
CANADA / JUDGMENT

R. v. J.G.

2000 BCCA 387

COURT

British Columbia Court of Appeal

DECIDED

23 June 2000

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2000 BCCA 387

Citation:

R. v. J.G.

Date: 20000623

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Docket:

CA027187

CA027192

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

CA027187

BETWEEN:

REGINA

RESPONDENT

AND:

J.G.

(Young Offenders Act)

APPELLANT

- AND -

CA027192

BETWEEN:

REGINA

RESPONDENT

W.A.D.

(Young Offenders Act)

APPELLANT

Before:

The Honourable Madam Justice Prowse

The Honourable Madam Justice Ryan

The Honourable Madam Justice Huddart

E.K. Jones

Counsel for the Appellants

R.A. Mulligan

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

May 25, 2000

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2000

Dissenting Reasons by:

The Honourable Madam Justice Prowse

Majority Reasons by:

The Honourable Madam Justice Ryan (Page 22, para. 38)

Concurred in by:

The Honourable Madam Justice Huddart Reasons for Judgment of the Honourable Madam Justice Prowse:

- [1] These are appeals by two 14-year-old aboriginal girls, J.G. and W.D., from sentences of six months' open custody and 18 months' probation imposed by a youth court judge on May 8, 2000 following their guilty pleas to a count of assault with a weapon, contrary to s. 267(a) of the Criminal Code. The victim of the assault was another young aboriginal girl. J.G. received a concurrent sentence on a count of having her face masked with intent to commit an indictable offence arising out of the same incident. W.D. was also sentenced to seven days' concurrent for failure to comply with an undertaking.
- [2] Leave to appeal sentence was granted with respect to both appellants on May 15, 2000, at which time they were released on bail pending appeal.
- [3] Counsel for the young offenders submits that the sentences imposed with respect to the assault charges were excessive and unfit, not in relation to the nature of the offences, which he concedes were extremely serious, but in relation to the circumstances and background of the offenders. He submits that the sentencing judge erred in principle in failing to give effect to all of the relevant principles of sentencing set forth in the Young Offenders Act, R.S.C. 1985, c. Y-1, (the "YOA"). In particular, he submits that the sentencing judge gave undue emphasis to general deterrence and denunciation, and too little consideration to rehabilitation. He submits that all of the relevant factors of sentencing would be met by allowing the appeal and substituting a sentence of time served and, if necessary, more stringent terms of probation.
- [4] Counsel for the Crown submits that this is an appropriate case to consider whether the sentencing judge erred in basing his sentence solely on considerations of general deterrence and denunciation. He also suggests that the overall sentences may be excessive, given the lengthy period of probation imposed in addition to the custodial sentences. He notes, however, that the local community is taking an interest in the outcome of these and related proceedings. The trials of two other young people who were charged with offences arising from this incident are set to be heard this summer.
- [5] In order to place the sentences imposed in context, I will refer briefly to the circumstances of the offence and to the circumstances of J.G. and W.D.
- [6] The assault took place in December 1999 in a secluded area near Ucluelet, B.C. where the victim, another 14-year-old aboriginal girl, had been lured by a young male who knew one of the instigators of the offence. It appears that rumours had been circulating that the victim had been involved in some way with the boyfriend of one of the other perpetrators of the assault. The circumstances of the assault were described by the sentencing judge in the following passage at pp. 12-13 of his reasons:

The facts of this case are as follows: at least three young teenage girls heard a rumour that their friend, also a young teenage girl, had said something about someone's boyfriend. As a result, they planned to assault her. These plans included having a change of clothes at the school to change into so that the victim would not recognize them, having a boy lure the victim to a prearranged place, obtaining ski masks and hair spray. Dressed in this fashion, they met the

victim at the prearranged spot, sprayed the hair spray into the victim's eyes, punched the victim, cut the victim's hair, punched the victim when the victim tried to get up and leave, tried to burn the victim's hair with the hair spray and a lighter. One of them tripped the victim as she tried to leave, and they then continued to punch and assault the victim to most parts of her body. The victim finally fell or was pushed down a bank and made her escape.

- [7] It is apparent that the assault was planned, that J.G. and W.D. were willing and active participants, and that the intention of the perpetrators was to terrorize the victim. They succeeded in effecting their purpose.
- [8] The physical injuries suffered by the victim included bruises, scratches and abrasions, but she did not require hospitalization. This is more fortuitous than not, as she could well have been seriously burned by the reckless use of the hairspray and lighter, or otherwise gravely injured. More significantly, the victim suffered psychological scars from the attack as is evidenced by the victim impact statement placed before the court. At the time of the attack, she believed she was going to die, and she has continued to suffer from recurring nightmares. She also felt betrayed by J.G. and W.D. whom she had previously regarded as friends.
- [9] Following the attack, the victim, who is a ward of the court, moved to Nanaimo where her older sister is living. She is afraid to return to the community and, at present, it appears unlikely that any form of reconciliation is possible between her, the perpetrators of the attack and the local aboriginal community.
- [10] In summary, these young offenders were active participants in a vicious, cowardly and premeditated attack on a young and defenseless member of their own community who was physically injured and emotionally devastated by the attack.
- [11] The background of the young offenders is set out in thorough pre-disposition reports and psychological assessments which were prepared for the purpose of sentencing.
- [12] One of the most noteworthy features of this case is that both J.G. and W.D. come from supportive homes, and neither has had any prior involvement with the criminal justice system. Their participation in this assault was viewed by those who know them as shocking and completely out of character.
- [13] J.G. was described in the reports as a cooperative and likeable student and as a child who posed few problems either at school or at home. There is some indication from her record of absenteeism in high school, however, that she may have been gravitating toward a negative peer group in the community. Other personal problems which may have contributed to her participation in these events are referred to in the following passage from the report prepared by the psychiatric social worker:

Examination into [J's] life circumstances in the months previous to the offence may shed some light on this matter as it is apparent that the period was a very stressful time for [J]. [J's] parents had suddenly separated in August 1999 due to a rather sudden incident in their relationship

which was not chronic or longstanding. The separation was devastating to the children in the home and [J] was confused about the situation and greatly missed her father. Around the same period [J's] uncle, whom she had grown close to, committed suicide across from the family home. [J] struggled with these events but held most of her stress and confusion inside, as her older sister and closest confidante had moved away during the same time frame. It may have thus been the case that [J's] lingering and unresolved frustration may have contributed to her involvement in the offence.

- [14] The reports prepared with respect to W.D. also indicate a child who had presented few behavioural problems at home or at school. It appears, however, that she was experiencing academic difficulties and that she was increasingly truant from school. She had also recently learned that she was adopted and that her biological mother had died. The episode leading to the charge of breach of undertaking also suggests that she may have been having some problems with her father, for whom she had been caring several hours a day during his recovery from a motor vehicle accident. Both the psychiatric assessment and the pre-disposition report indicate that W.D. is in need of counselling.
- [15] In summary, it is apparent that this incident occurred at a time when J.G. and W.D. were attempting to cope with not only the turbulence commonly associated with early adolescence, but also with significant upset within each of their families.
- [16] The sentencing judge, who is familiar with the local community in which these offences took place, was clearly troubled by the degree of violence involved in the attack and the extent of the participation of these offenders. At several points in his reasons for sentence he mentioned the well-publicized case of Reena Virk, a young girl from Victoria who was lured to her death in circumstances bearing a disturbing resemblance to those here. While the consequences in the Virk case were more tragic than here, the willingness of those involved to participate in such inexplicable cruelty to a defenseless victim was an aggravating feature of both attacks.
- [17] In his reasons for sentence, the youth court judge referred to the principles of sentencing in the following passages, at p. 15:

The Young Offender's Act section 3 says that the protection of society is the primary objective of the judicial system in sentencing and that youth rehabilitation is the best avenue to achieve that goal. However, it also says that young persons need to be held accountable for their actions. The Act recognizes that probation and counselling are not always the best possible sentences to deal with the protection of society. I am also acutely aware of section 718 to 718.2 of the Criminal Code. Although I have not been provided with case law, I am aware that general deterrence is not usually to be used as a primary consideration in sentencing young offenders. I am also aware that many of Reena Virk's assailants received sentences of six months incarceration. Our Youth Worker has advised me today in court that his recollection was sixty days and up, and because he works more closely with those kinds of matters, I accept his recollection. Because of the extreme nature of this assault, at least three people on one; the use of hair spray and a lighter; the cutting

of the hair with scissors; the planning to have a change of clothes at school; to have a boy lure the victim to the location; the wearing of ski masks; the preventing of the victim from leaving the scene after the initial attack, I find that incarceration is necessary for general and specific deterrence and for denunciation. [18] The sentencing judge went on to express the view that a custodial sentence with a lengthy period of probation would be the best protection for society. After one further reference to the Virk case, he concluded that a fit sentence would be six months' open custody with respect to the assault-related offences, together with a lengthy period of probation.

[19] The provisions of the YOA which are of particular significance in this case are s. 3, s. 20(k) and s. 24 which provide, in part:

3. (1) It is hereby recognized and declared that
 - (a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future; (a.1) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions; (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour; (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance; (c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour; (d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;
 - ...
 - (f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families; ... (h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

- (2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1). * * * 20. (1) Where a youth court finds a young person guilty of an offence, . . . the court shall then make any one of the following dispositions, . . . and may make such other disposition as the court considers appropriate: . . .
- (k) subject to sections 24 to 24.5, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
- (i) two years from the date of committal, . . .

* * * 24. (1) The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person. (1.1) In making a determination under subsection (1), the youth court shall take the following into account:

- (a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures; (b) that a young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and (c) that custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.

[Emphasis added.]

[20] Section 28 of the YOA is also relevant since it provides a mechanism by which an otherwise fit sentence can be varied to take into consideration new information or changed circumstances not available to the youth court judge at the time of sentencing. It provides, in part:

[28.] (3) Where a young person is committed to custody pursuant to a disposition made under subsection 20(1) in respect of an offence, the provincial director . . . shall, on the request of the young person . . . on any of the grounds set out in subsection (4), cause the young person to be brought before a youth court

- (a) where the committal to custody is for a period not exceeding one year, once at any time after the expiration of the greater of
- (i) thirty days after the date of the disposition made under subsection 20(1) in respect of the offence, and (ii) one third of the period of the disposition made under subsection 20(1) in respect of the offence, . . .

or, with leave of a youth court judge, at any other time, and where a youth court is satisfied that there are grounds for the review under subsection (4), the court shall review the disposition.

- [21] The Court was not advised how long it would take following an application for such a review to be heard. It is important to emphasize, however, that s. 28 is not a substitute for this Court's role in determining whether a sentence imposed under the YOA is fit.
- [22] The first question to be asked, therefore, is whether the sentences which were imposed on J.G. and W.D. relating to the assault were fit. If the sentences were fit at the time they were imposed, a second question which arises is whether circumstances have arisen since then which should reasonably be taken into account by this Court in reviewing the sentence - or should this Court decline to interfere with the sentence, leaving the appellants with their remedies, if any, under s. 28?
- [23] In answering these questions, it is helpful to refer to the leading case setting forth the principles to be applied in sentencing young offenders, *R. v. M.(J.J.)* (1993), 81 C.C.C. (3d) 487 (S.C.C.). There Cory J., speaking for the Court, made the following observations:
- (1) s. 3 of the YOA should not be treated as merely a preamble or statement of principles but should be given substantive effect; (2) the principle of proportionality is of greater significance in sentencing adult offenders than in the disposition of young offenders; (3) general deterrence has less importance in the sentencing of a young offender than in the sentencing of an adult; (4) the fact that there is review procedure available under the YOA is a factor, albeit not a major one, in assessing the appropriateness of a disposition.
- [24] In *M.(J.J.)*, the Court noted that crimes committed by young persons tend to be group activities and that this was a factor to take into account in determining a fit sentence in the first instance. However, Cory J. qualified his remarks in that regard with the following cautionary note at p. 497 of the decision:
- Having said that, I would underline that general deterrence should not, through undue emphasis, have the same importance in fashioning the disposition for a youthful offender as it would in the case of an adult. One youthful offender should not be obliged to accept the responsibility for all the young offenders of his or her generation.
- [25] Although amendments have been enacted to ss. 3 and 24 of the YOA since *M.(J.J.)* was decided, I am satisfied that the principles I have extracted from that decision continue to apply.
- [26] I do not propose to refer to the other cases provided by counsel since they are all fact-specific. Suffice it to say that several of them dealt with sentences imposed on young offenders for group criminal activity in which the court emphasized that custodial sentences are generally imposed on young offenders as a last resort.

- [27] In this case, the youth court judge accepted that J.G. and W.D. were genuinely remorseful for their participation in this assault. There is no suggestion in his reasons, nor did the Crown suggest, that specific deterrence was a primary factor in sentencing these two young offenders. Rather, the emphasis of the youth court judge was on general deterrence and denunciation. It is apparent that he intended the custodial sentences to send a strong message to other young people that group violence of this kind would not be tolerated.
- [28] In my view, however, the youth court judge allowed the aggravated circumstances of the offence, viewed against the backdrop of the Virk proceedings, to overwhelm considerations of the individual circumstances of these two young offenders. In so doing, he ran afoul of Mr. Justice Cory's caution in M.(J.J.) quoted at para. 24 above by holding these two young offenders up as examples of what would befall those who participated in such an offence in the future. While I am sympathetic to his desire to deter others from engaging in such conduct, I am not satisfied that a six-month custodial sentence for these first-time offenders was necessary in order to achieve this purpose or for the general protection of the public.
- [29] Sections 3(1)(f) and (g) and ss. 24(1) and (1.1)(c) of the YOA, set out at para. 19 of these reasons, make it clear that custodial sentences should not be imposed except where the principles of sentencing leave no other reasonable alternative. In my view, the youth court judge failed to give adequate consideration to those provisions, and to the alternatives to a custodial sentence, in concluding that a six-month period of custody was necessary to protect the public and fulfill the other purposes of sentencing in the case of these offenders.
- [30] As matters currently stand, J.G. and W.D. have spent eight days in custody in five different lock-ups since being sentenced. They have filed affidavits describing their experiences in custody. They were harassed and challenged by other inmates, strip-searched and transported from one institution to another in handcuffs and leg-irons. Any illusions they may have harboured about how tough they were have been extinguished by their experiences in custody thus far. They have been separated from their families and their communities, frightened, humiliated, and intimidated.
- [31] Counsel for the Crown informed the Court that he had spoken with a senior corrections officer in Victoria, B.C. who advised that the institution in which the young offenders are to serve the custodial part of their sentence in Burnaby, B.C. houses many older, tougher and more sophisticated offenders than these appellants. The Court was also advised that there is no custodial facility for female young offenders on Vancouver Island. The open custody facility in Burnaby, which forms part of the Willingdon Youth Detention Centre, is the closest to the appellants' residence on the Esowista Reserve near Ucluelet.
- [32] Given the fact that both J.G. and W.D. are first-time offenders who have experienced the "short, sharp, shock" which a period of incarceration often has on young people in their position, I see little benefit to them, or to the public, in returning them to custody. In my view, any general deterrent value of returning them to custody would be more than offset by the potential deleterious effects of exposing them to the older and more street-wise

offenders they are likely to encounter in custody. There are other methods of ensuring their rehabilitation and protecting the public which do not run the same risk of criminalizing them further. In coming to this conclusion, I note that, in addition to spending time in custody, J.G. and W.D. have also been punished by being expelled from their schools and isolated from their peers.

- [33] In considering a fit sentence in this case, it is significant that, unlike many young offenders, J.G. and W.D. have both family and community resources available to them to monitor their conduct and assist them in making reparation for their crimes. It is open to the Court to take advantage of these resources in fashioning appropriate terms upon which these young offenders can be released into the community.
- [34] The local aboriginal community has expressed a willingness to arrange and supervise a form of restorative healing process for the benefit of these two offenders, the victim (if she wishes to participate) and the community. While it would have been of assistance if counsel had provided the Court with the details of such a plan so that a probation order could have been fashioned to take it into account, I anticipate that the youth probation officer who will supervise J.G. and W.D. on probation will be able to assist in that regard. I also anticipate that he will ensure that the additional terms of the order which I propose to impose as part of the disposition will be closely monitored to ensure compliance. The families of J.G. and W.D. will also have a role to play in that regard.
- [35] In the result, I would allow the appeals and vary the custodial sentences imposed on J.G. and W.D. to time served. I would also make an order under s. 20(1)(g) of the YOA that J.G. and W.D. each perform 100 hours of community work service at the direction of their youth probation officer. I would not interfere with the 18-month probation order, except to add the following term:

During the period from the release of these reasons for judgment until August 31, 2000, J.G. and W.D. shall not leave their residences between 6:00 p.m. and 6:00 a.m. except when authorized to do so by their youth probation officer in order to comply with the terms of their probation order, including absences to participate in community work service, counselling, and healing and cultural activities, or for such other purposes as authorized by their youth probation officer in writing. This term shall not apply in the case of a genuine emergency, considered to be such by their youth probation officer, if available.

- [36] I would direct that the terms of the probation order, including this additional term, be read and explained to the young offenders and a copy of the order provided to them. I would also direct that they be advised of the consequences of breaching this order, including the prospect of being charged with breach of probation, and being brought back before the court and a custodial order being imposed. I would also direct that any applications for variation or enforcement of this order be brought before the youth court.
- [37] I would allow the appeals accordingly.

"The Honourable Madam Justice Prowse"

Reasons for Judgment of the Honourable Madam Justice Ryan:

INTRODUCTION

[38] I have had the privilege of reading the reasons for judgment of Madam Justice Prowse who has determined that these appeals must be allowed. In reaching her conclusion that a sentence of six months' open custody is unfit in this case, Madam Justice Prowse has emphasized the appellants' age and absence of other criminal involvement against the backdrop of the rehabilitative goals of the sentencing provisions of the Young Offenders Act. With respect, I am of the view that in spite of the youth and inexperience of the young offenders this Court should defer to the opinion of the trial judge that the grievous circumstances of the offence demand that denunciation and deterrence play a meaningful role in these sentences.

FACTUAL BACKGROUND

- [39] The trial judge in this case was faced with a most difficult task. He had before him a serious violent offence committed by two 14-year-old aboriginal girls who had not encountered the court system before. Both girls come from supportive, loving homes. Both expressed remorse. None of the psychological assessments or pre-sentence reports prepared for either girl identified any underlying reason to explain why the two girls would become involved in a violent attack on a friend.
- [40] The attack was fierce. Madam Justice Prowse has referred to the circumstances. Since the nature of the offence played a significant role in sentencing I will repeat the facts in a bit more detail.
- [41] The facts placed before the trial judge by the prosecutor were not challenged by the defence. The facts were as follows:
- [42] The victim, V.T., had known the appellants, W.D. and J.G., since elementary school. After school on December 9, 1999, V.T. was asked by a young man to go for a walk. He led V.T. to an area known as Big Beach. Once at the beach three masked girls accosted V.T. Two other girls stood nearby. W.D. held V.T.'s arms behind her back while J.G. and another girl punched V.T. about the head and stomach. At one point during the onslaught W.D. sprayed hairspray through a lighter to throw flames at V.T.'s head. The third girl had a pair of scissors with her and attempted to cut the victim's hair during the assault. When V.T. broke free and attempted to jump into an embankment, W.D., J.G. and the third girl pulled her back by the hair and proceeded to punch her again. The third girl reportedly kicked her as well. V.T. eventually escaped. After wandering through the woods, she made her way to the hospital and reported the matter to the police.

- [43] As a result of the attack V.T. suffered a goose egg bruise above her hairline over her left eye, a black eye bruise under her left eye, a bump on the right side of her head, and scratches on her arms, wrists, legs, back and groin. A portion of her hair had been ripped out of her head and remained tangled, possibly melted in the rest of her hair when she was examined at the hospital. No victim impact statement was filed, but in an interview with the probation officer who composed the pre-sentence report V.T. said that when she saw the flames near her face she thought she might die. Shortly after the assault V.T. left the community to live with her sister in Nanaimo. She continues to have nightmares about what transpired. She remains afraid of her attackers and does not wish to see them again.
- [44] The motivation for the attack was never really disclosed. Most of those involved claimed that it was because V.T. had attempted to interfere with a girlfriend/boyfriend relationship in the group. In the psychological reports placed before the court, each appellant blamed the other for getting her involved in the offence.
- [45] The attack was planned at least the day before it happened. The girls brought masks and a change of clothing to school in anticipation of the attack. At lunch hour on the day of the attack, W.D. told a classmate about the plan to attack V.T. W.D. told the girl that they were planning to cut V.T.'s hair and to use hairspray to burn it.
- [46] Up to nine young people were involved in the attack, either as participants or on-lookers.
- [47] Although they expressed remorse, it was the opinion of the psychologists and probation officer that W.D. and J.G. did not, at the time of sentencing, fully appreciate the effect of the attack on the victim.
- [48] In several places throughout the pre-sentence reports members of the families of the two young people expressed a desire that the sentencing include community involvement in traditional restorative mediation. At the time of sentencing J.G. and W.D. had participated in communal dinners hosted by the families designed to address these issues. One of the difficulties in dealing with the matter in a traditional way was the fact that the victim refused to return to the community.

REASONS FOR SENTENCE

- [49] In sentencing the two young people to six months open custody the trial judge said this:

Because of the extreme nature of this assault, at least three people on one; the use of hair spray and a lighter; the cutting of hair with scissors; the planning to have a change of clothes at school; to have a boy lure the victim to the location; the wearing of ski masks; the preventing of the victim from leaving the scene after the initial attack, I find that incarceration is necessary for general and specific deterrence and for denunciation. The maximum sentence is two years. I believe that the young women will be given an opportunity in custody to take courses and programs which will aid in their rehabilitation, as well as speak to the deterrence and the denunciation of the offence. This, coupled with lengthy probation, will, I believe, best protect society in the future.

ANALYSIS OF FITNESS OF SENTENCE

[50] The issue for this Court is whether the sentence is unfit. The question posed by Mr. Jones, counsel for the appellants, was whether the provisions of ss. 24(1) and (1.1) of the Young Offenders Act were properly taken into account by the trial judge in sentencing the appellants. My colleague has set out the sections. For convenience I will repeat them here:

24. (1) The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person. (1.1) In making a determination under subsection (1), the youth court shall take the following into account:
- (a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures; (b) that a young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and (c) that custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.

[51] These provisions make it clear that a custodial sentence is to be considered only as a last resort and only when other alternatives would not protect the public. It is clear that the public is protected when other like-minded individuals are deterred from similar behaviour. What might be less clear, but no less important, is the notion that protection of the public includes the preservation of the public's confidence in the administration of justice. When a violent crime such as this one, which is essentially unexplained, is committed by a group of young people, a sentence which incorporates the goals of denunciation and deterrence is appropriate to protect the public. As Lamer C.J.C. said in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 81:

The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. . . . Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.

[52] Denunciation is one of the goals of sentencing which ensures that an offender will receive a punishment which "fits the crime". As can be seen by ss. 24(1) and (1.1) denunciation, for obvious reasons, defers to rehabilitation to a greater degree with young people than it does with adult offenders.

[53] Recently in *R. v. Kennedy* and *J.G.F.* (1999), 140 C.C.C.(3d) 378, Feldman J.A. of the Ontario Court of Appeal said for the Court at para. 34:

Although it is recognized that general deterrence plays a much less significant role in sentencing young offenders than adults, the Young Offenders Act makes it clear that general deterrence must be taken into account: *R. v. M.(J.J.)* (1993), 81 C.C.C. (3d) 487 (S.C.C.) at 496. In that case Cory J. noted the high proportion of youth crimes that are committed in a group. As discussed above, in this case the twist on that observation is that the victim of the assault was a peer of the respondent and of his friends at school who quickly learned of the assault. Although they were not part of the assault, their reaction of taunting and further humiliating the victim demonstrates the need for general deterrence and denunciation directed at those peers. [54] Although he did not specifically refer to these sections, the reasons for sentence of the trial judge demonstrate that he was aware of the principles they embody. In spite of the youthfulness of the offenders, their aboriginal status and the fact that they had no prior criminal history, the trial judge was struck by the seriousness of the violence and the fact that no explanation could be offered as to why the two appellants would resort to this brutality. It was not an error of principle, for the experienced trial judge in these circumstances, to emphasize deterrence and denunciation. Nor can the sentence be said to be so far out of the range as to be unreasonable. I am of the view that the trial judge did not err, for the reasons he gave, in imposing a sentence of six months' open custody.

[55] Madam Justice Prowse has referred to events that have occurred since these two appellants were sentenced. This Court must consider the fitness of a sentence at the time of its imposition. Although this Court has looked at events that have taken place since the sentencing, it is done only in the rarest of cases. I do not think that we should do it in this case. This is because the Young Offenders Act, as my colleague has pointed out, provides a mechanism, in s. 28, by which a sentence may be varied in youth court where new information or changed circumstances arise after sentence is imposed.

[56] I noted earlier that the parents of the young offenders in this case expressed their desire that the sentence imposed be administered through traditional ways. Traditional approaches can serve to express the community's condemnation of violent conduct and can promote the rehabilitation of the offender. Unhappily, no specific plan which could form part of a conditional sentence was put forward to the sentencing judge in the first instance. Nor was any particular course suggested to this Court on this appeal. Perhaps this is because the victim was, and is still, unwilling to return to

the community to participate in a traditional mediation process. On the other hand, the reports indicate that healing might be achieved by way of a surrogate or by representations made by the victim in writing. Since matters have arisen after the appellants were taken into custody which might properly form the basis for a s. 28 review, community involvement would likely be the subject of serious inquiry if the matter is placed back before the trial judge.

CONCLUSION

[57] I would therefore dismiss both appeals.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Madam Justice Huddart"

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