

CANADA / JUDGMENT

R. v. L.(V.T.)

2001 BCSC 956

COURT

Supreme Court of British Columbia

DECIDED

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Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

AND:

V.T.L.

REASONS FOR SENTENCE

OF THE

HONOURABLE MADAM JUSTICE D. SMITH

Counsel for the Crown: D. Fox

Counsel for the Defence: J. Fishman

Date and Place of Hearing: June 25, 2001

New Westminster, BC

[1] On December 5, 2000, V.T.L., also known as M.L., now age 16, was convicted by a jury of the second degree murder of 16-year-old R.J. This hearing is to determine his sentence.

[2] The offence occurred on February 19, 2000. M.L. has been in custody since February 20, 2000 when he was arrested. He had just turned 15 on January 29, 2000.

- [3] M.L. elected to be tried by a Supreme Court judge and jury pursuant to s. 19(4) of the Young Offenders Act, R.S.C. 1985, c. Y-1 (the "YOA"). Section 19(4) provides that if convicted, the young person must be sentenced pursuant to the provisions of the YOA and not the Criminal Code (the "Code").
- [4] Section 20(1)(k.1)(ii) of the YOA further provides that a young person's sentence for second degree murder may not exceed seven years and that it must be balanced between a period of custody and a period of supervision in the community. The period of custody must be served continuously and for no more than four years from the date of committal. The balance of the sentence must be served in the community in a placement under conditional supervision.
- [5] Pursuant to s. 28 of the YOA, an automatic review of the young person's custodial disposition occurs after one year subject to the completion of all appeal procedures. There is also an opportunity for ongoing interim reassessment of the young person's sentence in the following circumstances:
- (a) where the young person has made sufficient progress to justify a change in disposition;
 - (b) where the circumstances that led to the committal to custody have changed materially;
 - (c) where new services or programs are available that were not available at the time of the disposition; or
 - (d) where the opportunities for rehabilitation are now greater in the community; or
 - (e) on such other grounds as the youth court considers appropriate.
- [6] Before the young person is released from custody, the provincial director must prepare a report setting out any information that may be of assistance to the court in establishing the conditions for releasing him into the community under supervision. While serving the conditional supervision portion of the sentence, the young person is subject to both mandatory conditions as set out in s. 26.2(2) of the YOA and any discretionary conditions ordered under s. 26.2(3).
- [7] These provisions are in marked contrast to the provisions in the Code. The penalty for an adult offender convicted of second degree murder is life imprisonment with no eligibility for parole for a period of 10 years. There is no period of parole ineligibility for a young offender sentenced under the YOA for second degree murder. Instead, there are provisions to review the custodial disposition.

- [8] It must be noted that despite the capping of the maximum sentence under the YOA, a maximum term of custody is not reserved for the worst offence by the worst offender: *R. v. H.(A.)* (1991), 65 C.C.C. (3d) 116 (B.C.C.A.). As well, the sentence starts on the day of committal, so granting credit for time served in custody is discretionary: *R. v. D.C.*, [2000] B.C.J. No. 663 (Q.L.)(C.A.). However, as noted by Donald J.A. in *D.C.*, there is a clear trend for giving some credit for time served. Often the allowance is on a one-for-one basis.
- [9] In short, while the YOA provides for a maximum sentence of seven years, of which only up to four may be served in custody, there is considerable opportunity for the young person to reduce his sentence if his rehabilitation supports such a change.
- [10] The primary focus of the sentencing provisions in the YOA is the rehabilitation of the young person with the expectation of eventual reintegration into society. Section 3(c.1) of the YOA provides:

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;

- [11] However, under the umbrella of "protection of society", the YOA permits consideration of other sentencing principles, including general and specific deterrence, that may be relevant both to the young offender and to other young persons, and to protecting society: *R. v. H.(A.)* (1991), 65 C.C.C. (3d) 116 (B.C.C.A.).
- [12] In *R. v. M.(J.J.)*, [1993] 2 S.C.R. 421, Cory J. commented on the role of general deterrence in the sentencing of young offenders. He stated that it must be taken into account and further noted at para. 30:

There is reason to believe that Young Offenders Act dispositions can have an effective deterrent effect. The crimes committed by the young tend to be a group activity. The group lends support and assistance to the prime offenders. The criminological literature is clear that about 80 percent of juvenile delinquency is a group activity, whether as part of an organized gang or with an informal group of accomplices. ... If the activity of the group is criminal then the disposition imposed on an individual member of the group should be such that it will deter other members of the group. For example the sentence imposed on one member of a "swarming group" should serve to deter others in the gang.

- [13] At issue in this sentencing hearing are:

- (i) the length of sentence M.L. should be ordered to serve, to a maximum of seven years; and,
- (ii) the balancing of those years between a custodial period of up to four years, and an order for conditional supervision in the community.

- [14] For the purpose of sentencing, I have had the benefit of a Pre-Sentence Report ("PSR") and a comprehensive inpatient assessment report from the Youth Forensic Psychiatric Services ordered under s. 13 of the YOA ("s. 13 assessment") that includes a psychiatric, psychological and social history evaluation of M.L.
- [15] M.L. declined to discuss the circumstances of this offence with any of the interviewers for the s. 13 assessment on the grounds that he was appealing his conviction and did not want to be a "rat" on the three older youths who were facing criminal charges in adult court arising from the same incident. Another youth (who was younger than M.L.) pled guilty to manslaughter (in addition to a second unrelated offence of aggravated assault) and received a custodial sentence of one year in addition to the time he had already served in custody.
- [16] In addition to the s. 13 assessment, M.L. obtained a further psychological assessment which has been filed in this hearing. The authors of both assessments were called as witnesses and subject to cross-examination in the one-day hearing.
- [17] The assessments addressed the issue of M.L.'s risk of future violence and potential for rehabilitation. The s. 13 assessment found M.L. to be a long-term risk needing lengthy treatment. It recommended a maximum custodial and supervisory term. In contrast, the defence's psychological assessment concluded M.L. was not a high risk to re-offend and recommended a short custodial term to be followed by a longer supervisory term in the community.
- [18] Both assessments recommended that M.L. participate in the Violent Offender Program at the Boulder Bay Secure Custody Centre. This program is an intensive six-month program that may be repeated several times if necessary. Its purpose is to help young offenders break the cycle of antisocial behaviours and violent crime, provide alternatives to delinquent lifestyle, and help to facilitate integration into the community in a manner that will significantly lower the risk of re-offence and reincarceration. Components of the program include group and individual therapy, anger management, risk assessment at the time of admission and at the end, as well as relapse prevention plan, which is shared with the community supervisors upon release.
- [19] Both assessments also were in agreement that M.L. should receive a lengthy period of supervision in the community after his release from custody. They disagreed on the appropriate length of M.L.'s custodial term.
- [20] The Crown's position is that M.L. should receive the maximum custodial and supervisory sentence available under the YOA. It points to aggravating factors of planning, using a weapon, and acting with unprovoked senseless violence that resulted in the death of a young person. It acknowledges that if M.L. receives credit for the time he has already served in custody on a one-for-one basis, the maximum additional custodial time that could be imposed would be an additional two years and eight months.

[21] Defence submits that a short custodial term of no more than six months is warranted, and points to mitigating factors including the age of the young offender, his lack of any prior criminal record, and the 16 months that he has already spent in custody since his arrest. It concurs with the recommendation of a lengthy supervisory term.

[22] I turn now to the circumstances of this offence.

CIRCUMSTANCES OF THE OFFENCE

[23] The Crown's case against M.L. was based on circumstantial evidence. There was no direct evidence linking M.L. to the offence.

[24] On the evening in question, M.L. was with a peer group of Vietnamese and Filipino youths. Several members of that group became involved in a verbal altercation and minor scuffle with several members of a group of Korean youths. Ironically, neither M.L. nor R.J. were involved in that altercation.

[25] M.L. appeared to be the leader of his group. When he was informed of the altercation, he set in place a plan of action to correct what he believed was a perceived wrong to the members of his group. This plan ultimately led to R.J.'s death.

[26] M.L. recruited a number of youths to attend at the parking lot outside the Karaoke club. He used his cell phone to call his sister's boyfriend, an older youth. He also called another group of youths who were a short distance away. M.L.'s group then walked to a local pool hall where he continued to make calls. Several of the Korean youths followed M.L.'s group to the pool hall where they apologized to them for any wrong they might have committed.

[27] The manager of the pool hall became concerned that a fight between the youths might ensue and phoned the police. They attended and interviewed M.L. and several of his group. M.L. was described by one of the police officers as "disrespectful", walking away to take a call on his cell phone while she was trying to get information from him, and on two occasions interrupting another police officer who was interviewing one of the other youths.

[28] M.L.'s group eventually returned to the parking lot outside the Karaoke club. Shortly thereafter, his sister's boyfriend and several of his friends drove up in two vehicles. The second group that was a short distance away also arrived. The youths in the vehicles removed bat-like objects from the trunks of their cars and distributed them to the crowd. Members of this enlarged group were seen carrying objects variously described as bars, pipes, sticks, an axe and a machete.

[29] M.L. was observed talking with his sister's boyfriend and pointing in the direction of the Karaoke club where the group of Korean youths was inside celebrating a birthday. He appeared to be making arrangements with his sister's boyfriend to take retaliatory measures against the Korean youths inside. He told another youth they were there to fight the Koreans.

- [30] M.L. approached the club and attempted to gain entry. When he was unable to tell the manager the names of the friends he had asked to see inside he was refused admission. He returned to the larger group milling around outside. That group then headed back toward the Karaoke bar. Some were wearing bandanas about their face and carrying bat-like objects. Again, some youths tried to enter the club but were turned away by the manager. Witnesses observed M.L. at anywhere from the front, middle or back of the crowd.
- [31] The group became aggressive when it was refused admission. It pushed its way into the club by striking the manager and causing her to fall down. It rushed down a narrow hallway of the club wielding the bat-like objects. The youths pounded on the doors to the Karaoke rooms where the Korean youths were hiding in order to avoid a confrontation. A washroom door was smashed in.
- [32] R.J., who was with the group of Korean youths, had been in the washroom immediately before the outside group pushed its way into the club. When he came out of the washroom he did not have time to escape into one of the Karaoke rooms. He had no way to avoid the angry group, which swarmed and attacked him. He was at the wrong place at the wrong time and became trapped at the end of the hallway. He was heard screaming and within two minutes he was bludgeoned to unconsciousness. Immediately after the attack, the group raced out of the club and quickly dispersed.
- [33] M.L. was observed at the front of the group as it headed down the hallway. He was also observed standing over R.J. at the end of the hallway.
- [34] R.J. must have experienced extreme terror in the moments before he was attacked as he remained trapped against the wall at end of the hallway watching the group, some of whom were carrying weapons, bear down on him. He had no chance to escape and could only await his fate.
- [35] Shortly thereafter the police and ambulance arrived. R.J. was rushed to hospital. He was deeply comatose and had sustained massive trauma to his head. The medical staff realized death was inevitable but because of his age several operational procedures were unsuccessfully attempted. He was pronounced dead on February 20, 2000.
- [36] The forensic pathologist who conducted the autopsy stated R.J.'s skull had been shattered into "many, many pieces" by a blunt force trauma causing the brain to swell and cut off its blood supply, resulting in R.J.'s death. In the pathologist's opinion, a cylindrical object such as a bat, pipe or stick caused a bruise pattern on R.J.'s chest. This injury was consistent with a metal pipe seized from M.L.'s bedroom after the incident although no forensic evidence linked that pipe to the crime scene. No defensive injuries were found on R.J.'s body.

- [37] Following the incident, M.L. met with other members of his group. He switched jackets with another youth and told that person if the police questioned him that he should say they were at an arcade that night and later partying at a park. Later that night, that same youth phoned M.L. to advise him he had heard the victim might die. M.L. did not express any remorse or sorrow but merely reiterated his earlier instructions to the youth regarding what he should say to the police if he was questioned.
- [38] The jury found M.L. guilty of second degree murder. On the evidence, it could have concluded that M.L. was either the principal offender or a party to the offence. Under our criminal law a party to an offence is equally as culpable for the offence as the principal offender. However, it is more likely the jury found M.L. guilty as a party to the offence for the following reasons: (i) there was no direct evidence that he was the principal offender; and (ii) during its deliberations the jury had three questions seeking clarification on the issue of parties to an offence.
- [39] In summary, R.J., a 16-year-old youth with his whole life ahead of him, was senselessly and brutally bludgeoned to death by a complete stranger over an incident in which he played no part. He did not provoke the attack but was an innocent victim of an apparent retaliatory measure to correct, through violence, a perceived wrong.
- [40] M.L. must live the rest of his life knowing the effect of his role in this terrible tragedy. If any lesson can be learned from R.J.'s death, it is that violence resolves nothing and often leaves in its wake the tragedy of innocent victims.

EFFECT ON THE VICTIM'S FAMILY

- [41] The victims of this crime include not only R.J., who paid the ultimate price of his life, but also his family, and in particular his parents who have been devastated by the senseless death of their son. They have been so traumatized by their loss that Mrs. J. could not speak of its effect on her and Mr. J. could only deal with his suffering by returning to Korea. Undoubtedly, the senseless nature of the attack on their son has contributed to their devastation.
- [42] It is of considerable concern that M.L. expresses no empathy for the death of this young man. Only very recently has he even acknowledged the pain R.J.'s family is suffering as a result of this tragedy.

CIRCUMSTANCES OF THE OFFENDER

- [43] M.L. was born in Vietnam on January 29, 1985. When he was four, his parents and a sister fled to Thailand to escape the Communists, leaving him and his elder sister in the care of their maternal aunt. For the following three years his parents and sister lived in a refugee camp. In 1993 they immigrated to Canada. In 1994 they sent for M.L.

- [44] M.L.'s older sister (age 26) and a half-brother (age 24) remained in Vietnam. While still in Vietnam, M.L. developed a close bond with his aunt and uncle, older sister and maternal grandmother. He also spent time in the summers with his half-brother. His parents reported that in August 1998, M.L.'s half-brother was killed in a motorcycle accident. M.L. stated he was killed in a gang-related fight.
- [45] Upon arriving in Canada, Mr. L. Sr. worked at a variety of labouring jobs until he purchased a grocery store about a year ago. Mrs. L. was a homemaker and now also works at the grocery store. Both work long hours in the business.
- [46] Although M.L.'s parents deny that M.L. was any problem at home, the independent evidence from school records, their previous statements to others, and M.L.'s own admissions suggest otherwise. The evidence indicates that starting in about the fall of 1998, M.L.'s parents had difficulty controlling his behaviour. M.L. was disrespectful to them, stayed out late at night, and hung out at malls, arcades and around the Karaoke club. He also lied to his parents about his whereabouts and about his friends.
- [47] M.L. does not have any prior criminal record. He denied involvement in any serious antisocial behaviour but at the same time he hung out with an older peer group, some of whom were involved in antisocial and criminal activities. He indicated that conflicts with peers often involved gatherings of 30 - 80 youths with sticks and pipes in order to "outnumber the other side". If a physical altercation ensued, a victim might be beaten up. M.L. was not concerned about this and said he did not think about it much.
- [48] M.L. appeared to value his friendship with the peer group associated with this offence. He said he would not "rat" on his friends whom he said respected him because they knew that if they started trouble he would "beat them up". M. L. described himself as very loyal and devoted to his friends. His parents stated that M.L. was very popular with his friends and that his popularity was sustained by his loyalty to them.
- [49] M.L.'s school history is very checkered. When he first came to Canada in 1994 he did not speak any English. He was enrolled in an ESL program and now speaks English primarily.
- [50] His elementary school record was uneventful. However, his subsequent school performance deteriorated and was described as poor. By February 1999 school records noted M.L. "must learn more self-control". His behaviour was fraught with incidents of violence including numerous threats (sometimes with a weapon), assaults, and verbal altercations resulting in several suspensions and eventual expulsion.
- [51] From September 1998 to June 1999 he attended junior high school. The school counsellor described him as a "trouble-maker". The Vice-Principal described him as a "very angry young man ... seething". He was suspended for fighting with other students and for pulling a fire alarm unnecessarily. He was verbally abusive to his parents who were unable to control his behaviour.

- [52] In September 1999, M.L. transferred to another high school for grade 9. His performance continued to be poor. He was described as a "ring leader" and appeared to intimidate other students who would "get out of his way" when he walked down the hall. School personnel believed M.L. was involved with a gang.
- [53] During this period, M.L. was quick to anger and often resorted to the use of profanities. He continued to be disrespectful to his parents and his behaviour at school continued to be threatening. One recorded incident involved intimidation with a machete (although M.L. denied ever using a machete). In November 1999, he was expelled from school for threatening to punch a pregnant teacher in the stomach. He said he did that as a "joke" and because he was bored. He could not explain what was funny about this threat and he seemed to have no understanding how such conduct could be frightening.
- [54] After his expulsion, he transferred to an adult education program where he did quite well in his courses, achieving a math grade of 86% with minimal effort. His improved grades indicated his previous failing marks were more a result of his attitude than any inability.
- [55] Although M.L. has used marijuana in the past, substance abuse does not appear to be an issue for him.
- [56] He was arrested for this offence on February 20, 2000. While in remand custody, the progress reports indicated that M.L. was a very capable student. However, he was also the subject of a number of incident reports involving threats, fights, and discipline issues. He had a poor attitude and was "arrogant". He put in little effort, distracted others, was unmotivated and "off task". He consistently resorted to using profanity and was argumentative to the staff. Of concern was a note on his file that he had a "lack of empathy for others." In short, he was not very pleasant to deal with.
- [57] He told the author of the PSR he expected his first criminal charge would have been "weapons-related" based on his activities at the time. Although he would not discuss the circumstances of this offence, he did admit that he had expected to be acquitted or at least convicted of the lesser-included offence of manslaughter. At the same time, he denied any involvement with the offence other than being there and stated, "There's no direct evidence that I did anything and they still convict me". He took no responsibility for his admitted role in organizing the group that swarmed the Karaoke club and attacked R.J. He commented that "it was only a gang fight and someone died, that's all."
- [58] M.L.'s parents reinforce his minimization and denial of any responsibility in R.J.'s death by claiming M.L. was the victim in the incident. They claim he was wrongly charged and unjustly convicted. They also claim he was wrongly accused of the earlier school incidents and was a victim of the school system. Contrary to M.L.'s own admissions of acting out and lying to his parents in at least the six months before the offence, they state he was good at home, did what they asked, and never needed punishment. They denied any difficulty controlling M.L. yet school records indicate Mrs. L. had expressed fear of M.L. Mrs. L. denied her fear of M.L., although she admitted to being "worried" about him.

- [59] By all accounts M.L.'s parents had no ability to control him but they refuse to acknowledge M.L.'s out-of-control behaviour before this offence. Like M.L., they were reported to lack insight and remorse for the 16-year-old victim. Their wilful blindness concerning their son's involvement in this very serious offence, in my view, can only impair his rehabilitation. Ms. Morton also expressed this concern in the social history report.
- [60] On a more positive note, since his conviction M.L.'s behaviour and attitude have changed notably. After being admitted to the Inpatient Assessment Unit on February 28, 2001, for the s. 13 assessment, he was described as cooperative, acting maturely, and conscious about making a good impression. He needed a few limits placed on his behaviour but overall was not a management problem. He now appears to realize the seriousness of his present circumstances. Personnel in the secure custody facility described him as "totally different", "very nice", and "not in trouble at the centre". His school progress has also improved.
- [61] M.L. also voluntarily attended 12 sessions of the group skills program. The purpose of that program is to teach prosocial behaviour by "enhancing communication skills and the understanding of the role of values, to increase one's ability to identify prosocial and antisocial behaviours or beliefs, to facilitate a recognition of the impact of one's behaviour on others, and to introduce each participant to basic social skills." M.L. successfully completed the program and demonstrated a readiness for treatment. He appeared ready to contemplate change but had not yet internalized the concepts he had been taught.
- [62] In addition to the group skills program, M.L. has successfully completed most of the available courses at the Burnaby Youth Secure Custody Centre on substance abuse.
- [63] M.L. appears to have gained some insight into his needs by admitting that he "needs one to two years to change [his] life around".
- [64] In summary, immediately prior to this offence M.L. showed all the symptoms of an out of control youth with serious anger management issues. Unfortunately, his poor behaviour and attitude on remand apparently was tied to his belief he would not be convicted of this offence or if convicted would be found guilty of the offence of manslaughter. This attitude alone suggests at that time M.L. was in a state of denial as to the seriousness of his behaviour both before and after this offence occurred. While understandably his parents have been very supportive of M.L., they have also reinforced his poor attitude and view of himself as a victim. M.L.'s attitude appears to have improved since his conviction but admittedly he needs more time in order to ensure that the necessary changes in his life become permanent.

THE ASSESSMENTS

- [65] Dr. Peter Constance, a forensic psychiatrist with Youth Forensic Psychiatric Services, oversaw the preparation of the s. 13 assessment and conducted the psychiatric evaluation. He had two interviews with M.L. He also case conferenced with Dr. Heather Gretton, the forensic psychologist who conducted a psychological assessment of M.L., and Ms. Sandra Morton the social worker who prepared the social history report. Dr. Constance also had access to the nursing observations and assessments of M.L. while he was at the unit.
- [66] Dr. Gretton noted M.L. only superficially cooperated with the interview and seemed very concerned to make the right impression. She found he had a strong need for social approval and had a strong tendency to present himself in a favourable light although he had difficulty maintaining a relationship over time.
- [67] Both Dr. Gretton and Dr. Constance described M.L.'s responses as vague, guarded, evasive and defensive, particularly in relation to questions about his behaviour both before and after the incident. The psychological testing results showed him to be hostile, suspicious, and easily agitated. He had a tendency to blame others and was sensitive to criticism. His profile suggested a tendency to lack empathy and a willingness to override others for personal ends.
- [68] Dr. Constance also found that M.L. was socially insensitive, anxious, hostile, suspicious, irritable, edgy, and had amoral identification. M.L. appeared to him to be self-assured, self-focused and narcissistic, with a tendency to lack empathy. He tended to portray himself as the victim and to absolve himself of responsibility for the incident. He at no time expressed any remorse for R.J. but instead was self-focused on the negative consequences of the incident to himself.
- [69] While M.L. would not discuss the circumstances of the offence in view of his possible appeal, he was also reluctant to discuss his personal circumstances or feelings, including his background, schooling and associations. When pressed for details he became irritable and angry. M.L. denied anger problems but when asked about the violent and threatening incidents reported of him at school and while on remand, he minimized and tried to normalize his behaviour, could not remember details and became vague and defensive.
- [70] M.L.'s minimizing of his antisocial behaviour was a concern that was noted by all who interviewed him for the s. 13 assessment.
- [71] M.L.'s lack of concern about the consequences of the fight resulting in R.J.'s death was of particular concern to Dr. Constance. He found M.L. lacked empathy for the victim or the victim's family and had no significant remorse. He found him callous, evasive, and refusing to take any responsibility in the offence, all the while portraying himself as the victim. He found M.L. lacked insight with respect to his involvement with the group which Dr. Constance described as "gang affiliated" based on M.L.'s comments to Ms. Morton, the circumstances of the incident, and the police report.

- [72] Dr. Constance found no psychiatric or psychological disorder. He noted that M.L. had a full range of emotional responses and no abnormality of thinking or behaviour. However, he did conclude M.L. had a conduct disorder based on M.L.'s interviews with both himself and Dr. Gretton and the results of the psychological testing.
- [73] Based on this evaluation, it was Dr. Constance's opinion that M.L. had an emerging personality disorder with psychopathic traits and therefore was a long-term risk. Although M.L. did not have many of the factors noted in the psychopathy checklist, he was of the view that his antisocial and aggressive behaviour, lack of remorse, and continued association with an antisocial peer group increased his risk of violent reoffending. Dr. Constance recommended M.L. receive a lengthy period of custody during which he should take the violent offender program and other treatment, to be followed by a long period of supervision in the community. If M.L. responds well to treatment, then Dr. Constance was of the view his long-term risk would be lessened.
- [74] Dr. Robert Ley conducted the assessment of M.L.'s personality and psychological functioning on behalf of the defence. He had a significantly different impression of M.L. after a 41/2-hour interview with him. He also relied on the psychological test results obtained by the Inpatient Assessment Unit of Youth Forensic Psychiatric Services as part of his assessment.
- [75] In contrast to Dr. Constance, Dr. Ley found M.L. to be open and forthcoming, his responses full and informative, and as having good social and communicative skills. M.L.'s apparent lack of memory regarding the details of his past behaviour at school and home was not present with Dr. Ley. During his interview M.L. recounted additional negative behaviour that he had not previously disclosed. Dr. Ley stated that M.L.'s manner with him was polite, respectful, and even deferential. He did not find M.L. "cocky, grandiose, or narcissistic" or his interpersonal style to be "obsequious or manipulative". He said he found him likeable.
- [76] With Dr. Ley, M.L. adamantly denied committing the offence and insisted that he did not carry or use a weapon on R.J., or strike him in any fashion. M.L. acknowledged that he had telephoned his friends to rally them and others for a retaliatory fight against the Korean youths whom he believed had confronted and beat up his friends. Dr. Ley did not ask him about the specifics of his role in the incident although he noted that M.L. was apparently "amidst" a group of 20 or more mostly older persons who swarmed and attacked R.J.
- [77] It is interesting that M.L. did not offer any of these comments to Dr. Constance or Dr. Gretton even when they pressed him for answers about his behaviour both before and after the incident. Instead, he became angry, irritable and defensive. With Dr. Constance, Dr. Gretton, Ms. Morton and Ms. McPhee (the author of the PSR), M.L. denied any responsibility for the offence and claimed that he was a victim in this incident. In contrast, Dr. Ley states that M.L. "took responsibility for his wrongdoing" although what exactly he took responsibility for is unclear. With Dr. Ley, M.L. expressed some empathy for the victim's family but not the victim, although he also appeared more emotionally distressed over the

hardship and embarrassment he had caused his family.

- [78] In Dr. Ley's opinion, M.L. did not have a conduct disorder. He found him well bonded to his family and not unduly aggressive or violent as a child. He also noted M.L. had no prior criminal record.
- [79] It was Dr. Ley's opinion that problems related to M.L.'s aggressive behaviour only surfaced in 1998 and were a response to his half-brother's death. It was his view that the loss of his brother and the onset of adolescence facilitated and strengthened M.L.'s opposition to teachers and authority, involvement with older antisocial teens (at least half of whom were involved in criminal activities), and increased non-compliance with his parents.
- [80] Dr. Ley suggested that Dr. Constance's assessment overlooked cultural factors, although what these cultural factors were, or how they might have contributed to M.L.'s present circumstances, remain unclear. Dr. Ley was of the opinion felt that it was more likely M.L. was not a member of a gang, based on the paucity of historical and psychological factors in his background that are generally associated with youth violence and M.L.'s denial that he was a member of a gang. It was Dr. Ley's view that these indicators were more reliable than other factors that were relied on by Dr. Constance in forming his opinion, including: (i) M.L.'s comments to Dr. Gretton that the incident was just a gang fight where someone died; (ii) his comments to Dr. Constance that he and his friends would sometimes get together in a group of 30 - 80 and beat up on someone; and (iii) M.L.'s admitted loyalty and devotion to this antisocial peer group.
- [81] Dr. Ley concluded that M.L.'s lack of empathy for the victim, unwillingness to discuss the offence, and minimization or evasiveness regarding the offence had more to do with his counsel's instructions not to discuss the matter while the case was under appeal and his desire not to "rat" on his friends who were still facing trial than M.L. having an antisocial or aggressive personality.
- [82] However, Dr. Ley said that M.L.'s concern for his peers was relevant to the single issue identified by Dr. Ley in assessing M.L.'s risk of future violence: whether M.L. will persist in associating with peers, whether older or similarly-aged, who are antisocial and criminally oriented.
- [83] In Dr. Ley's view, M.L. was motivated to rehabilitate and self-improve. M.L. had taken several meaningful counselling programs while in custody. Also, it was Dr. Ley's opinion that M.L. would benefit from the violent offender program and individual therapy in the community. He recommended a short custodial period in which to complete this program with a longer period of supervision in the community.

THE APPROPRIATE SENTENCE

- [84] At age 15, M.L. was still relatively young when this offence occurred. However, incidents of threats, assaults, and defiance of his parents' attempts to limit his activities had surfaced in about the fall of 1998, over a year before this offence. While in remand, M.L.'s behaviour continued to be belligerent and uncooperative and did not change for the better until after his conviction. Now, realizing the seriousness of his circumstances, he has made some positive steps to rectify his past mistakes. He states that he now recognizes the hurt he has caused his parents and has promised them he will change his attitude and focus by becoming a good student and looking for work.
- [85] It is hoped that M.L.'s promises will in fact become permanent changes in his life. As stated by Dr. Ley, the choice to discontinue his association with the peer group that participated in this incident is his choice alone to make. M.L. acknowledges that in the past he won the social approval of his peers by his loyalty and devotion to them. His parents reinforce this aspect of their son's personality. However, if that loyalty and devotion continues, M.L.'s future may be bleak. On the other hand, if he gains insight into why he believes he needs this social approval, and if he chooses to terminate his association with the antisocial peer group, then he should succeed in his rehabilitation efforts and eventually become a productive member of society.
- [86] His lack of empathy or remorse for his involvement in the offence and his apparent callousness about the consequences of the fight remain disturbing. While his failure to discuss the circumstances of the offence because of a possible appeal are understandable, I am of the view that he continues to minimize his role as an active agent in the incident that resulted in R.J.'s death. His organization of the reinforcements that arrived with weapons could only have been intended for one purpose - to instigate a retaliatory fight against the Korean youths that, as in the past, might result in a victim being "beaten up". M.L. shows no insight into how these actions reflected a plan to specifically harm someone or how his continued association with such a peer group would inevitably lead him into such criminal activity. M.L. did not appear to connect the extent of his leadership role in organizing the attack on R.J. with the attendant tragedy.
- [87] While M.L. has recently acknowledged with Dr. Ley some responsibility for his actions, it is problematic how meaningful that acknowledgement is, especially in view of his continued adoption of a victim role in this incident and in his past suspensions and expulsion from school. This attitude reflects a lack of understanding into how he arrived at where he is in life. Until he begins to internalize the prosocial values he has been taught, and truly accept responsibility for his active role in this tragic incident, any treatment he receives will be of limited benefit. As noted by Ms. Morton, his family's current outlook, which reinforces his denial and minimization, will hinder his rehabilitation. It is hoped that his parents, as well, will take steps to receive the necessary counselling so that their supportive role for M.L. can be used to enhance rather than undermine M.L.'s rehabilitation.

- [88] I confess to having some difficulty in accepting the theory that M.L.'s loss of his half-brother was the cause of his deteriorating behaviour after the fall of 1998. Even assuming a close bond between M.L. and his brother who died, there is no evidence of how or if that bond was maintained after M.L. came to Canada in 1994, how or if M.L. was significantly affected by the lengthy separation from his brother, or how the death of his brother might have contributed to his antisocial behaviour. That is not to say that M.L. did not experience grief over the loss of his brother, but rather that there was no evidence to connect that loss with his subsequent behaviour other than a temporal connection. During that time, M.L.'s relationship with his maternal aunt and elder sister who were parent substitutes also ended. Yet no antisocial behaviour is attributed to that change in his life.
- [89] Later school records indicated that M.L. was a "ringleader" in his threatening and assaultive conduct. It has been suggested that his behaviour was a result of M.L.'s need for social approval and to replace the older brother he no longer had. However, if such was the case, it is unclear why M.L. did not begin his association with this peer group when he first was separated from his brother. The other explanation offered for his association with an older antisocial peer group was that it coincided with the onset of adolescence. However, that explanation, in my view, is insufficient to explain M.L.'s role as an active agent and not a passive participant in this incident.
- [90] His actions in organizing the group that swarmed the Karaoke club was indicative of a similar leadership role to that which he had assumed during the school incidents. Even now, M.L. does not appear to understand the need to completely sever his association with the group described as "gang affiliated" whom M.L. admits is involved in criminal activity, and to whom he has given his loyalty and devotion. This lack of insight, in my view, is very significant in addressing Dr. Ley's single issue regarding M.L.'s risk of future violence. In the words of Cory J. in M.(J.J.), the principle of general deterrence is applicable to circumstances where the offence is part of a group activity, whether formal or informal, that involves criminal activity. It can never be forgotten that the consequence of this group's activities that night, which were organized by M.L., was the death of another young man.
- [91] In all of the circumstances I have determined that M.L.'s rehabilitation requires a more lengthy custodial sentence. Taking into account the 16 months he has already served in custody and giving him credit, on a one-for-one basis for the time he has already served, I am of the view that M.L. should serve a further two years in custody. I am also of the view that M.L. requires this time in order to successfully complete the violent offender program, internalize the prosocial values he has been taught, and to acquire the much needed insight into the negative consequences to him of any continued association with the antisocial peer group he was involved with at the time of this offence. That custodial sentence shall be balanced by a subsequent period of conditional supervision in the community of five years. Conditions for that supervision may be addressed at the time of his release.

[92] M.L. should understand that his further two years in custody are subject to a mandatory annual review by this court. In the result, the length of his custodial term may be varied upon the factors earlier specified being established. In other words, if M.L. is successful in his participation in the violent offender program, and any other treatment he may receive, the custodial term of this disposition may be shortened.

"D.M. Smith, J."

The Honourable Madam Justice D.M. Smith

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