.

- [40] Crown refers to the psychological opinions, including the potential risk to the community because of the risk to re-offend. This raises concerns about the possibility of rehabilitation and reintegration, and how much time or supervision that might take.
- [41] The Crown acknowledges that a sentence approaching two additional years in custody in light of the pre-sentencing time of approximately six months would be close to a sufficiently long sentence to make J.F. accountable as contemplated by s. 72.1. However, the Crown suggests that significantly more time is required under supervision to assist with J.F.'s rehabilitation and reintegration into the community. This is an important consideration for the long term protection of the public [s. 38.(1) of the YCJA].
- [42] If J.F. were sentenced to an adult sentence of two years, or two years less a day, he could also be sentenced to probation for a period of three years, which would allow a significant amount of time for monitoring and support in the community. If J.F. is sentenced as a youth, the maximum total sanctions would be three years, which could consist of two year's custody and one year of supervision, or some combination of custody and supervision, plus probation which did not exceed a three-year period.
- [43] The Crown refers to *R. v. Ritchie*, 2006 BCSC 1579 that dealt with the sentencing of a 19-year old Aboriginal person who had committed an offence as a youth. The offence was somewhat similar to this one in that it involved a home invasion and an assault upon the occupants of the home, which included a 72-year old female and her developmentally challenged adult children in their 40s. The court imposed an adult sentence for an extremely troubled young man who needed significant supervision over a period of time. The effective sentence was 18 months plus three years probation.
- [44] The Crown also referred to *R. v. D.D.V.*, 2005 BCCA 396. In that case, an adult sentence was imposed so that a lengthy period of probation could also be imposed. The sentence was 18 months to be served in a youth facility, plus three year's probation. That case involved manslaughter. The offender was 16 years old and was one of a number of people who attempted to break in and steal marihuana from a marihuana grow operation. The caretakers returned and one of the individuals shot one of the caretakers causing his death. The Court of Appeal upheld an adult sentence for that youth. The court also pointed out that the rule of thumb that existed at that time of two-for-one credit for pre-trial custody, did not apply to youths who had access and full benefit of programming while in pre-trial custody [para. 27].
- [45] In determining what might be an appropriate adult sentence, the Crown agreed that the adult sentence referred to in the YCJA, s. 73(1), is defined in s. 2(1) as any sentence that could be imposed on an adult who was convicted of the same offence. Part 23 of the Code is applicable to a youth being given an adult sentence [s. 74(1) of the YCJA]. Section 3 of the YCJA must also be considered when imposing an adult sentence. This includes the heightened consideration to the age of the young person and recognizing their dependency

and level of maturity. The level of maturity of a young person is incremental depending on the age and the particulars of that person: *R. v. Pratt* at para. 53.

- [46] The Crown argues that if there were a range of sentences for these offences for adults, the global sentence would be five to eight years. The Crown recognizes that given J.F.'s youth and his Aboriginal background, in considering the directions to the court in sentencing given by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, and more recently in *R. v. Ipeelee*, 2012 SCC 13, that a custodial sentence of approximately two years, plus three years probation would be appropriate. The Crown also agrees that s. 3(1)(c) and (4) of the YCJA also re-enforce the need to consider J.F.'s Aboriginal background and his needs or special requirements as a result. The Crown agrees that the sentence would be in effect a sentence of two and a half years, and that this would not be disproportionate. If sentence is imposed as an adult then the provisions of s. 718 of the Code apply which include denunciation and deterrence. The considerations in s. 718 of the Code overlap somewhat with those in s. 72 of the YCJA.
- [47] The defence suggests that an appropriate sentence would be 18 months, consisting of 12 months custody and six months supervision, followed by a period of probation for 18 months. Defence argues that this would allow J.F. to gradually reintegrate into the community and to be supervised for a significant period of time. If he were given an 18-month sentence under the YCJA, he would serve 12 months in custody, plus an additional six months supervised in the community, followed by the 18 months probation.
- [48] The defence emphasizes that I should be conscious of and consider the fact that J.F. has some cognitive difficulties, and perhaps fetal alcohol syndrome disorder, although not diagnosed. Defence argues that he is not a sophisticated person, nor is he as mature as his age might suggest. Defence also emphasizes that although he may have had some initial problems in youth detention, he is now at the highest level that a youth can achieve in a youth detention centre; that is, he is complying with all of the rules and functioning well in the institution.
- [49] Defence points out that the *Ritchie* decision was decided before it was clear whether pre-sentencing time must be deducted from the maximum sentence. It would appear that the court proceeded on the mistaken view that in that case two years was the maximum sanctions that could be imposed under the YCJA. The court, in *Ritchie*, imposed a six-month jail term, which was in addition to six months in custody, plus three years probation. At two-for-one, this amounted to an equivalent of an 18-month sentence.
- [50] Defence referred to *R. v. J.H.*, [2006] B.C.J. No. 3425. In that case, after conviction for several offences arising out of a home invasion, which included discharging a handgun with intent to wound, the youth sentence was 15 months in custody and a supervision order of closed custody, followed by a nine-month intensive supervision order in the community.
- [51] I note in *J.H.*, that the offender had committed a prior home invasion as well.

- [52] Defence referred to *R. v. Z.Q.P.*, 2006 BCPC 505. This case involved the imposition of a youth sentence, and the only question was whether it would be open or secure custody. These offences arose out of a home invasion in which a knife and a firearm were used. The youth had been on probation for a robbery charge and had a weapons prohibition at the time of the offences. The youth had been in custody since his arrest in July of 2006. Sentencing was dealt with in November of 2006. The joint submission was a 21-month custodial sentence. The youth was a 17-year old First Nations youth who had a difficult upbringing and a moderate youth record.
- [53] Defence referred to *R. v. M.B.*, 2007 ABPC 3. This involved a home invasion with a gun, pointing the gun at people and demanding money. The youth pled guilty to attempted assault using a weapon, house breaking with intent to commit an indictable offence, unlawful confinement and unlawfully pointing a firearm. The youth had been in custody for one year and three weeks before sentencing. The youth had 39 prior convictions, including robbery and assault with a weapon. The court said that without credit for time served, the sentence would have been 15 months consisting of ten months closed custody, followed by five months in the community with supervision. The sentence imposed was six weeks closed custody followed by three weeks of community supervision. This was followed by one year probation and a two-year weapons prohibition. That case includes a number of references to other sentences of youths in which sentences of less than two years were imposed [paras. 21-22].
- [54] Defence referred to *R. v. J.R.L.*, 2007 NSCA 62. In that case, the court dealt with an appeal from a sentence of six months deferred custody and 18 months probation imposed on a 17-year old. The offences arose out of a home invasion. The appeal was dismissed. In that case, the youth had no prior record and had pled guilty.
- [55] Defence referred to *R. v. L.K.S.-L.*, 2011 BCCA 509. The 15-year old offender had no prior record. He was involved in a home invasion. The Court of Appeal upheld a sentence of 15 months custody and a supervision order followed by a 12-month intensive support and supervision order. The offences included unlawful confinement, break and enter a dwelling house, robbery and assault causing bodily harm.
- [56] The defence referred to Gladue and Ipeelee which I have considered as well.
- [57] The Crown did consider the defence cases and also added the decision *R. v. C.W.P.*, 2008 BCCA 394. In that case, a youth was sentenced to a global sentence of open custody and supervision for nine months, followed by nine months probation. The offences were break and enter using an imitation firearm during the commission of an indictable offence and unlawful confinement. The youth was 15 years of age at the time of the offence, and had entered guilty pleas. He, with another young offender and two adults, invaded an apartment looking for drugs and money. They were armed with a machete and a pellet gun that looked like a real gun. The youth appealed the sentence.

- [58] The Court of Appeal found that there were some errors in the sentencing decision and, therefore, determined the appropriate sentence itself. The court found that the nine-month custodial sentence was excessive and that it would remove him from a home and a school where he appeared to have done well prior to sentencing. The Court of Appeal found that the two months he had spent in open custody before being released on bail pending appeal, were sufficient to provide meaningful consequences to the appellant for his actions, if combined with other components of sentence the court imposed.
- [59] The court found that the other young offender, who also received nine months, did receive a fit sentence, partly because of the difference in his age. He was two years older at the time; that is 17. He also had a number of previous convictions, including robbery, and the appellant had only one prior conviction for theft.
- [60] The Court of Appeal imposed a sentence of two months open custody which was already served, and six months deferred custody with supervision, which the court said was comparable to an adult conditional sentence.
- [61] As pointed out in C.W.P., the sentencing of a young offender is an even more subjective exercise than the sentencing of an adult offender [p. 16]. The determination under s. 72, whether to sentence a youth as an adult or a youth, does involve a difficult balancing of all of the factors counsel have referred to.
- [62] I appreciate the help both counsel have given me in dealing with this very difficult and delicate exercise.
- [63] J.F. has had a very traumatic upbringing. Both of his parents attended residential schools, and it appears that they have suffered the traumatic impact of that, including substance abuse and violence in their own relationship. This resulted in the separation of the children from the family. J.F. went through a series of foster homes, and I am told in at least one of the homes, did not receive the care that he was entitled to. He was not even being fed properly in that home and was removed, but subsequently returned. He was in need of significant dental treatment that would have cost in excess of \$6,000.00, but did not receive that treatment because the budget only allowed \$500.00. As pointed out by defence counsel, J.F. was in the care of the Ministry and their responsibility to J.F. was the same as the responsibility of any parent to their own child. It is understandable that J.F. would have had problems in school given the separation from his family, and the abuse that he had witnessed or suffered at the hands of his own parents. It is understandable that he would have difficulty adjusting to separate homes and would have difficulty coping in school. As pointed out by defence counsel, he has done well during the last number of months in custody because that is probably the most stable environment he has been in for years. While he was a youth, J.F. was under the supervision of a youth probation officer who had his own serious problems. This resulted in a number of the breaches because J.F. could not deal with this individual who was a cocaine addict, and apparently abused his position, or acted completely inappropriately given his position.

- [64] J.F. does have some cognitive problems and difficulties, and his level of maturity is less than would be expected for his age or his physical size. J.F. does have significant problems that he will have to deal with and for which he requires significant support. I am satisfied that J.F. was easily influenced by his peers, and that may largely be as a result of his lack of maturity and understanding.
- [65] Keeping all of these factors in mind, I am satisfied that a meaningful sentence that holds J.F. accountable for these offences can be imposed as a youth sentence. In addition to time served, I am imposing a custodial sentence of 21 months, which would consist of 14 months in custody, followed by seven months of supervision. This will be followed by a period of probation for 15 months. The terms of his probation shall include:
- a) You shall keep the peace and be of good behaviour;
 - b) You shall appear before the Court when required to do so by the Court;
 - c) Within 72 hours after completion of your term of custody and supervision, you shall report in person to the youth worker at the youth probation office nearest the place of your release from custody, or the youth probation office located at Williams Lake, British Columbia, and after that you shall report as and when directed by the youth worker;
 - d) After first reporting to the youth worker, further reporting may include reporting by telephone at the discretion of the youth worker;
 - e) When first reporting to the youth worker, you shall reside at a residence approved by the youth worker, and you shall not change your residence at any time without first obtaining written consent of the youth worker;
 - f) You shall obey the rules and regulations of your residence;
 - g) You shall remain in the Province of British Columbia at all times unless you have first obtained the written consent of the youth worker to go elsewhere;
 - h) You shall have no contact, directly or indirectly, with Taylor Davies or Robert Stephenson, except for preparing and delivering to your probation officer a letter of apology which may be forwarded by your probation officer to Taylor Davies and Robert Stephenson. The form and content of the letter of apology must be approved by your probation officer;
 - i) You shall attend, participate and successfully complete any assessment, counselling, or program as directed by your probation officer, without limiting the general nature of this condition, such assessment, counselling or program that may relate to:
 - i. anger management;
 - ii. alcohol or drug abuse;
 - iii. full time attendance at a program for drug or alcohol abuse;

- iv. such full time attendance program as maybe directed by your probation officer; and
 - v. you shall comply with all the rules and regulations of such assessment, counselling, or program.
 - j) You shall also provide a sample or samples of your bodily substances to be taken for the purposes of registration in the National DNA databank in accordance with Part XV of the Code;
 - k) You are also prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance for a period of 10 years beginning from your release from imprisonment, and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for the period of your life.
- [66] I am satisfied that this sentence will be a sufficient length to place J.F. on the road to rehabilitation and reintegration. If that process is not going to be successful, it will be apparent within the length of this sentence. If it is going to be successful, he will be well on his way by the time this sentence is completed.

"R.E. Powers J."

POWERS J.

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