CAC157509
Date: 20000121

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. J.L.Z., 2000 NSCA. 17]

Glube, C.J.N.S., Hallett and Pugsley, JJ.A.

BETWEEN:

J.L.Z. (Young Offender)	)	Megan Longley
	)	for the appellant
Appellant	)	
- and -	)	
	)	Kenneth W. F. Fiske, Q.C.
HER MAJESTY THE QUEEN	)	for the respondent
Respondent	)	
	)	Appeal Heard:
	)	November 24, 1999
	)	Judgment Delivered:
	)	January 21, 2000

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: The appeal is dismissed, per reasons for judgment of Pugsley, J.A.; Glube, C.J.N.S., and Hallett, J.A., concurring.

Publishers of this case please take note that s.38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> 38(1) No person shall publish by any means any report
>
> > (a) of an offence committed or alleged to have been committed by a young person, unless or order has been made under section 16 with respect thereto, or
> >
> > (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, is disclosed.

Pugsley, J.A.

[1] JLZ, born Dec. *, 1984, applies to this court, pursuant to the provisions of the **Young Offenders Act**, R.S.C. 1985, c. Y-1, (the **Act**) for a review of the decision of Justice Moira Legere, of the Supreme Court (Family Division), which ordered that JLZ be proceeded against in ordinary court.

[2] JLZ was charged on April 15, 1999, with having committed the following offences on or about April 12, 1999:

- robbery with violence to R. D., contrary to s. 344 of the **Criminal Code**, R.S.C. 1985, c.C-46 (the **Code**),
- robbery with violence to B. D., contrary to s. 344 of the **Code**,
- aggravated assault to R. D., contrary to s. 268 of the **Code**,
- aggravated assault to B. D., contrary to s. 268 of the **Code**,
- break and enter, contrary to s. 348(1)(b) of the **Code**; and
- breach of probation, contrary to s. 26 of the **Act.**

[3] After JLZ was remanded, with plea being adjourned, the Crown made application for transfer of the proceedings to ordinary court. The transfer hearing was held over a period of four days in late June of 1999.

[4] As required by the **Act**, a predisposition report, as well as a psychological assessment of JLZ, were both ordered and filed with the court.

[5] On July 2, 1999, Justice Legere delivered an oral decision ordering that JLZ be proceeded with in ordinary court.

[6] The grounds of appeal are that Justice Legere:

- misapprehended the evidence, and
- failed to properly apply the evidence to the test set out in s.16(1.1) of the **Act**.

[7] It is further submitted that the decision is unsupported by the evidence.

The Nature of the Review Process

[8] Section 16(9) of the **Act** provides:

> An order made in respect of a young person under this section or a refusal to make such an order shall, on application of the young person or the young person's counsel or the Attorney General, or the Attorney General's agent, made within thirty days after the decision of the youth court, be reviewed by the Court of Appeal, and that court may, in its discretion, confirm or reverse the decision of the youth court.

[9] In **R. v. M.** (**S.H.),** [1989] 2 S.C.R. 446, Justice McLachlin (as she then was) in reviewing the predecessor section, said at p. 465:

> Section 16(9) and (10), by conferring on the reviewing court the "discretion" to confirm or reverse, establish different rules for the review than normally apply on appeals, where the court is limited to correction of error. The reviewing body's function must be to "review" the decision, and then "in its discretion", confirm or reverse it. This involves evaluation, not only of whether the court below made an error of law or jurisdiction, but of whether its conclusions are correct based on the factors set out in the Act. In short, the reviewing tribunal can go into the merits of the application. If this review leads to the conclusion that the decision below was wrong for any of these reasons, the reviewing court in the exercise of its discretion may substitute its own view for that of the judge below.(emphasis added)
>
> There is, however, an important limit on the power of the review tribunal. Because it has not heard the evidence, it must accept the Youth Court's findings of fact and defer to it in matters involving the credibility of witnesses. Parliament has conferred on the review court a

> discretion to confirm or reverse the Youth Court judge's decision, but it has left the task of hearing and evaluating the evidence entirely to the Youth Court judge.

[10] And at p. 466:

> In summary, it is my conclusion that the review court must base its review on the facts found by the Youth Court judge and give due deference to the Youth Court judge's evaluation of the evidence. It must then proceed to apply the factors set out in s. 16(2) to that evidence. In applying these factors, the review court is not confined to asking whether the Youth Court judge has erred, but should make an independent evaluation on the basis of the facts found by the Youth Court judge. The result of that evaluation will be either to confirm or to reverse the Youth Court's decision.

The Evidence

[11] The strict rules of evidence that apply at trial do not necessarily apply to a transfer hearing (Monnin CJM, for the majority, in **R. v. M**. (1985), 23 C.C.C. (3d) 538 at 541 (Manitoba C.A.)).

[12] The Alberta Court of Appeal in **R. v. G. J. M.** (1993),135 A.R., 204, pointed out, at 206, that facts offered to the youth court during transfer applications are:

> ...unusually pliable. . . . Opinion, inference, evidence of character, good and bad, are all received. Hearsay is not resisted and it is quite arguable that evidence of inadmissible confessions cannot be controlled under s. 24(2) of the **Charter** because the Youth Court is not a court of competent jurisdiction on these applications.

[13] And again at 207:

> In order to weigh the circumstances of the offence, the factors of treatment and the adequacy of the competing sentencing regimes, it is obvious that the young person's guilt of, and his conviction for, the offence charged has to be assumed.

[14] Some limits have to be imposed in the event of an absence of evidence, as pointed out by Justice Berger in his dissenting judgment in **R. v. T.H.L.**, **H.V.T. and K.H.Y.** (1998), 219 A.R. 97, at 100:

> Were it otherwise, a mere accusation of crime would trigger immersion of a young person in the adult court system (assuming an assessment of the remaining factors favoured an adult court disposition). I reject that view of the law.

[15] I would adopt the comments of Justice Weiler (dissenting) in **R. v. B. (C.)** (1994), 86 C.C.C. (3d) 214, at 224:

> In a transfer hearing, once the Crown has established a *prima facie* case, the court assumes that the young offender will be convicted of the offences with which he is charged.

The majority **in R. v. B.(C.)** did not comment on this issue.

[16] The Crown called as witnesses:

- Sgt. Robin McNeil, who conducted the police investigation. Sgt. McNeil referred, in his evidence, to a statement he had taken from Mrs. D.. Mr. D. was not able to be interviewed as a result of the injuries sustained on April 12. Sgt. McNeil also referred to statements that he had taken on April 15 from JLZ, E. B. (a female co-accused) and P. H., another co-accused. Sometime after April 15, Mr. H. pled guilty to robbery with violence to both Mr. and Mrs. D., contrary to s. 344 of the **Code**, and also to aggravated assault upon Mr. D., contrary to s. 268(1) of the **Code**. (On June 30, 1999, Mr. H. was sentenced to fifteen years on the robbery charge, and fourteen years, concurrently, on the aggravated assault charge. His appeal to this court from his sentence was dismissed on January 13, 2000.)

- officials representing the Provincial Correctional Institution for Halifax County, the Nova Scotia Youth Centre, and the Federal Penitentiary at Springhill ;
- Carmella Hawkes-Lavin, JLZ's probation officer;
- Dr. Joan Boutilier, a clinical psychologist on the staff of the Nova Scotia Youth Centre.

[17] Three witnesses were called on behalf of JLZ - a youth counsellor at Brenton House in Halifax, a child community support worker who had previously counselled JLZ, and Stephen Gouthro, a psychologist on the staff of the IWK Grace Hospital in Halifax.

[18] JLZ did not testify at the hearing.

[19] The evidence disclosed that the D.s lived on a quiet cul-de-sac in * of the City of Halifax. The majority of the residents who lived on the street were elderly. At the time of the offence, Mrs. D. was 77 and her husband 79. Both were able-bodied senior citizens.

[20] JLZ advised E. B. on the afternoon of April 12 that he was looking to do a break and enter. Ms. B. responded that she knew someone who would be interested in participating. JLZ then met with H., who was unfamiliar with the *, and the two proceeded, at JLZ's direction, to the D. house and attempted to gain entry by cutting a screen covering a window on the back porch. It was 9:30 at night. Attracted by the noise, Mr. D. came to the kitchen door. JLZ displayed through the window glass a youth help line card and asked permission to use the telephone. Mr. D. refused entry and instructed his wife to call 911.

H. and JLZ left the premises. The police arrived in response to the 911 call, searched without success, and left at approximately 10:00 p.m.

[21] JLZ and H. adjourned to a nearby coffee shop to discuss with Ms. B. the discovery of the presence of the D.s at their home.

[22] According to the statement given to Sgt. McNeil, Ms. B. attempted:

> ...to counsel them at that point that this is actually a home invasion. You're now taking this a step up from just break and enter and you're looking at, people are there, you're running the risk of people getting injured or hurt and people can get - she references actually a time people are getting six years for this type of offence. You know, you'd better think what you're doing.

[23] Notwithstanding this caution, both JLZ and H. returned to the D. home on at least two further occasions to continue cutting away the screen in the back window. On the second occasion, at about 11:30, they succeeded and H. then cut the exterior phone lines leading to the house.

[24] Mr. D. had gone to bed at about 11:00 p.m. At 11:30 Mrs. D., alerted by a rush of air into the kitchen area, attempted to close the kitchen window. It was forcibly pushed open and H. and JLZ came into the house via the kitchen window. Mrs. D. turned and ran from the window screaming for her husband. She was pushed to the ground by JLZ. He then ripped the telephone cord out of the wall.

[25] Notwithstanding that it appears well established that on a transfer application where there is conflicting evidence, the court may proceed on the evidence most damaging to the

young person (Chipman, J.A. on behalf of this court in **R. v. T.T.G.** (1997), 157 N.S.R. (2d) 208 at 213), Justice Legere was cautious before making any findings adverse to JLZ without proof being established.

[26] An example of this attitude is illustrated in the conflict between the statements being given by JLZ to the police and the statement given by Mrs. D..

[27] Justice Legere stated:

> Mrs. D. states in her second statement on May 4th, that later in the evening as [JLZ] came down the stairs to check on the couple in the course of the ransacking of the home Mr. D. let out a sigh. Mrs. D. states that [JLZ] kicked Mr. D. in the ribs and said "stay put old man". [JLZ] denies this.
>
> [JLZ] maintains that he did nothing to Mr. D., but obtained a facecloth for him. In addition, he advises that he offered to assist Mr. D. to a chair.
>
> With respect to the kick to Mr. D. I would have to hear evidence on this point to draw a conclusion. I accept that [JLZ] caused Mrs. D.'s injuries. There is no evidence that would link any of the serious injuries inflicted on Mr. D. to this kick or to [JLZ].

[28] As this court is obliged to accept Justice Legere's findings of fact, it is convenient to set out the following excerpt from her summary of those facts:

> The evidence from the police is that Mr. H. is 5'10" and 165 pounds at the time of arrest and [JLZ] is 5' 5-6" and 121 pounds at the time of arrest. There is some evidence to suggest that Mr. H. is 20 years old.
>
> . . .
>
> ...Mr. D. came down the stairs with a small hand saw. The evidence discloses that Mr. H. viciously beat Mr. D. over his head, back, shoulders and hand with his cane. The cane was broken in the beating. Mr. D. was rendered unconscious. As the beating progressed [JLZ], the 14 year old accused, told him to stop beating Mr. D. or he would kill him. [JLZ] advises that at this point Mr. H. stamped on Mr. D.'s face.
>
> . . .
>
> The evidence is that Mrs. D. sustained the least serious injuries. She sustained an injury as the result of being pushed to the floor. ... Her injury resulted in full hip replacement surgery.

I accept that [JLZ] caused Mrs. D.'s injuries. There is no evidence that would link any of the serious injuries inflicted on Mr. D.... to [JLZ].

Mr. D. lay at the base of the stairs that lead to the upper floor for most, if not all, of the robbery. Mrs. D. lay around the corner. She advised the police that both young men had to step over her husband's body to get upstairs to finish the job they had set about to do. [JLZ] came down from upstairs where they were rummaging through the possessions of the D.s, occasionally to check on the D.s.

It was estimated by police that the accused and Mr. H. stayed in the home approximately 45 minutes to one hour after their entry into the home. Entry occurred about 11:30 p.m. . . . .

...both Mr. H. and [JLZ] ransacked the house. . .. On one occasion [JLZ] came down the stairs fanning Mr. D.'s wallet and commenting on the amount of cash in the wallet. This required that he walk down the stairs and stand over Mr. D.'s body.

. . .

[JLZ] is said to have come down on one occasion, entered the living room, found packages of cigarettes, offered Mrs. D. a cigarette, and when she refused he said, "Good then I'll take these". In addition, there is evidence that [JLZ] went into the kitchen and took a banana from the basket. He found a package of gum, offered Mrs. D. gum, opened the wrapper, discarded it and ate the gum. There is further evidence that he asked Mrs. D. where he could find bags to pack up the items they intended to take. She directed them to some duffle bags and [JLZ] and Mr. H. retrieved the bags to assist them, [JLZ] then returned to the upstairs, apparently to gather the possessions they intended to take.

On their last trip down the stairs Mrs. D. asked the youths to call an ambulance. She pleaded with them for help. At one point she pleaded with them to come and give her assistance as her husband was not breathing. Both accused admit that she asked for assistance. [JLZ] said in his statement that the lady said "Please help, he's not breathing". They ignored this request. [JLZ] also advises that he responded affirmatively to a request by Mrs. D. to leave a light on. Mrs. D. said [JLZ] responded to her request by saying that they did not leave lights on. She also asked him to call 911 and he asked her where she lived.

Ms. E. B. waited for [JLZ] and Mr. H. at the coffee shop. When they did not arrive she returned to her home and on arrival found the two accused in her apartment at * "freaking out". She confirms [JLZ] phoned 911. The 911 records confirm they traced the call to *. The call was made shortly after arrival at Ms. B.'s apartment at * at 1:07 a.m., after he left the D. residence, after he and his partner hailed a cab and were driven to Ms. B.'s place.

The efforts of the accused did not result in getting the needed assistance to the D.s as [JLZ] could not provide precise details as to the location of the house. He did advise the general direction. He also declined to take the police there.

. . .

The evidence indicates [Mr. D.] was badly beaten with severe bruising on his hands, face, shoulders, back and side. There is evidence of significant and visible bleeding which was immediately visible at and after the beating. There could be no reasonable doubt in the mind of both accused regarding the severity of the beating. Mr. D. is not expected to return home.

. . .

[JLZ] admits in his statement that at the time of arrest he and Mr. H. were still planning, as of April 13, 1999, to do a big cash crime. He thought of "doing" a corner store.

> The police found each of the two accused had in their possession a balaklava, latex gloves and a screw driver. Both had a knife. ...
>
> The evidence of Mrs. D., confirmed by the pictures and the medical evidence, is that Mr. D. was badly beaten, remained at the bottom of the stairs for some time, and later through the course of the night made his way on his knees at some time to the front of the house to the living room area, stopped to rest and managed to slide himself into the living room through the course of the night, even though Mrs. D. urged him not to move. Her evidence is that she dragged herself first to try to move the splinters of the cane away from her husband's path, then through the course of the night to the front door, attempted to turn the light on and off to alert passers by, and in the dawn pulled herself into a chair. She pounded on the door to attract attention. Finally a neighbour responded at about 8:00 a.m., entered, called 911 and the elderly couple were taken to hospital.

[29] In addition to a VCR, cash, and other items of personal property, JLZ and H. took mounted war medals awarded to Mr. D. for his service in the Second World War.

Pre-Meditation

[30] After reviewing s.16 of the **Act** which set forth the provisions respecting transfer to ordinary court, and recognizing that she was to be guided by the Declaration of Principle set out in s. 3 of the **Act**, Justice Legere said:

> I must consider whether rehabilitation of the youth and protection of the public can be reconciled in the youth court system. If they can be reconciled the youth remains and the Crown application is denied. If they cannot be reconciled, the protection of the public is paramount and the youth must be transferred to ordinary court.

[31] Mindful that the burden is on the Crown, Justice Legere then considered the factors mandated by s. 16(2) of the **Act**, i.e.:

> (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed;
> (b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the *Juvenile Delinquents Act*, . . . or previous findings of guilt under this Act or any other Act of Parliament or any regulation made thereunder;

(c) the adequacy of this Act, and the adequacy of the *Criminal Code* or any other Act of Parliament that would apply in respect of the young person if an order were made under this section to meet the circumstances of the case;
(d) the availability of treatment or correctional resources;
(e) any representations made to the court by or on behalf of the Attorney General or his agent, and
(f) any other factors that the court considers relevant.

[32] As the review was obviously critical to her decision to order a transfer of JLZ to ordinary court, it is helpful to consider her conclusions in light of the independent evaluation that I have made on the basis of the facts found by Justice Legere.

Section 16(2)(a) - The seriousness of the alleged offence and the circumstances in which it was allegedly committed

[33] This was a most serious offence.

[34] JLZ's participation was critical.

[35] He met Ms. B. on April 12, 1999, and told her he was "looking to do a break and enter".

[36] Ms. B. then spoke to her boyfriend, P. H., who was unfamiliar with this part of the City of Halifax.

[37] JLZ selected the D.s' home as the target.

[38] H. and JLZ returned to the D.s' home on at least two occasions after they were aware of the D.s' presence in an effort to gain entry.

[39] The circumstances in which the offences were committed were appalling.

[40] The initial violent assault on Mr. D. occurred immediately upon their entry into the residence. H. and JLZ remained for an additional forty-five minutes to one hour while they ransacked the house, ignoring Mrs. D.'s plea to help her husband ("he's not breathing").

[41] JLZ made a call to 911 after he returned to Ms. B.'s residence, in an attempt to obtain assistance for the D.s.

[42] According to JLZ, at the time they were arrested, they were:

> ...looking to do a big score. He felt that that would be a - they were going to rob a corner store to get some cash to be able to get out of town.

[43] The seriousness with which this court views home invasion offences has been previously expressed in **R. v. Fraser** (1997), 158 N.S.R. (2d) 163; **R. v. Foster et al** (1997), 161 N.S.R. (2d) 371; and **R. v. Stephenson** (1998), 169 N.S.R. (2d) 159.

[44] In **R. v. Fraser** it was stated at p. 167-8:

> This court has approved a range of sentences between six to ten years for robberies of financial institutions and private dwellings . . . I consider that house invasion robbery of this type should attract a sentence greater than that imposed for armed bank robbery.

Section 16(2)(b) The age, maturity, character and background of the young person....

[45] JLZ 's prior youth court history reveals the following:

- on July 6, 1998, a conviction for breach of an undertaking, contrary to s. 145(3)(b) of the **Code**, for which he was sentenced to four months' probation, and fifteen hours of community service;
- on September 1, 1998, a conviction for breach of s.334(a) of the **Code**, for which he received twelve months' probation, seven days' open custody, and fifteen hours' community service;
- on April 15, 1999, conviction for two charges under s. 334(b) of the **Code,** for which he received one week's custody on the first, and two weeks' on the second, and a finding of guilt on two breaches of s. 26 of the **Act**, for which he received four weeks, and ten months' probation, ending March 17, 2000.

[46] JLZ's parents separated when he was six. He was shifted back and forth between his mother and father for the next four years. When he was twelve he was placed in an adolescent centre for thirty-eight days. During that time he ran away on twenty-three occasions. He was then rotated through a number of metro-area group homes.

[47] The one consistent description applied by various assessors and probation officers during the last two years was the inconsistency of his behaviour. He was described as a leader, but also a follower; one who possessed street smarts, but also suffered from emotional immaturity; polite and co-operative on some occasions, but on others obnoxious; an individual who alternated periods of good behaviour with those of defiance.

[48] He was described as not responding well to, nor respecting authority.

[49] In the two-month period following probation in July of 1998, his behaviour was "completely out of control and his whereabouts unknown".

[50] In an April pre-disposition report prepared for the transfer hearing, Ms. Lavin wrote:

> There has been concern voiced about his personal safety, suspicions of substance usage and worry regarding choice of associates . . . at times his whereabouts unknown. Such impulsive, defiant, out of control behaviour also occurred in the weeks prior to his last sentencing hearing. Again, his blatant disrespect for the Court Order, and the rules and regulations of the Group Home indicate he did not learn from past Court consequences, and that he is again not considered, at this time, a suitable candidate for community supervision.

[51] Justice Legere reviewed at length the evidence and reports of Dr. Boutilier, a clinical psychologist called on behalf of the Crown, and Stephen Gouthro, a staff psychologist working at the Adolescent Day Treatment Clinic at the IWK-Grace Hospital in Halifax, called on behalf of JLZ.

[52] Both were well qualified and were in agreement that JLZ had a conduct disorder with moderate severity. They further agreed that JLZ was in immediate need of intervention, requiring long-term therapy in excess of two and a half years to change his behaviour.

[53] Dr. Boutilier testified that she would be surprised if JLZ's conduct disorder could be rehabilitated in three years.

[54] Mr. Gouthro testified that it could be accomplished “towards the high end of three years”.

[55] Justice Legere found:

> Both agreed that the possibility of critical change rests almost entirely on the availability of resources and critically on [JLZ’s] motivation. Without the presence of both of these two factors rehabilitation is not likely. There is no reliable way to predict [JLZ’s] motivation on the evidence I have before me. Without assessing blame to [JLZ] or to the “system” there simply is no history of sustained successful intervention. There have been many who have attempted to assist [JLZ].
>
> ... Mr. Gouthro assesses a number of factors in concluding that there is hope for rehabilitation of [JLZ]. . . . These factors indicate that there exists the possibility of rehabilitation.
>
> . . .
>
> .... The estimate obtained from both psychologists is at best a professional guess, dependent on the presence of appropriate services and commitment from [JLZ]. [His] past history indicates a failure to remain committed to behavioural change.
>
> . . .
>
> While he has indicated to Dr. Boutilier that he is remorseful I agree with her caution in accepting his expression as indicative of true remorse. On the totality of the evidence before me it is more likely he is aware of the difficult situation in which he now finds himself and wishes to mitigate the consequences. I am not satisfied that [JLZ] understands or feels true remorse. This ability to develop empathy is the skill most necessary to turn [JLZ] around.
>
> . . .
>
> However, the evidence of his behaviour before, during and after the break and enter indicates there is nothing but a premeditated and callous disregard for their victims.
>
> I am mindful that the accused cannot be accurately labelled as a follower. . . . In assessing [JLZ] I am mindful that he invited a discussion with E. B. regarding his wish to commit a break and enter . . . The notion of breaking into an occupied home was advocated by Mr. H. . [JLZ] was informed by Ms. B. that this raised the risk of more serious criminal penalty, i.e. increased jail time. They discussed this and he committed himself to the task. He did not commit the brutal violence evidenced in this case but he did cause severe physical injury to Mrs. D.. . . . There is no doubt that he called 911, creating an opportunity for the authorities to trace his call. However, despite the opportunity to turn back, to stop, to intervene as Mr. H. savagely beat Mr. D., he did nothing to intervene or to mitigate the potential injury. He continued to rob the victims and leave them defenceless and abandoned.
>
> The protection of the public can best be assured by working towards the rehabilitation of the accused. To rehabilitate [JLZ] he needs to develop an ability to understand and appreciate the needs and feelings of others and the ability to respond to those needs.

[56] Justice Legere acknowledged that the fact that JLZ was only fourteen at the time of the offence "weighs heavily in this equation". She concluded, however, that:

> He has a moderate conduct disorder, hard to treat, needing lengthy intervention. He needs a supervised gradual reentry into the community if rehabilitation and protection of the public are to be achieved. This cannot be assured within the structure of the Young Offenders Act. ...
>
> Simply put, there is a window of opportunity to effect rehabilitation with [JLZ]. Time is of the essence. I cannot conclude under the current sentencing options and length of sentence and community supervision available to a sentencing judge that the protection of the public and rehabilitation of the accused could be reconciled. To achieve that reconciliation a sentencing judge would have to have a wider range of options to give any assurances that both objects of Section 16 can be attained.

Section 16(2)(c) and Section 16(2)(d)

[57] It is convenient to consider sections 16(2)(c) and (d) together.

> (c) the adequacy of this Act, and the adequacy of the *Criminal Code* or any other Act of Parliament that would apply in respect of the young person if an order were made under this section to meet the circumstances of the case;
>
> (d) the availability of treatment or correctional resources; . . .

[58] Evidence was introduced by the parties respecting the services and environment in Waterville Youth Centre, the provincial correctional facility, and Springhill Penitentiary.

[59] Justice Legere concluded that the Waterville Youth Centre could provide the necessary programming and supervision. While the federal penitentiary offered some rehabilitative services, violence and drug abuse was prevalent in both the provincial correctional centre and the federal system and victimization of the young or vulnerable inmate was a reality. She concluded that if JLZ were sentenced in an adult court he would be able to be assigned to a youth facility until he matures.

[60] She considered that:

> The sentencing judge would have available the information I have about the appropriateness of these facilities. It is a real possibility that the accused, if convicted in ordinary court, could spend all of his custodial time in [the youth facility].

[61] Criticism of this kind of approach was expressed by Justice Then of the Ontario Court of Justice (General Division) in **R. v. V.(T)** 1990 O.J. No. 593.

[62] In the course of a thoughtful decision reversing an order transferring the trial of an accused young offender to ordinary court, Justice Then referred to s. 733 of the **Code** (now s. 743.4), an enabling provision which permits the transfer of a young offender sentenced in ordinary court to a young offender's facility until he has reached twenty years of age with the consent of the provincial director.

[63] Justice Then stated at p. 12:

> On its face, the section appears to be designed to permit the transfer of a prisoner under the age of twenty to a provincial institution where detention in an adult institution would be inappropriate in the view of the prison authorities. It is immediately apparent that the views of either the judge on the transfer hearing under s. 16 of the Young Offenders Act or even at the sentencing hearing in adult court do not have any bearing on what appears to be the unfettered discretion of the prison authorities to transfer a prisoner under 20 years of age to a young offender' facility. While it is likely that some deference might be paid to the sentencing judge and the record supports this, there is no evidence on the record whatever that the prison authorities would in fact invoke the provisions of s. 733 of the **Code** so as to effect the result which the youth court judge intended in transferring the young offender to adult court.
>
> The ordering of a transfer to adult court in reliance on the beneficial effect of s. 733 is inappropriate for another reason. In the course of his reasons the youth court judge was quick to acknowledge that he was "dealing with assumed situations and alleged facts". The short point is that after a trial the facts found by the sentencing judge could of course be quite different from those available to the judge on the transfer with the result that the sentencing judge may not be prepared to recommend to the prison authorities that s. 733 be utilized or impose a sentence of such a length so as to render the application of s. 733 impractical. In my view, it is highly speculative to surmise that the sentencing judge would necessarily hold the same views as the transferring judge as to the availability of s. 733 of the **Criminal Code**.

[64] I do not share the same concerns in this case, as were expressed by Justice Then in the fact situation before him.

[65] We were advised by counsel for the Crown, to which no objection was taken, that the transcript of the evidence before Justice Legere respecting the services and environment at Waterville as contrasted with the provincial correctional facility and Springhill Penitentiary, would be placed before any sentencing judge who was called upon to consider the relevant disposition for JLZ in the event he was found guilty of the offences charged.

[66] I have reviewed the evidence on this issue and conclude that in view of the age of JLZ and all other relevant circumstances, that the chances of JLZ being sentenced to any institution other than Waterville is extremely unlikely.

[67] There was no evidence before Justice Legere respecting the likelihood of prison authorities invoking the provisions of s.743.4 of the **Code** but one can opine with reasonable confidence that they are responsible individuals who would carry out their duties in a responsible manner.

[68] With respect to the concern expressed by Justice Then, that the facts found by a sentencing judge could be different from those before Justice Legere, I would point out that

in the present case uncontested evidence was given by the co-accused P. H., who had already pled guilty to crimes for which JLZ had been charged.

[69] In addition, material parts of the statement, given by JLZ to Sgt. McNeil on April 15th, were placed before the court without objection.

[70] Justice Legere was satisfied that Waterville was the most appropriate placement for JLZ in the event he pled or was found guilty.

[71] She stated:

> I cannot conclude that rehabilitation can be achieved within the time frames set out in Section 20. In fact I lean towards having available a longer period of incarceration and supervision with gradual reintroduction of [JLZ] into the community in order to place some greater certainty to the possibility of rehabilitation such that the goal of protection of the public can be achieved.

[72] Recognizing that any doubt ought to be resolved in favour of JLZ and that his young age weighed heavily in the equation, Justice Legere could not conclude that under the current sentencing options and length of sentence and community supervision available to a sentencing judge in the youth court, that the protection of the public and the rehabilitation of JLZ could be reconciled.

[73] In her words:

> I cannot conclude under the current sentencing options and length of sentence and community supervision available to a sentencing judge that the protection of the public and the rehabilitation of the accused could be reconciled. To achieve that reconciliation the sentencing judge would have to have a wider range of options to give any assurances that both objects of Section 16 can be attained. After considering the factors in Section 16.(2), it

> allows the sentencing judge to create a sentence that promotes the rehabilitation of the accused and the protection of society with greater certainty.

[74] The trial judge, under s. 16.2 of the **Act**, is obliged to conduct a placement hearing to determine whether a young offender who has been sentenced in ordinary court should serve any portion of a sentence in a place for the custody of young persons, after taking into consideration the factors enumerated in s.16(2)(a)(ii).

[75] I agree with Justice Legere when she concluded that a sentencing judge would be given a wider range of options, and greater flexibility, including the ability to impose much longer term controls, under the ordinary court regime, rather than under the young offender system (see comments of Chipman, J.A. in **R. v. T.T.G.** at 219).

[76] The words of Lambert, J.A., in **R. v. A. (F.B.)** (1993), 62 W.A.C. 280 (BCCA) at 291 are apposite:

> Rehabilitation is a complex factor. It is not the case that the lightest sentence is always the sentence that will have the best rehabilitative effect. In many cases that is not so. It is important though that the best resources that are available be utilized and that the person who is undergoing incarceration be encouraged to seek the use of those resources to help himself or herself. The protection of the public in this case cannot be ascertained in relation to this young man with any degree of certainty.

The Burden of Proof

[77] Justice Legere recognized that experts can never offer more than a qualified opinion respecting the likelihood of the success of rehabilitative treatments.

[78] She said:

> To set the bar at certainty is too high. The question may be better put - Is it likely? It is possible that rehabilitation can be achieved and that with the accused's motivation and commitment and the resources available there is hope. There is no evidence to suggest this will take anything other than the higher end of 3 years or more. I am satisfied that early release before effective therapeutic intervention will not, with any degree of certainty, achieve the rehabilitation required to adequately protect the public.

[79] Counsel for JLZ submits that Justice Legere erred when she imposed on the appellant the burden to establish, by expert evidence or otherwise, "with any degree of certainty", that rehabilitation could be achieved within three years.

[80] The appropriate test, in my opinion, was expressed by Justice Helper on behalf of the Manitoba Court of Appeal in **R. v. K.(C.J.)** (1994), 88 C.C.C. (3d) 82, at 91:

> Any doubt about the need to transfer a young person in order to accomplish rehabilitation must be resolved in his favour.

[81] I recognize that the above passage from Justice Legere, as well as other expressions by her, suggests that she may have placed the burden of proof on JLZ to establish his rehabilitation could be accomplished within three years.

[82] Even if Justice Legere erred in law in placing the burden of proof on JLZ to establish that his rehabilitation could be completed within a three-year period, I am nevertheless of the view that her decision to transfer JLZ to ordinary court should be confirmed.

[83] Our task, according to Justice McLachlin, in **R. v. M. (S.H.) supra**, is to review the decision and then, in our discretion, confirm or reverse it.

[84] Based on the findings of fact made by Justice Legere on the evidence adduced before her, and placing the appropriate burden on the Crown respecting the transfer issue, in my opinion her decision to transfer should be confirmed.

[85] A reading of her 38-page judgment as a whole, in my view, leads me to conclude, however, that she recognized that the burden rested on the Crown.

[86] I come to this conclusion for several reasons.

[87] For example, she stated:

> I am mindful that the burden is on the Crown. The burden is not regarded as a heavy one, (**R. v. L.(J.E.)** (1989), 50 C.C.C. (3d) 385 (S.C.C.)). I am mindful of the words of McLachlin, J.S.C.C., in **R. v. M.(S.H.)** (1989), 50 C.C.C. (3d) 503 at p. 547 wherein she states:
>
> > One is not talking about something which is probable or improbable when one enters into the exercise of balancing the factors and considerations set out in s. 16 (1) and (2) of the **Young Offenders Act.** The question, rather, is whether one is satisfied after weighing and balancing all of the relevant considerations that the case should be transferred to ordinary court. (emphasis added)
>
> **. . .**
>
> In reviewing the case law and the restrictive interpretation adopted in **R. v. D.C.** (Indexed as: R. v. C.(D.), 85 C.C.C. (3d) 547), the court reviewed the reconciliation needed between the public protection with rehabilitation of the young person. If that can be achieved in the youth court then the transfer application must be dismissed. If these objectives cannot be achieved then the youth must be transferred. ...
>
> The question is: Given all the factors set out in s. 16(2) of the **Act**, could the young person be rehabilitated within the period of incarceration prescribed under the **Young Offenders Act** and to be served at a Youth Centre. Any doubt ought to be resolved in favour of the young person. (emphasis added)

[88] When considering the issue of rehabilitation of JLZ , Justice Legere recognized that: there were two essential elements:

- motivation of JLZ and
- the availability of the necessary therapeutic resources and the appropriate and effective application of those resources .

[89] Justice Legere obviously concluded that JLZ had not demonstrated in his life to date the appropriate motivation.

[90] The evidence of his behaviour both before, during and after the April 12 incident, she described as “nothing but a callous and premeditated disregard for the victims”.

[91] She concluded that JLZ could not be labelled as a follower. By example, she referred to the evidence that he was the one who initiated the conversation with Ms. B. concerning a wish to commit a break and enter. He entered into a discussion with H. concerning the risk of a more serious criminal penalty in view of Ms. B.'s caution that their activities would constitute a home invasion. Notwithstanding the caution, JLZ "committed himself to the task during which he caused severe physical injury to Mrs. D.”.

[92] Justice Legere considered that JLZ's lifestyle and previous opportunities for treatment were relevant. She concluded that he was unsuccessful in attempting to re-integrate into his home with his mother, that since leaving her home he had lived in many group homes "less than successfully", he had involvement with substance abuse (although

there was conflicting evidence on the extent to which this was a factor on April 13th), he had not been successfully integrated in a school or social setting, he resisted intervention of authority, etc.

[93] Justice Legere concluded that the ability to develop empathy was the skill most necessary to turn JLZ around and she was not satisfied on the basis of the evidence before her that JLZ understood or felt true remorse.

[94] She concluded her remarks on this issue by finding:

> However, despite the opportunity to turn back, to stop, to intervene as Mr. H. savagely beat Mr. D., he did nothing to intervene or to mitigate the potential injury. He continued to rob the victims and leave them defenceless and abandoned.

[95] The foregoing examples taken into account by Justice Legere played a large part in her conclusion that rehabilitation could not be achieved within the time frame set out in s. 20.

[96] It was entirely reasonable for Justice Legere to consider JLZ's past conduct as a guide on which to make reasonable predictions respecting his future conduct.

[97] The evidence satisfies me that the objectives of affording protection to the public, and rehabilitation of JLZ, cannot be reconciled by JLZ being under the jurisdiction of the youth court. I am, as well, satisfied that JLZ's rehabilitation cannot be addressed in the youth court system.

The Factor of General Deterrence

[98] Justice Legere concluded that she was bound to consider the factors set out in s. 16(2) of the **Act**. In her assessment of those factors she did not express an opinion as to whether protection of the public, included, in addition to the rehabilitation of JLZ, the sentencing objectives of general deterrence.

[99] In my view, she would have been correct if she had considered the principle of general deterrence as a factor. If she had done so, there would have been additional and compelling reasons for allowing the Crown's application to transfer.

[100] In making the determination referred to in s. 16(1) or (1.03), the youth court judge is directed to carry out two tasks:

- to consider the interests of society, which <u>includes</u> the objectives of affording protection to the public, and rehabilitation of the young person (s. 16(1.1)), and, as well,
- take into account the factors enumerated in s. 16(2)(a) to (e) as well as any other factors the court considers relevant.

[101] General deterrence, in my opinion, is an issue that comes within the purview of the phrase "protection of the public".

[102] The Ontario Court of Appeal, in two decisions in 1993, limited the scope of the tests mandated by the predecessor to s. 16(1.1) to be conducted by the youth court judge, in

contrast to the more flexible considerations adopted by the Courts of Appeal in Manitoba, Saskatchewan, and British Columbia.

[103] In **R. v. C.(D.)** (1994), 85 C.C.C.(3d) 547, Osborne, J.A., said at p. 557:

> Ms. Bartlett-Hughes submitted that the interest of society, as referred to in s. 16(1.1), is not limited to protection of the public and rehabilitation and that factors coming within the scope of the interest of society other than protection of the public and rehabilitation should have been taken into account by the youth court judge. She also submitted that the youth court judge erred in not balancing the factors set out in s. 16(2).
>
> Although I agree that the interest of society includes more than the protection of the public and rehabilitation, the provisions of s. 16(1.1) are clear in their identification of only two elements of the interest of society - public protection and rehabilitation. It is protection of the public, on the one hand, and rehabilitation, on the other, which must be assessed with a view to determining whether those objectives can be reconciled within the youth court system. In *R. v. S. (A.)* (1993), 40 W.A.C. 18, 19 W.C.B. (2d) 99 (B.C.C.A.), released March 3, 1993, and in *R. v. W. (A.C.)* (1993), 121 N.S.R. (2d) 301, (N.S.C.A.), released April 26, 1993, the British Columbia Court of Appeal and the Nova Scotia Court of Appeal, respectively, viewed s. 16(1.1) in this way.

[104] The reference to the Nova Scotia case presumably is directed to my comments, on behalf of the court, at p. 307:

> In my opinion, the injunction that the protection of the public is paramount is only to be followed if the Youth Court judge has reached the conclusion that the twin objectives of affording protection to the public and rehabilitation of the young person cannot be reconciled by the youth remaining under the jurisdiction of the Youth Court.

[105] With respect, that expression does not, nor was it intended to, limit the scope of the definition of protection of the public to exclude general deterrence. The issue of the extent of the factors to be considered in the determination of the phrase "protection of the public" was not addressed in **R. v. W. (A.C.)**.

[106] Justice Robins, for the majority, in commenting on the same issue, said in **R. v. B. (C.)** (1994), 86 C.C.C. (3d) 214 (Ontario C.A.) at 218:

> The court was unanimously of the view in R. v. C.(D.) that the transfer order test set out in s. 16(1.1) limits the “interest of society” concerns to two identified objectives - the protection of the public and the rehabilitation of the young person. Other factors which may also pertain to the “interest of society”, such as general deterrence, the gravity of the offence and the circumstances surrounding its commission, and the need to maintain and promote public confidence in the administration of criminal justice, on the court’s interpretation of s. 16(1.1), cannot in themselves provide the basis for transferring a young offender to adult court. (emphasis added)

[107] I do not interpret Justice Robins' words to mean that while "other factors" cannot, in themselves, provide the basis for the transfer, they have no relevance.

[108] A contrary view was expressed by Justice Weiler in a vigorous dissent. She said at p. 224:

> The rules of statutory construction require that, if possible, all of s. 16 must be given effect. This means, for example, that the seriousness of the offence and the circumstances under which it was committed listed in s-s. (2)(a), as well as the other factors, listed in s-s. (2)(b) to (f), are relevant to the question of whether the young offender should be transferred, and must be taken into account when balancing the protection of the public and the rehabilitation of the young offender under s. 16(1.1).

[109] She went on to say:

> On my reading of the legislation, it is not a necessary corollary that the public is protected if the evidence indicates that the respondent is likely to be rehabilitated within the time limits contained in the Act. Such a reading would, in effect, collapse the two considerations into one consideration, namely, whether the young offender can be rehabilitated, as opposed to balancing them. If one considers protection of the public to be only a corollary of rehabilitation, then specific deterrence alone is considered. Protection of the public through general deterrence is not.

[110] Although not referred to by Justice Weiler, the decision of the British Columbia Court of Appeal in **R. v. A. (F.B.),** handed down six weeks earlier on September 24, 1993, was supportive of the position she took in her dissent.

[111] Justice Cumming, with whom Justice Proudfoot concurred, in a case that involved a Crown appeal from a refusal to transfer a young offender to ordinary court, stated:

> ...in my view the seriousness of the alleged offences and the circumstances in which they were allegedly committed must, in this case, be given the greatest weight, and those matters outweigh any which may appear to be in favour of the respondent.

[112] The position of the Saskatchewan Court of Appeal is illustrated in **R. v. R.J.T. and E.J.C.** (1994) 120 Sask. R. 81, (an appeal from a decision of a youth court judge who allowed the crown application to proceed against the appellants in adult court), at 93:

> Rehabilitation of a young offender is only one aspect of the interest of society. Another aspect is protection of the public from these horrendous crimes. The public is becoming increasingly concerned over their protection.

[113] On the issue of the relevance of general deterrence, I would adopt the words of Provincial Judge MacDonnell presiding in youth court in the Ontario Court of Justice in **R. v. A.S.** (1994), OJ 3122 at 18 where he said:

> Accordingly, I conclude that the **societal interest** in general deterrence is capable of being relevant to a determination, under s. 16 (1.1), of what is required to afford protection to the public. However, I also conclude that the need for general deterrence must be assessed in accordance with the principle that deterring others is of diminished importance in relation to young persons.

[114] Judge MacDonnell referred to the decision of Cory J., speaking for the Supreme court of Canada in **R. v. M.(J.J.),** [1993] 2 S.C.R. 421, where he said at 434:

> In *R. v. O., supra*, Brooke, J.A., writing for the Ontario Court of Appeal, expressed the opinion that although the principle of general deterrence must be considered, it had diminished importance in determining the appropriate disposition in the case of a youthful offender. This, I believe, is the correct approach.

[115] The issue before the court in **R. v. M.(J.J.)** was one dealing with the appropriate sentence for a young offender, as distinct from the issue of transfer from youth court to ordinary court, as is the case here. Nevertheless, both Judge MacDonnell in **R. v. S**. and Justice Weiler in her dissent in **R. v. B.(C.)** relied on Justice Cory's words in support of their conclusions, in cases involving the transfer of a young person to adult court.

[116] With respect, I would do so, as well.

[117] I would also refer to the words of Justice Helper, writing for the majority of the Manitoba Court of Appeal, in **R. v. K.N.P**. (1997), 115 Man. R.(2d) 126, when she said at p. 132:

> In considering the “interest of society” and in attempting to reconcile “the objectives of affording protection to the public and rehabilitation of the young person” (s.16(1.1)), the factors listed in subsections 16(2)(a) to (e) inclusive are required to be taken into account. Parliament included ss. (f) in s. 16(2) which states that “any other factors that the court considers relevant” shall be taken into account. In any particular case, the court may, therefore, consider all those factors which relate to the “protection to the public”, if relevant, in attempting to reconcile the two objectives which Parliament particularized as being included in the “interests of society”. General deterrence may be a very relevant factor when a Youth Court judge is attempting to reconcile rehabilitation and the protection of the public if the crime is a result of gang activity.

[118] I would add to those words, in view of the circumstances of this particular case, that general deterrence was a very relevant factor when attempting to reconcile rehabilitation and the protection of the public where the crime is a result of home invasion resulting in grievous and permanent injury to senior citizens.

[119] As this court expressed in **R. v. Fraser** (1997), 158 N.S.R. (2d) 163 (C.A.) at 168:

> The targeting of elderly people in rural areas of this Province by criminals seeking money for drugs, or other vices is, unfortunately, an increasingly common phenomenon. Like-minded individuals must understand that if they are involved in such an offence they will be dealt with severely.

[120] It is obvious that urban centres are not immune from the same attacks.

Conclusions

[121] The premeditation involved in this offence, the violent nature of the invasion, the callous acts carried out for a period of forty-five minutes while Mr. D. lay unconscious on the floor, the little evidence of remorse, the evidence that JLZ planned to re-offend, JLZ's special needs, and the sentencing options in the event of a finding of guilt, were all before Justice Legere.

[122] I do not accept the applicant's submission that Justice Legere misapprehended the evidence, that she failed to properly apply the evidence to the test set out in s. 16 of the **Act**, or that her decision was unsupported by the evidence.

[123] I have reviewed the evidence before Justice Legere. I have evaluated her conclusions and I am satisfied that they are correct based on the factors set out in the **Act**.

[124] While I do not endorse in some instances the manner in which she expressed the relevant test, the evidence satisfies me that the interests of society, including the objectives of affording protection to the public and rehabilitation of JLZ cannot be reconciled by JLZ being under the jurisdiction of the youth court. I am, as well, satisfied that JLZ's rehabilitation cannot be addressed in the youth court system.

[125] I would therefore exercise my discretion to affirm the decision that JLZ be transferred to the ordinary court to be tried on the charges against him.

[126] I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Glube, C.J.N.S.