
CANADA / JUDGMENT

R. v. S.N.J.S.

2013 BCCA 379

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 379 R. v. S.N.J.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. S.N.J.S.,

2013 BCCA 379

Date: 20130827

Docket: CA040903

Between:

Regina

Respondent

And

S.N.J.S.

Appellant

Restriction on Publication: A publication ban has been automatically imposed under s. 110(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person referred to in this judgment by the initials S.N.J.S. This publication ban applies indefinitely, unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2013 (R. v. S.N.J.S., 2013 BCSC 852, Kelowna Docket 8094-2).

Counsel for the Appellant:

D. Turko

Counsel for the Respondent:

E. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

August 14, 2013

Place and Date of Judgment:

Vancouver, British Columbia

August 27, 2013

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice D. Smith

Summary:

S.N.J.S., a young offender, appeals her sentence for manslaughter. She was convicted on November 18, 2012, following a jury trial and was sentenced to an 18 month custody and supervision order of which nine months was to be served in open custody at a youth facility and the remaining nine months on community supervision, to be followed by an 18 month probation order.

On appeal S.N.J.S. argues that the sentencing judge erred in imposing a custodial sentence, even one to be served in a youth facility, without adequately considering a non-custodial sentence. S.N.J.S. also contends that the judge's reasons were not adequate to meet the requirements of s. 39(9) of the Youth Criminal Justice Act (YCJA), particularly in light of the consensus among the experts that incarceration was unnecessary for her rehabilitation. She says that the imposition of a custodial sentence of nine months was an error in principle given that the expert evidence before the sentencing judge indicated a custodial sentence was not necessary and might even be harmful to her. She argues that the judge placed too great an emphasis on other principles and purposes of sentencing, namely s. 38(2)(c) (the seriousness of the offence and her degree of

responsibility), in preference to the requirement to fashion a non-custodial sentence where possible: s. 39(1).

The appeal was dismissed.

The sentencing judge made no error in the manner in which he balanced the sentencing principles and objectives of the YCJA as they applied to the appellant. The reasons of the judge make clear that he did consider other non-custodial sentencing options but that on balance he considered a fit sentence, one that fully observed the principles in s. 38 of the YCJA, required the incarceration of S.N.J.S. for nine months of her sentence. The concern of the expert psychologists as to her vulnerability was mainly in respect to the possibility of S.N.J.S. being placed in an adult facility and the judge carefully crafted the sentence so as to avoid S.N.J.S. being placed in an adult facility.

The court did not accede to the argument that the judge failed to sufficiently state his reasons for imposing a custodial sentence as is required by s. 39(9). The judge's reasons demonstrated that he considered and rejected the submission that S.N.J.S. should not be incarcerated on the grounds that doing so would not hold her sufficiently accountable for the commission of this offence.

Reasons for Judgment of the Honourable Madam Justice Garson:

- [1] S.N.J.S. ("SNJS"), a young offender, appeals her sentence for manslaughter. She was convicted on November 18, 2012, following a jury trial. On April 17, 2013, she was sentenced to an 18 month custody and supervision order of which nine months was to be served in open custody at a youth facility and the remaining nine months on community supervision, to be followed by an 18 month probation order. The maximum sentence available was three years. Reasons for judgment of the sentencing judge may be found at 2013 BCSC 852.
- [2] On appeal she argues that the sentencing judge erred: by failing to state the reasons why he determined that an entirely non-custodial sentence was not adequate to achieve the purposes set out in s. 38(1) of the Youth Criminal Justice Act, S.C. 2002, c. 1 especially in light of the expert opinion evidence that the appellant was a low risk to reoffend; in failing to find that a custodial sentence was unnecessary for her rehabilitation; and by ignoring expert evidence that a prison sentence might have a negative impact on her rehabilitation. She also argues that the judge erred in penalizing her for failing to admit she stabbed the deceased despite the expert evidence of the likelihood of a psychological block to her memory of the offence.

The Offence

- [3] This tragic and senseless killing occurred in the context of a party attended by SNJS and a group of her teenage friends. By all accounts, almost everyone in attendance had been drinking heavily. A dispute arose between the deceased and SNJS. Both the appellant and the deceased were 16 at the time. The deceased accused SNJS of "cheating" on her (that is SNJS's) boyfriend. The argument escalated to the point that the two girls became engaged in a

physical fight. The judge described the evolution of this pointless quarrel to a deadly stabbing in the following passage of his judgment (at paras. 57 and 58):

- [57] There are a number of factors which, while perhaps not properly regarded as mitigating, do serve to reduce the level of moral blameworthiness or responsibility of SNJS. First, I am satisfied the act was neither planned nor premeditated. That follows almost inexorably from the jury's verdict. It is also a conclusion that fits comfortably with the evidence. Second, SNJS did not bring about the events which eventually gave rise to the tragic consequences that evening. Next, she was faced with two girls, both of whom were somewhat older than her and both of whom were at least as big as she was. The two girls were not overtly threatening SNJS, but they were doing things that were provocative in a general sense. From SNJS's point of view, they were spreading false stories about her conduct in relation to her boyfriend and actively and physically preventing her from attempting to explain to him her version of the underlying events. With the benefit of hindsight, even those involved must now surely appreciate how silly and senseless this all was. I recognize, however, that from the perspective of a 16-year-old girl, relatively new to the community, a girl more in need of acceptance and approval from others than many 16-year-old girls, this was a serious and troubling situation.
- [58] Next, I accept that SNJS may have experienced some fear. I do not accept that she thought AH was going to initiate a physical confrontation with her, but she feared that if she did not leave, the prospect of a physical confrontation was in the air. She chose not to leave. There was a physical confrontation. I accept that the initial exchange was mutual, neither one nor the other particularly responsible for the aggression, both bent on securing the outcome they thought was appropriate, and both willing to be physically violent towards the other to achieve that end. SNJS lost. They stopped fighting. At that point, SNJS produced a knife which I find that she had armed herself with in the house during the verbal confrontation that she and AH and others had participated in while inside the residence. I am satisfied that she did that for a variety of reasons including possible self defensive but also because she was not going to be deterred in approaching and explaining to [her boyfriend] her side of the events. When she produced the knife, she did not attack AH. She did, however, tell her that if she did not relent, she would use it. AH did not relent. SNJS used it. It is worth noting that she used the knife twice. Both times the weapon was wielded at AH's head. The first blow cut her cheek and neck. AH responded by again returning to SNJS's immediate vicinity and she was then stabbed in the neck. Viewed in this light, the crime cannot accurately be described as either near murder or near accident. It falls somewhere in between. SNJS is responsible for it. She chose to arm herself. She used the weapon in a lethal way. AH, while obviously not responsible for the outcome, was responsible to some degree for the conduct that gave rise to the confrontation.
- [4] Although the appellant testified to a different version of these facts at trial, on appeal the findings of fact made by the trial judge are not in dispute.

Background of the Offender

- [5] SNJS is now 19. She has no record of previous offences. She grew up in a supportive loving family. Her family moved from Langley to Kelowna when she was about to begin Grade 10. As the sentencing judge explained, this move to Kelowna had a disruptive effect on SNJS:
- [19] In terms of biographical information, SNJS was born February 27, 1994. She was 16 at the time of the offence and is now 19. Her mother, TR, is a status member of the Katzie First Nation. SNJS is not a status Indian, but she is eligible to become one if she wishes. Her father is DS. He and TR met in the early 1990s. They have two children, a 21-year-old son, who is SNJS's older brother, and SNJS. They were living on the Barnston Island in South Surrey when SNJS was born. Barnston Island is part of the Katzie First Nation Reserve. SNJS had, by all accounts including her own, a happy and comfortable childhood. Her father worked in construction and was steadily employed. When SNJS was eight years old, her parents separated. Although that was no doubt a difficult time, it was addressed in a mature way by her parents. They explained to their children that they had grown apart and that they were separating, but they did not display any animosity towards one another, at least none that was apparent to SNJS. SNJS continues to have a positive and caring relationship with both of her parents.
- [20] Following their separation, TR met and later married SR. He, too, developed and continues to have a positive relationship with SNJS. In 2009, he was offered a job in Kelowna. SNJS was then about to begin Grade 10. The family moved and this was a significant change in SNJS's life. She left behind her boyfriend, her school friends, and her soccer team. She played competitive soccer most of her formative years. On arrival in Kelowna, she continued to play soccer.
- [21] As the 2009/2010 school year progressed, things in SNJS's life began to deteriorate. She began to miss the curfew that her mother had imposed and attempted to enforce. She had a new peer group that she did not feel comfortable bringing home. When she broke her mother's rules, she was reprimanded and would again toe the line at least briefly. As the school year progressed, she began to miss class. She was frequently late. Between February and March, she was absent from 40 classes and late for 11 others. Although some of this corresponded with a family trip, that does not explain all the absences. SNJS, herself, told Dr. Riar that she began skipping class in Grade 9 and it escalated in Grade 10 to the point, not long before the offence, that she was missing at least a couple of classes a week.
- [22] Other aspects of her life were noted to be problematic during this time by others including her mother. She would stay out sometimes until three or four o'clock in the morning. She was "definitely drinking." She went on a trip to Las Vegas with her soccer team and was disciplined for her involvement with alcohol while on that trip. I digress to note that her coach pointed out that this was the only aberrant behaviour he noted on SNJS's part and he found that she was responsible and committed to the team and dealt with her punishment responsibly.

- [23] SNJS had begun drinking before moving to Kelowna, not regularly, but on occasion. Once in this community, her alcohol consumption increased. She drank on weekends, not all weekends and not both nights of the weekend, but with some regularity. She also started to use marihuana. By the time of the offence, she was smoking marihuana a couple of times a week. She also had experimented with the drug MDMA on a couple of occasions at parties.
- [24] All of this was out of character for her. She had been a good student prior to entering high school, achieving A's and B's. She remained a reasonable student in high school and still earned some high marks, but she also began to get C's and more frequent B's .
- [6] The offence occurred early in June of her Grade 10 year. She did not complete Grade 10 as a consequence of the charges. She recommenced her schooling while in custody following the imposition of the sentence under appeal.
- [7] She was on bail for three years before being sentenced. Her bail conditions were restrictive. Except on one occasion, she obeyed her curfew and the other conditions imposed upon her.

Youth Criminal Justice Act Provisions

- [8] Section 3 of the YCJA describes the broad principles that govern judges in the sentencing of young persons:
3. (1) The following principles apply in this Act:
- (a) the youth criminal justice system is intended to protect the public by
- (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
- (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
- (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
- [9] Section 38(1) of the YCJA describes more fully the applicable sentencing purposes that apply to young persons. Section 38(2)(e)(i) requires a sentencing judge to impose the least restrictive sentence that is appropriate:
38. (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.
- (2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
- (e) subject to paragraph (c), the sentence must
 - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
 - (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
 - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and
- (f) subject to paragraph (c), the sentence may have the following objectives:
 - (i) to denounce unlawful conduct, and
 - (ii) to deter the young person from committing offences.
- (3) In determining a youth sentence, the youth justice court shall take into account
 - (a) the degree of participation by the young person in the commission of the offence;
 - (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
 - (c) any reparation made by the young person to the victim or the community;
 - (d) the time spent in detention by the young person as a result of the offence;
 - (e) the previous findings of guilt of the young person; and
 - (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

[Emphasis added to s. 38 (d) and (e)(i).]

[10] Section 39(9) of the YCJA provides that the court must state the reasons why a non-custodial sentence is not adequate to achieve the purpose set out in s. 38(1):

- (9) If a youth justice court imposes a youth sentence that includes a custodial portion, the court shall state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1), including, if applicable, the reasons why the case is an exceptional case under paragraph (1)(d).
- [11] Under s. 39(1) a sentencing judge may not commit a young person to custody unless the young person has been convicted of certain specified offences. Of relevance to this appeal, a serious violent offence under s. 2(1), would also meet the definition of a violent offence under s. 2(1): manslaughter;
39. (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
- (a) the young person has committed a violent offence;
- (2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.
- (3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
- (a) the alternatives to custody that are available;
- (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
- (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.
- [12] Section 42 specifies the available sentences. Pertinent to this appeal is s. 42(2)(o):
- (1) A youth justice court shall, before imposing a youth sentence, consider any recommendations submitted under section 41, any pre-sentence report, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person, and any other relevant information before the court.
- (2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and .
- (o) in the case of an offence set out in section 239 (attempt to commit murder), 232, 234 or 236 (manslaughter) or 273 (aggravated sexual assault) of the Criminal Code, make a custody and supervision order in respect of the young person for a specified period not exceeding three years from the date of committal that orders the young person to be committed into a continuous period of custody for the first portion of the sentence and, subject to subsection

104(1) (continuation of custody), to serve the remainder of the sentence under conditional supervision in the community in accordance with section 105;

[13] The term "custodial portion" is defined in s. 2:

"custodial portion", with respect to a youth sentence imposed on a young person under paragraph 42(2)(n), (o), (q) or (r), means the period of time, or the portion of the young person's youth sentence, that must be served in custody before he or she begins to serve the remainder under supervision in the community subject to conditions under paragraph 42(2)(n) or under conditional supervision under paragraph 42(2)(o), (q) or (r).

[14] Thus it appears that the sentencing judge was required to sentence SNJS to at least some period of custody even if just time served already.

Sentencing Hearing and Reasons for Judgment

[15] Before the sentencing judge the Crown argued that SNJS should be sentenced to between one and three years, the first two years of which should be served in custody, and the final year in the community, under a supervision order.

[16] At the request of the Crown and without opposition from the appellant, the judge granted an order that the offence of which SNJS was convicted, manslaughter, was a "serious violent offence" under s. 42(9). Section 42(9) had been repealed and therefore the declaration made by the judge was unnecessary under the relevant provisions of the YCJA. In closing submissions counsel advised the court that the applicable provision of the YCJA was s. 42(2)(o). It appears that the judge did correctly apply s. 42(2)(o) and thus the unnecessary declaration is insignificant. Neither the Crown nor SNJS raised the declaration under s. 42(9) as an issue on appeal, and it is unnecessary to say more about it.

[17] The appellant sought a non-custodial sentence, that is, one entirely served in the community.

[18] As to SNJS's background and circumstances, the judge had before him four reports that provided detailed information about and assessments of, the appellant. These reports were authored by Dr. Murdoch, a forensic psychologist, Dr. Riar, a psychiatrist with Youth Forensic Psychiatric Services, Dr. Ley, a clinical and forensic psychologist, and Mr. Josephsen, a psychiatric social worker.

[19] Dr. Murdoch, a psychologist with Youth Forensic Psychiatric Services concluded her assessment by noting that from a purely rehabilitative perspective it was not necessary to incarcerate SNJS. She explained the basis of her opinion in the following passage:

Overall, in my opinion, [SNJS] has a high likelihood of leading a prosocial, productive life, and a low likelihood of committing a further violent act. When the offence was committed, she was a sixteen year old youth with the physical, cognitive and socio-emotional maturity that was appropriate for her age in some respects and somewhat low for her age in other respects. From a

purely rehabilitative perspective (i.e., without factoring denunciation or general deterrence), in my opinion, it is not necessary, nor in [SNJS]'s best interests, to separate her from her family for an extended period of time or for her to be immersed in a criminalized milieu for a lengthy period of time. Given [SNJS]'s personality profile as one who tends to seek the approval of peers, with strong needs to fit in with those around her, having her associate with antisocial individuals for an extended period of time would likely serve to hinder her chances of achieving her potential in the prosocial world.

[20] Dr. Ley expressed a similar opinion:

In regard to the disposition of this matter, from a psychological standpoint [SNJS] is an ideal candidate for some sort of community-based sentence. As noted she is a low risk for future offending, she has spent almost three years now in the community without negative incident or other kinds of criminal conduct, [SNJS] has engaged rarely in aggressive or violent behaviour and (tragically but notably) the violence associated with her current offence is measured in a few mere minutes and is not representative of her more general character and adjustment. Similar to the opinions and recommendations of Drs. Riar and Murdoch, it is my view that a custodial sentence for [SNJS] would be extremely harmful, would significantly worsen her psychological state, and ironically that it would serve to increase her risk for future criminality given the possible harm that could result for her in a correctional setting. In my opinion and given my familiarity with women's jails and prisons, if [SNJS] is sentenced to a custodial period, there is a significant risk that [SNJS] could be abused or assaulted, physically and/or sexually, given that she is a young, attractive woman who has not been in correctional settings previously. Obviously in most jails and prisons [SNJS] would be exposed to a large number of anti-social, violent women, with well-entrenched criminal value systems and with much capacity to be aggressive towards [SNJS]. In my view [SNJS] is not a tough person, either mentally or physically. In order for her to cope effectively in most women's jails and prisons she would need to adopt a highly formidable and aggressive stance towards other inmates. Likely she would need to fight in order to defend and protect herself. Additionally in my view [SNJS] does not have so-called "street smarts," which most anti-social, criminally oriented women do. As a result of this shortcoming, [SNJS] is also vulnerable to manipulation and exploitation in most correctional settings. As a final consideration, in my opinion [SNJS] does not require the educational, vocational, psychological or substance abuse programs that are available in correctional settings. More specifically, I do not view [SNJS] as needing an intensive treatment program for violent offenders. All of [SNJS]'s treatment needs can be easily met within the community.

[21] The judge noted that all four of the reports were consistent in finding that SNJS was at a low risk to re-offend and that a custodial sentence was unnecessary for rehabilitation purposes. The reports all noted the need for some substance abuse counselling.

- [22] In accordance with s. 38(2)(c) of the YCJA, the sentence must reflect, inter alia the degree of responsibility of the young person who committed the offence. It is fair to say that the judge found some aspects of the circumstances of the offence to be mitigating (such as the fact SNJS did not start the altercation) but others troubling. Balancing these factors led him to conclude that her degree of responsibility was high.
- [23] Next the judge turned to the questions of rehabilitation and whether a custodial sentence was necessary to meet the sentencing objectives of s. 38. He noted the "conundrum" he faced where on the one hand, the high degree of responsibility and the seriousness of the offence would tend to indicate the appropriateness of a longer custodial sentence, but on the other hand, such a sentence was not necessary to meet the individual offender's rehabilitation goals. He expressed grave concerns about SNJS's vulnerability if she were to serve her sentence in an adult facility. In the result he imposed a custodial sentence but one to be served in open custody at a youth detention facility, thus minimizing the risk of a significantly negative impact from incarceration by ensuring SNJS would not enter an adult facility.

Discussion

- [24] As already noted SNJS contends that the sentencing judge erred in imposing a custodial sentence, even one to be served in a youth facility, without adequately considering a non-custodial sentence. SNJS also contends that the judge's reasons were not adequate to meet the requirements of s. 39(9), particularly in light of the consensus among the experts that incarceration was unnecessary for her rehabilitation. She says that the imposition of a custodial sentence of nine months was erroneous given that the expert evidence before the sentencing judge indicated a custodial sentence was not necessary and might even be harmful to SNJS. Finally she argues that the judge over-emphasized other principles and purposes of sentencing, namely those referred to in s. 38(2)(c) (the seriousness of the offence and her degree of responsibility), in preference to the requirement to impose a non-custodial sentence where possible: s. 39(1).

- [25] SNJS relies on *R. v. S.L.*, 2003 BCCA 563 at para. 53 where Levine J.A. said:

The trial judge accepted the probation officer's analysis of the provisions of the YCJA as they applied to this case, without analysis or comment, in particular with respect to the alternative of an ISSP. It is an error in principle, in my opinion, not to comply with the specific directions in the YCJA that require a youth justice court to consider all available alternatives to custody and state the reasons why the suggested non-custodial alternative was not adequate and would not meet the purpose set out in s. 38 of making the appellant accountable for the offence and promote his rehabilitation and reintegration into society, thereby contributing to the protection of the public.

- [26] R. v. S.L. does not stand for the proposition, advanced by the appellant, that when the individual rehabilitative needs of the young person, examined in isolation, do not require a custodial sentence, a judge need not or should not balance those individual rehabilitative needs with the other purposes of the sentence. Such a reading would suggest that the goals of individual rehabilitation must trump the other purposes of sentencing. Beginning at para. 25, of S.L. Levine J.A. also said:

Sections 38(2)(d) and (e)(i) address alternative sanctions, discouraging the imposition of custody and encouraging rehabilitation and accountability. Section 38(2)(d) provides that "all available sanctions other than custody that are reasonable in the circumstances should be considered". Section 38(2)(e)(i) requires that the sentence be the least restrictive that is capable of achieving the purpose set out in s. 38(1). Sections 38(2)(e)(ii) and (iii) require that the sentence be the one that is most likely to rehabilitate the young person, reintegrate him into society and promote a sense of responsibility and an acknowledgement of the harm done.

[Emphasis added.]

- [27] Paragraph 38(2)(e) provides that it is "subject to paragraph (c)" of the same subsection. Accordingly, to the extent there is any hierarchy within the principles laid down in s. 38(2), it is (c) which is at the top of that hierarchy, not (e)(i) as contended by SNJS. Within (e), there is no hierarchy between the three requirements, and there is no reason for a judge to treat (e)(i) as trumping (e)(ii) or (iii). The judge must consider all of those requirements, along with the other principles laid down in s. 38(2), and the principles set out in s. 3, in determining a sentence.
- [28] Reading the Act as a whole also leads to the conclusion that sentencing is not entirely "offender-centric", in the sense that the Act speaks of the importance of accountability and meaningful consequences. The 2012 amendments (S.C. 2012, c. 1), now include s. 38(2)(f)(i) which states specifically that one of the sentencing objectives is to "denounce unlawful conduct". This amendment is a legislative response to R. v. P.(B.W.); R. v. N. (B.V.), 2006 SCC 27, [2006] 1 S.C.R. 941 and means that denunciation and specific deterrence (though not general deterrence) are proper considerations in the sentencing of a young person. (See Clayton C. Ruby, *Sentencing*, 8th ed (Markham: Lexisnexis, 2012) at 768-9).
- [29] "Accountability" is not defined in the Act, but must be understood in part to be concerned with the severity of the sentence in relationship to the seriousness of the offence. Holding a young person "accountable" must also be understood to include consideration of whether the sentence meets the goal of ensuring the person is rehabilitated and reintegrated into society. While s. 38(1)(d) and (e) do require the Court to impose the least restrictive sentence possible, this does not mean, as the appellant contends, that the "least restrictive" requirement should be read independently from the other principles and purposes in the Act, particularly "accountability". This notion of accountability includes consideration of the seriousness of the offence and requires a sentencing judge to balance and match the rehabilitative needs of the young person, with the other purposes and principles of

sentencing. (See also Malcolm Thorburn, "Accountability and Proportionality in Youth Sentencing" (2009) 55 Criminal Law Quarterly, 304; but note the 2013 YCJA amendments post-date this article).

- [30] Here the judge did balance the obligation to impose the least restrictive sanction possible with the other sentencing principles and purposes. After a careful analysis of the mitigating and aggravating circumstances of the offence, he returned to his consideration of the guiding principles and purposes of sentencing in s. 38. He concluded that some period of incarceration, (over that already served, which met the statutory requirement in ss. 42(2)(o)) was necessary. He explained his reasons for that conclusion in the following passages:
- [61] Returning to the statutorily prescribed objectives and purposes of sentence, if I were to impose a sentence such as that sought by the Crown, that the sentence would violate the principle set out in s. 38(2)(b) namely, that it would not be similar to sentences imposed on similar persons found guilty of similar offences in similar circumstances. I say that because the authorities I have referred to above demonstrate that youths guilty of more serious manslaughters and with higher risks to their respective communities have been sentenced to terms not dissimilar to that urged upon me in this case. I have addressed the seriousness of the offence. It was serious. A human life has been taken. I have also addressed the degree of responsibility that SNJS bears for that offence. Her degree of responsibility is high, albeit mitigated to some degree by the events that were developing around her and which she wanted no part of.
- [62] This case does, perhaps more than most, highlight the conundrum that Faulkner J. noted in the case I referred to above. [R. v. J.D., 2011 YKJC 2] Just sanctions must have meaningful consequences for a young person and must be assessed in light of the seriousness of the crime and the young person's degree of responsibility. That can and does on occasion conflict with what would be appropriate if rehabilitation and only rehabilitation were the goal of the process. A disposition that is served entirely in the community is not, in the circumstances of this case, in my view, sufficient to hold SNJS adequately accountable for her actions. Although I accept that stringent conditions imposed as part of a community-based disposition can be "meaningful," in this case, they would not be sufficiently meaningful.
- [64] Next, in this case, there is the prospect not only that custody may have little rehabilitative consequence, it may have the opposite effect. Dr. Riar offers the opinion that given SNJS's age, she will likely be able to manage a custodial disposition if served in a youth facility. If she were to serve a sentence in an adult facility, he said:

There is a probability of her picking up bad and criminal attitudes by being exposed to serious antisocial or criminal elements.

[Emphasis added.]

- [31] After referring to the expert opinions, I have already mentioned, the judge continued:

Although Dr. Lee did not specifically mention an adult facility, I take from his comments that that is what he had in mind.

[65] I am told that SNJS is able to serve a custodial sentence in a youth facility notwithstanding that she is now 19. I am told that that is presumptively available until she is at least 20. It may be that she could continue to serve a sentence in a youth facility beyond the age of 20, but that is not guaranteed. She will be 20 in February 2014.

[66] Taking all of the foregoing into account and attempting to strike the balance that the legislation mandates, I impose the following sentence.

[32] The Court took into account the seriousness of the offence and the fact that a young life was lost. Regardless of the fact that the deceased might be considered to have been the instigator of the argument, SNJS did choose to arm herself and twice use a knife against the deceased, the second stab causing death. The judge was sceptical about the reasons SNJS gave for her refusal to acknowledge the consequences of her conduct. But he did not penalize the appellant for the denial or treat the denial as an aggravating factor.

[33] In my view, the sentencing judge made no error in the manner in which he balanced the sentencing principles and objectives of the YCJA as they applied to the appellant. His reasons make clear that he did consider other non-custodial

sentencing options but that on balance he considered a fit sentence, one that fully observed the principles in s. 38 of the YCJA, required the incarceration of SNJS for nine months of her sentence. The concern of the expert psychologists as to her vulnerability was mainly in respect to the possibility of SNJS being placed in an adult facility. I would not accede to the argument that he gave insufficient consideration to s. 38(2)(d) of the YCJA.

[34] For same reasons, I would not accede to the argument that the judge did not state sufficiently his reasons as required by s. 39(9). He clearly considered and rejected the argument that a non-custodial sentence was a fit one and he stated why he reached that conclusion, namely that such a sentence would not be "sufficient to hold SNJS adequately accountable for her actions." There is no doubt that ss. 38-39 are intended to encourage a sentencing judge to consider all possible alternatives to a custodial sentence, but there remain circumstances where a judge may nevertheless properly conclude that a custodial sentence is necessary to meet the other sentencing principles in s. 38. The judge did not err, in my view, in concluding so in this case.

[35] SNJS applies to introduce fresh evidence on appeal. That evidence consists of reports as to her progress in the youth detention facility where she has been incarcerated since she was sentenced in April of this year. This evidence would not alter my view as to the appropriate disposition of this appeal. I note that the reports would, in any event, support the view that an open custodial sentence in a youth facility was the appropriate one.

Disposition

[36] In conclusion I would dismiss the application to introduce fresh evidence and dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice D. Smith"

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Prepared on 27 October 2026 · Esheria