Docket: CAC159381
Date: 20000225

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. K.N., 2000 NSCA 36]

Freeman, Roscoe and Pugsley, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	
	)	Kenneth W. F. Fiske, Q.C.
Appellant	)	for the Appellant
	)	
- and -	)	
	)	Patrick J. Duncan, Q.C.
	)	and Elizabeth Buckle
K. N. (Young Offender)	)	for the Respondent
	)	
Respondent	)	
	)	Appeal Heard:
	)	February 10, 2000
	)	
	)	Judgment Delivered:
	)	February 25, 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.; Freeman and Roscoe, JJ.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] The Crown applies for a review of the decision of Ferguson, A.C.J. of the Supreme Court (Family Division), refusing the Crown's application to transfer the respondent, KN, from youth court to ordinary court.

[2] KN (date of birth August *, 1983) (*editorial note- removed to protect identity*) was charged on June 9, 1999, with having committed the following offences between June 3 and June 8, 1999:

- attempted murder of M. L., contrary to s. 239 of the **Criminal Code**, R.S.C. 1985, Chap. c-46 (the **Code**);
- endangering the life of M. L. when committing an aggravated assault, contrary to s. 268 of the **Code**;
- having in his possession a weapon (baseball bat) for the purpose of committing an aggravated assault, contrary to s. 87 of the **Code**;
- attempted theft from M. L. while armed with a knife, contrary to ss. 344 and 463 of the Code;
- carrying a weapon (knife) for a purpose dangerous to the public peace, contrary to s. 87 of the **Code**;
- knowingly uttering a threat of death or serious bodily harm to M. L. contrary to s. 264.1(1)(a) of the **Code** (two counts); and
- knowingly uttering a threat to T. S. to cause death or serious bodily harm to M. L., contrary to s. 264.1(1)(a) of the Code.

[3] KN was remanded to the provincial youth facility at Waterville on June 10, with plea being adjourned. The Crown subsequently applied to transfer the proceedings to ordinary court, pursuant to s. 16 of the **Young Offenders Act**, R.S.C. 1985 c.Y-1(the **Act**). The transfer hearing was held on September 8 and 9, 1999.

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

[5] On September 16, 1999, Associate Chief Justice Ferguson, sitting as a judge of the Youth court, delivered an oral decision refusing the Crown's application.

[6] The grounds for application for review stipulate that the youth court judge erred:

- in imposing on the Crown a burden to demonstrate the protection of the public could not be achieved should KN be proceeded against in youth court;
- in failing to balance all the factors enumerated in s. 16 of the **Act** to determine whether public safety considerations could be adequately addressed if KN were proceeded against in youth court;
- in making factual conclusions not supported by the evidence and furthermore erred in failing to make factual findings necessary to meet the requirements of s. 16(2) of the **Act**;
- in failing to consider the absence of remorse as an important factor in evaluating the seriousness of the offences;

- in failing to consider the premeditated nature of the offences;
- in failing to consider the evidence whether rehabilitation of KN was likely if he were proceeded against in youth court in view of his demonstrated lack of remorse, his failure in the past to refrain from criminal behaviour, and his failure to take advantage of prior rehabilitative opportunities.

The Evidence Before the Youth Court

[7] The Crown introduced a 62-page exhibit consisting of:

- a 10-page summary prepared by the Dartmouth police of the relevant events that occurred between the morning of Friday, June 4, 1999, and late Monday afternoon on June 7;
- copies of “Can Say” statements taken from 36 students at the junior high school where both KN and the 16-year old male victim attended;
- the victim’s medical record outlining the injuries sustained by him and his treatment and progress at QEII Health Sciences Centre in Halifax from his arrival at 9:50 a.m. on June 7 until June 14, 1999 (counsel agreed on a résumé outlining the victim’s medical condition as of September 8, 1999);
- a pre-disposition report prepared by Diane Wilson, Probation Officer, dated July 9, 1999.
- an assessment report prepared by Lowell Blood, PhD, Psychologist, dated July 12, 1999.

[8] All of the foregoing material was admitted by consent except for a few comments contained in the “Can Say” statements, to which counsel for KN took objection.

[9] In addition, the Crown called the following witnesses, all of whom were cross-examined by counsel for KN:

- Diane Wilson, probation officer,
- J.N., father of KN,
- E.M., principal of the subject junior high school;
- Debbie Baldwin, program worker at the N.S. Youth Centre, Waterville;
- Allan deStecher, psychologist employed at the Nova Scotia Youth Centre;
- Dr. Lowell Blood.

KN did not testify, nor was any additional evidence adduced on his behalf.

The Nature of the Review Process

Facts

[10] As this court is obliged to accept Justice Ferguson’s findings of fact, it is convenient to set out his findings:

> On Friday, June 4, 1999, during the school noon-time break, the victim went to a mall. He had $70 in his possession and showed it to acquaintances while the accused and a friend were across the street. The victim was detained in the mall parking lot by the accused and his friend. The accused asked the victim for his money. The victim replied in the negative. The accused’s friend told the victim to give the accused the money. The accused produced a knife. The victim fled into the mall. He was briefly pursued by the accused and his friend. While in pursuit, the accused hollered after the victim “I am going to kill you”.
>
> The victim entered a store and later, as he walked through the mall, observed the accused and his friend. The accused looked at the victim and drew his index finger across his throat. The victim took this to mean the accused was going to kill him. A short time later, the accused and his friend approached the victim in the food court of the mall

> and inquired as to his money. The victim stated he had spent it. The victim was then informed that he should have given them the money and the accused and his friend vacated the area.
>
> The victim returned to school and spoke to a teacher at approximately 12:30 p.m. The victim informed the teacher that he had been at a mall and that two boys came up to him and wanted his money. The victim told the teacher that he knew the boys that had approached him and that one of them had pulled a knife. The teacher called the police for the victim.
>
> The victim, while in school on Friday afternoon, told an acquaintance he had notified the police regarding the incident at the mall.
>
> The accused became aware the victim had been in contact with the police regarding the incident at the mall. He (the accused) was upset by this and there was talk of reprisal.
>
> On the following Monday morning, the victim approached the teacher of his first class and requested the opportunity to go and see the Vice-Principal because someone had tried to stab him over the weekend. The victim was given the opportunity to see the Vice-Principal but the Vice-Principal was not available.
>
> During the morning, between the first and second class, the victim arrived for gym class. The victim indicated to the teacher that he did not have his proper gym clothes with him but he did have shorts and a T-shirt in his locker. The gym teacher told the victim to go and get changed.
>
> While standing at his locker, the victim was approached from behind by the accused. The accused had in his possession what is described as a small baseball bat between one and two feet in length. The accused, without warning, hit the victim with what has been described as all his force numerous times on the head with this instrument. The accused then left the school.

[11] No *viva voce* evidence was adduced before Justice Ferguson respecting the nature of the attack. The only information available to him on this issue was contained in the “Can Say” statements given by students to the police. The description of the number of blows to the back of the victim’s head ranged from eight to fifteen.

[12] Teachers were quickly summoned to the locker room. Calls went out for aid, and the victim was rushed by ambulance to the QEII Hospital in Halifax.

[13] Upon transfer to the O.R. after admission, surgery was performed on the victim to relieve swelling on the brain and repair damage to the brain. Although surgery was carried out to repair a broken finger on his left hand, it was not successful. The victim is left-handed. He returned home to live with his parents on August 4. Part of his cranial cap had been removed, and he was required to wear a protective helmet. Surgery to reattach the cranial cap was described as “risky”. As of September 8, 1999, the motor skills on his right side are slow. He can walk unassisted but slowly. He cannot run. He cannot cut meat. The assault has affected his vision. He experiences double vision and after a point, no peripheral vision. He is understandable, but his speech is slurred. He requires 24-hour supervision. His judgment is impaired and he is not able to make any decisions for his own safety. He has no short-term memory. Prior to the assault, he was an active, healthy teenager who enjoyed basketball. He will require rehabilitation for his physical injuries.

[14] Upon hearing of the incident, KN’s father went to the school, picked up KN in his car, and remained with him until the two went to the police station that afternoon.

Events Subsequent to the Transfer Hearing

[15] On February 3, 2000, counsel for KN gave notice that an application would be made at the review hearings before this court, scheduled for February 10, for an order to permit fresh evidence to be adduced on behalf of KN.

[16] The proposed fresh evidence consists of a letter from Allan deStecher, dated February 1, 2000, describing KN's activities at Waterville since September, 1999. Mr. deStecher also expressed an opinion respecting KN's co-operation and participation in anger management programs, substance abuse programs, and sessions addressing empathy and other matters.

[17] It is questionable whether this court has jurisdiction to admit such evidence if objected to by the Crown (see **R. v. B.(C.G.)** (1997), 35 W.C.B. (2d) 399 (B.C.C.A.); **R. v. B.** (1993), A.J. No. 841 (Alta. C.A.).

[18] The Crown, however, raises no objection to the material being placed before us. The report does not constitute fresh evidence, as the phrase is understood in the context of a **Palmer** application, but rather an update of evidence that was before Justice Ferguson.

[19] In view of the Crown's agreement, proffered in the context of a review under s. 16(9) of the **Act**, the court should admit the evidence and consider it along with the other evidence introduced at the transfer hearing (**R. v. S. (G.)**, (1991), O.J. No. 1731 (Ont. C.A.); **R. v. M.L.** (1994), 89 C.C.C. (3d) 264 (Que. C.A.).

[20] The Crown, as well, requested that the court receive two letters respecting the medical condition of the victim - the first from Dr. David Clarke, neurosurgeon, dated

December 29, 1999, relating the condition of the victim as revealed on September 3, 1999; the second, from Dr. Richard Braha, PhD, a psychologist, respecting his attendances on the victim on July 23, 26, and 29, 1999. Counsel for KN raises no objection to our receipt of these reports.

[21] Dr. Clarke writes in part:

> Following surgery, [the victim] had a prolonged hospitalization which included extensive intensive care unit monitoring followed by a period of time on the neurosurgical ward and in-patient treatment at the Nova Scotia Rehabilitation Hospital. [The victim] was readmitted to hospital for surgery on September 28th, 1999, where he underwent reopening of his right-sided cranial incision for replacement of his bone flap.
>
> During the several months since his initial injury, [the victim] has made remarkable progress. When I saw him in clinic on September 3, 1999, he was felling well, although complained of double vision as well as persistent headaches. His motor skills have continued to improve.
>
> Although [the victim] has made remarkable progress, the fact that he sustained severe head injury cannot be overlooked. The extensive nature of the injuries as well as the very poor initial neurological status were indicative of the severity of the head injury, which could have been fatal. The extensive nature of the injury demonstrated on his CT scans indicate that he will likely have significant long lasting neuropsychological sequelae from this injury.

[22] Dr. Braha writes, in part:

> ...he showed marked reductions in working memory and in his ability to acquire, consolidate and retrieve new information in memory. He showed marked reductions in concept formation, abstraction, reasoning and problem solving.
>
> . . .
>
> ....[the victim] demonstrated markedly reduced insight regarding the meaning and consequences of his injuries in terms of his overall capabilities. I felt he would require assistance in making major decisions regarding his person, finances, health care and safety, at least until there was evidence of further recovery, mastery with the use of compensatory strategies or formal re-evaluation. ...
>
> . . .
>
> ...I felt the severity of his injuries and stage of recovery precluded cognitive rehabilitation at the time of the assessment. ...
>
> . . .
>
> The pattern of neuropsychological results I observed was consistent with the severe nature of his neurological injury and his early stage of recovery. I cautioned that no definitive conclusions could be made regarding the long-term impact of his brain injury on neuropsychological functioning at that early point in his recovery, and that any such

> conclusions should await neuropsychological re-assessment at a later point in his recovery.

[23] We were further advised by counsel that on December 1, 1999, KN pleaded guilty to two of the offences with which he had been charged, namely aggravated assault and attempted robbery while armed with a knife.

[24] He was sentenced on December 1 by Justice Gass, to two years' secure custody on the aggravated assault charge, three months' consecutive open custody on the attempted robbery, followed by probation of nine months. The conditions of the probation order provide, in addition to the usual terms, that KN:

- continue in whatever counselling or therapy or further assessments as deemed appropriate from time to time by his youth court worker,
- reside with his father and be in his ordinary place of residence from 9:00 p.m. until 7:00 a.m. each day,
- subject to the willingness of his victim and his family, to participate in a form of reconciliation to be convened in consultation with any professionals involved.

[25] KN was also prohibited from having in his possession any firearm, etc., for a period of ten years, pursuant to s. 109(1) of the **Code** and s. 20.1(1) of the **Act**.

[26] Counsel for the Crown advised the court, no objection being taken by counsel for KN, that if the appeal were to be allowed and KN were to be transferred to ordinary court, that the guilty pleas and the sentences imposed would be deemed null and void.

[27] KN also entered a plea of “not guilty” to the remaining charges. They have been set down for trial in June, 2000.

The Review Conducted by the Youth Court

[28] The application brought in the youth court was made pursuant to s. 16(1) of the **Act**. In determining the application, the youth court was obliged to decide the issue in accordance with the test mandated by s. 16(1.1) which reads:

> In making the determination referred to in subsection (1) or (1.03), the youth court, after affording both parties and the parents of the young person an opportunity to be heard, shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth being under the jurisdiction of the youth court, and
>
> (a) if the court is of the opinion that those objectives can be so reconciled, the court shall
>
> (i) in the case of an application under subsection (1), refuse to make an order that the young person be proceeded against in ordinary court, and
>
> (ii) in the case of an application under subsection (1.01), order that the young person be proceeded against in youth court; or
>
> (b) if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall
>
> (i) in the case of an application under subsection (1), order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence . . .

[29] Section 16(1.11) provides that the onus of satisfying the youth court of the matters referred to in ss. (1.1) rests with the applicant.

[30] In making the determination respecting the transfer issue, the youth court judge, in accordance with s. 16(2) of the **Act**, is obliged to take into account a series of six factors.

[31] Justice Ferguson recognized that s. 16, as all sections of the **Act**, must be considered in accordance with the declaration of principles set forth in s. 3.

[32] The principles that have particular significance in this transfer application are as follows:

> 3.(1) It is hereby recognized and declared that
>
> (a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;
>
> (a.1) While young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
>
> (b) Society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;
>
> (c) Young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;
>
> (c.1) The protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing

> the needs and circumstances of a young person that are relevant to the young person's offending behaviour.

[33] In accordance with the mandate set forth in s. 16(2) of the **Act**, Justice Ferguson took into account the six factors enumerated. Justice McLachlin, as she then was, stated in **R. v. M.(S.H.)**, [1989] 2 S.C.R. 446 at 467:

> It is inevitable that in the course of the review, some factors will assume greater importance than others, depending on the nature of the case and the viewpoint of the tribunal in question. The Act does not require that all factors be given equal weight, but only that each be considered.

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

The youth court judge found:

> The offences to be considered, especially those that relate to the injuries inflicted on the victim and resulted in his current condition, are of the most serious nature. The circumstances in which these offences were allegedly committed can hardly reflect more adversely on the accused. The victim was savagely attacked, without warning, from behind, while he was in a defenceless position. The victim was hit repeatedly with extensive force under circumstances which would indicate a requirement of previous consideration and planning by the attacker.

(b) Age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the Juvenile Delinquents Act, Chap. J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt under this Act or any other Act of Parliament or regulations made thereunder.

[34] KN had one prior conviction. According to his probation officer, Ms. Wilson, he pled guilty to the offence of mischief, contrary to s. 430(4)(b) of the **Code**. He was placed on probation on July 6, 1998, for a period of six months. Ms. Wilson testified that KN reported to his probation officer as directed and complied with all conditions of the probation order.

[35] Justice Ferguson then reviewed at considerable length the assessment report provided to the court by Dr. Blood. The review disclosed:

- although his intellectual and physical development matched his chronological age, socially and emotionally, KN functions at the level of a younger adolescent;
- KN has two older sisters, aged * and *, and one younger brother, who is *. (*Editorial note- removed to protect identity*) KN's mother became ill about the time of his birth. She was subsequently diagnosed with schizophrenia. JN indicated that she denied her illness, and consequently was resistant to treatment. Her illness "waxed and waned", with several "breakdowns" and suicide attempts. KN recalled that his mother lived at * "all through my childhood". (*editorial note- removed to protect identity*)
- The family life was marked by turmoil. The father reported that he was involved in a custody battle that went on for about four years.
- The parents separated in 1989 and subsequently divorced. The father was awarded custody of the four children.
- KN did well in school until Grade 7 when he started spending time with a "bad crowd". In Grade 8 he began to have serious problems. He moved in with his mother and became seriously involved with substance abuse. According to KN it got to the point where he was using "all day, every day". Much of this was in his mother's home. He stopped attending school and failed Grade 8. He had a number of physical confrontations with his father who was aware of KN's substance abuse and attempted to secure

counselling for him. KN, however, refused to go. According to him, “people tried to get me to stop, but there wasn’t much you could do”.

- It was his father who pushed to have charges laid against KN when he was caught breaking into a car. His father was successful in having a number of conditions placed on his probation, including that he live with his father, keep a curfew, return to school, and discontinue his drug use. During the fall of 1998, he became involved in several physical altercations. On one occasion he punched another student in a classroom, who according to KN was a bully and had been picking on a friend of KN’s. He also broke his hand on two occasions in fights with another peer, off school grounds.
- Following the end of probation he began spending weekends with his mother and his school attendance deteriorated. He was repeatedly suspended and eventually, according to KN, “stopped going”.
- Guidance counsellor, C.B., reported that there were no problems with KN in terms of behaviour. She stated that “There was no time we didn’t want him to be here”;
- In May of 1999, Ms. B. and JN presented KN with a plan whereby if he completed a number of assignments he would be provided with an opportunity to pass Grade 8. KN responded in a positive fashion for the weeks preceding the events of June 4.

Dr. Blood further noted:

> ... [KN] described being strongly aligned with a delinquent subculture with a strong loyalty to a deviant peer group. This is exemplified by [KN's] adherence to the code of this peer group, which includes a prohibition against "ratting" on others . . With regard to the incidents which led to the present charges, [KN] expressed confusion and remorse. [KN] stated "I don't really understand how I could do that to somebody". He denied that he was under the influence of any substance . . . It is clear from [KN's] depiction of events that the fact that the victim "ratted" made the greater impact on [KN]. [KN] stated that he "just wanted to beat him up because he got me mad". It was the following Monday when the attack on the victim occurred. [KN] indicated that it had not been his plan to harm the victim so badly and he did express remorse in this regard. However, when asked how he would have felt if the victim had not been so badly injured, [KN] stated that he would have felt "satisfied".

[36] A psychiatric assessment was performed in August, 1999. The report indicates that KN "did not have any evidence of psychosis at the time of the assessment". He was described as being at "increased risk for possibly developing a psychotic disorder in the future", as a consequence of his family background. While noting "some antisocial characteristics and antisocial traits", neither Dr. Blood, nor the psychiatrist, diagnosed KN with a conduct disorder.

(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.

[37] Justice Ferguson observed that if KN were found guilty of the charge of attempted murder, the maximum youth court disposition available would be three years to be served in custody. If KN were found guilty of aggravated assault, he could serve a maximum of two years in custody.

[38] If the proceeding were transferred to ordinary court, the maximum available disposition resulting from a conviction for attempted murder would be life imprisonment, and in the case of aggravated assault, fourteen years' imprisonment.

(d) The availability of treatment or correctional resources.

[39] Justice Ferguson determined:

> In applications of this nature, courts are often provided with extensive evidence of the functioning of adult and youth detention facilities that would be available to this particular youth on conviction and custodial disposition. This is not the case in this application. There was no evidence presented nor submission offered by the Crown that a consideration of this particular factor would be beneficial to the application for transfer.

[40] The only evidence on this particular issue was given by Dr. Blood, who stated:

> ... I don't think there is any doubt that he would be more suitably placed in an adolescent facility. If you have to choose between associating with adult criminals and adolescent criminals, for an adolescent, particularly one who has some immaturity in terms of social and emotional development, he would definitely be better off in an adolescent facility.

[41] The Youth court judge noted, however, that a custodial disposition in youth court does not automatically call for such time to be served in a youth facility. Conversely, a custodial decision handed down by an ordinary court to a young offender does not guarantee such time will be served in an adult facility.

[42] Section 16.2(1) provides that, under certain conditions, it is possible for a young person convicted and sentenced to a custodial disposition in ordinary court to serve such imprisonment in a place of custody "for young persons".

(e) Any representations made to the court by or on behalf of the young person or by the Attorney General or his agent.

[43] Under this heading, the youth court judge considered the testimony of:

- Diane Wilson, probation officer, author of the pre-disposition report, as well as KN's probation officer for the six months ending on January 5, 1999;
- E. M. , principal of the junior high school;
- Debbie Balcom, program worker at Waterville;
- Dr. Lowell Blood, psychologist;
- Allan deStecher, psychologist.

[44] In his review of Ms. Wilson's testimony, Justice Ferguson stated:

> The accused "complied" with the terms of his probation. On being directed to "attend" Choices (a drug-related program), he did. On being "offered" individual counselling, he declined. If he had been "ordered" to attend such counseling, Ms. Wilson believed he would not have "resisted". Given the information available to her (Ms. Wilson), at the time, she did not come to the conclusion it was necessary to order the accused to attend for such counseling. His probation contained a requirement of fifteen hours community service which was completed at the Dartmouth YMCA. The report she received was that the accused did a "good job".
>
> For the purpose of this current application, she interviewed the accused at the Waterville Youth Center. She found him "reserved, quiet, polite and cooperative". He expressed, on occasion, that he did not "understand his own behavior". On being asked as to her learning of his being accused of this vicious assault, Ms. Wilson replied that she was "shocked" and further indicated that the accused was "not one she would have suspected".

[45] With respect to Ms. M., Justice Ferguson stated:

> As principal, she was aware of the accused mainly as a result of concerns as to his habitual absenteeism and a suspected drug problem. The reason for the concern as to drugs related to the "smell" of him on occasions he came to the office and his acquaintances. The accused did not respond to direction. He was not rude, he simply did not comply with requests from those in authority at the school. There was a lack of motivation. He possesses the ability to proceed in school but this will only happen if he

> "shows up" and completes assignments. The accused participated willingly with a person termed "Drug Coordinator" who became available to the school. Approximately one month prior to the assault on [the victim] the accused began to come to school more regularly. On that occasion, he appeared to "settle in".

[46] Justice Ferguson summarized Ms. Balcom's testimony as follows:

> Her involvement with the accused resulted from his remand to the Waterville facility in June of 1999. He initiated his current educational program. The most common statement of those required to make comments on the accused was "positive". He has not been, nor, at the moment, is he considered a "behavioural concern".

[47] In addition to the court ordered assessment report of July 2, 1999, Dr. Blood provided a further letter of September 2, 1999, in which he stated, in part:

> It is my understanding that an outstanding issue with regard to the request for Transfer, is the expected time required for successful treatment with [KN]. It is extremely difficult to make such predictions with any certainty. However, I can provide the following comments. As the presence of a psychotic disorder has been ruled out, three years would be ample time for [KN] to complete the treatment he requires, *if [KN] is committed to the treatment process and puts forth a reasonable effort*. This also assumes that no new symptomatology emerges. It is impossible to know whether [KN] will make such an effort. He has not been involved in a previous treatment process, so there is no history on which a prediction could be based. He has issues around trust and relationships, which will likely be a treatment barrier. However, he does have a number of characteristics which are prognostically positive. He is intelligent and appears to have some capacity for insight. He has acknowledged having a problem. (emphasis added)

[48] In his review of Dr. Blood's evidence, Justice Ferguson remarked:

> He saw the accused at Waterville on one occasion for a period of five hours; that the success of any treatment undertaken by the accused would be dependent on the establishment of a trusting relationship between the accused and the therapist. In addition, both parties (the accused and a therapist) would also have to work hard and "be effective". There is no available information indicating the accused ever willingly entered into a therapeutic treatment program, nor is there any information to indicate a refusal by him to be so involved.
>
> Dr. Blood was asked for his prognosis of the accused willingly and earnestly entering a treatment program. In reference to the inquiry, he replied by using the term "prognosticatively positive". Adding this conclusion was based on (a) the accused's intelligence; (b) the accused's statement to him that he (the accused) realized "something had to be done"; and (c) there is no history of previous treatment.

> Dr. Blood concluded the accused showed serious remorse as to the extent of the injuries inflicted on the victim; however, he acknowledged the remorse related to the extensiveness of the injuries and not the incidents themselves; that, in this instance, a three-year period would be ample time to complete a therapeutic program with the accused; that the success of such treatment would be enhanced by the accused being in a custodial setting rather than proceeding on an in-patient basis.

[49] Allan deStecher had been involved with the Nova Scotia Youth Centre at Waterville for three years - first as an intern, then as a contract employee, and since May of 1999, as a full-time psychologist. He had two therapeutic sessions with KN, each lasting about 50 minutes.

[50] Usually his involvement with residents of the youth centre would commence after a sentence disposition had been made. In this case, KN approached Mr. deStecher for assistance. Mr. deStecher was cross-examined:

> Q. When an individual, such as KN, comes to you while on remand, it is a bit of a catch-22 situation, isn't it? Because it is difficult to start a therapeutic session without knowing what the disposition is.
> A. Correct.
> Q. Is that a fair -
> A. Yeah, actually it is very rare that it happens, as we said earlier. It doesn't happen very often that I would see somebody before they have been sentenced.
> Q. All right, so the fact that KN came forward, or has come to you willingly to speak to you prior to sentencing is a unique situation or just a rarity?
> A. I think it's the second case I ever have had. (emphasis added)

[51] Justice Ferguson commented:

> His [Mr. deStecher's] findings are consistent with the report of Dr. Blood. His intervention was not of a sort to provide an assessment or recommend a type of therapy. He found the accused to be open and sincere; that the accused would need to "go back to work on some issues" and that this would have to be done on an individual basis; that this process would not "be easy" and that there were "obstacles"; that he concluded in his involvement with the accused that he did put forth an effort; that while the accused exhibited "traits" of a conduct disorder, he would not make such a diagnosis in this instance. He found "no evidence of a psychiatric disorder at this time"; that "treatment" could be provided to the accused within a three-year time frame.

(f) Any Other Factors that the Court Considers Relevant

[52] The youth court judge found that any relevant considerations applicable to this subsection had been “adequately covered” within the provisions of s. 16(2)(a) through (e).

Conclusions of the Youth Court

[53] The youth court judge determined that the Crown’s application for transfer should be denied. He stated:

> I conclude, after examination of the evidence, that I am unable to come to the conclusion that it is unlikely that rehabilitation cannot be achieved if the accused remains in the youth court.
>
> . . .
>
> In this instance, I conclude, by consideration of all the factors mandated by the **Act**, that it has been demonstrated that the interests of society (which includes the objectives of affording protection to the public and rehabilitation of the young person) can be reconciled by the youth being under the jurisdiction of the youth court.

Analysis

[54] The Crown, in its factum, and oral submissions, stressed that the main contention for the review is that the conclusion reached by the youth court judge is unreasonable and unsupported by the evidence.

[55] In particular, counsel submits that Justice Ferguson erred:

- in concluding that public safety considerations could be adequately addressed if KN were proceeded against in youth court,

- in failing to consider the absence of remorse as an important factor,
- in failing to consider the premeditated nature of the offences,
- in failing to take into account KN's past history to take advantage of prior rehabilitative opportunities.

Review of This Court

[56] 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.

[57] The task of this court is to apply the factors set out in s. 16(2) of the **Act**, and to independently evaluate whether the conclusion of the youth court was correct. Our review is to be based on the facts found by the youth court judge, giving due deference to his evaluation of the evidence (**R. v. M.(S.H.)**, per McLachlin, J., at 465).

[58] In practical terms, the review to be exercised by this court falls somewhere between an appeal and a trial *de novo*.

Circumstances of the Offence

[59] I agree fully with the conclusions reached by Justice Ferguson respecting the seriousness of the offence and the circumstances in which it was committed. There were a number of aggravating circumstances surrounding the offence - planning, the use of a weapon, the victim was attacked while defenceless, the beating continued

while the victim was unable to defend himself, the ferocity of the attack, the seriousness of the injury, and the location where the attack occurred - namely, a school setting.

[60] This court strongly condemns assaults of this nature as is evident by a review of the decisions in **R. v. Silvea** (1988), 86 N.S.R. (2d) 346 and **R. v. Smith** (1997), 156 N.S.R. (2d) 71.

[61] It is appropriate to keep in mind, however, the comments of Osborne, J.A. in **R. v. C.(D.)** (1994), 85 C.C.C. (3d) 547 (Ont. C.A.), application for leave to appeal to the Supreme Court of Canada dismissed, March 10, 1994, for the majority, at 565:

> Public protection cannot realistically be assessed in a vacuum. The seriousness of the offence, while significant on the issue of the protection of the public, is not determinative. The offence, the circumstances of its commission and the circumstances of the young person must all be taken into account in determining the extent to which the public requires protection. (emphasis added)

Evidence Respecting Motivation and Commitment

[62] The determination respecting the likelihood of rehabilitation within the three-year period was based upon the conclusions reached by Dr. Blood as set forth in his two written reports and his *viva voce* evidence.

[63] In his examination-in-chief on September 8, Dr. Blood was asked:

> Q. ... Is there any way you can make any sort of prediction in relation to [KN]?
>
> A. Well, I think the fact that - I mean there are some things that are prognostically positive. The fact that he has good intelligence. He is a reasonably bright young man.

> The fact that he has said to me, and I gather to others as well, that he believes that there is something that needs to be done. That he feels that he does have a problem that needs to be addressed. I think that's a good sign. We don't have any history of KN being in treatment. So it is very difficult to know, once that process unfolds, whether he will be able to maintain a therapeutic process or not. I would think that there would be strong motivation to do that. But, sometimes, even with strong motivation, people aren't able to sustain that kind of work.
>
> Q. Are you able to comment on either strong motivation or lack of motivation in other areas of KN's life would have, some sort of prediction as to whether or not he will be motivated in terms of accepting the therapy?
>
> A. It is difficult to answer that. I think the past has suggested that he has not been motivated to enter into therapy, period, and he has not been motivated to take that initial step. My understanding from talking to Allan deStecher is that he feels that he has begun to take that step. I do have a sense from the time I spent with KN that he does have a certain determination and so that if he is determined in regard to something that he is likely to follow that through. That would be a positive indicator.

[64] Dr. Blood's opinion is supported by the February 1, 2000 letter of Mr. deStecher. Mr. deStecher responded to a series of questions posed to him by KN's counsel.

[65] I set out the questions and the responses:

> 1) What, if any progress has been made?
>
> As mentioned in my letter of November 27th the goals that we had set were to 1) work on controlling aggression and anger, 2) increase empathy, 3) work on substance abuse problem, and 4) improve academic work.
>
> On January 24th [KN] began participating in an anger management group in cottage 5. He has participated in all five sessions so far and has been active in discussions putting effort into assignments and group activities.
>
> In addition to the group format mentioned above I have also seen [KN] in 10 individual sessions between August 9th and the present. Each session has lasted approximately one hour and has consisted primarily of supportive counselling. His attitude has continued to be cooperative, answering questions in a straight forward manner and acknowledging his responsibility for his action. We have spent several of these sessions working on his empathy. This has been primarily with his own family as it would be inappropriate to work on empathy with the victim of the alleged crime prior to any disposition.
>
> Charles Goddard reported to me that [KN] had successfully completed the AA based substance abuse program in cottage three. If any further details are required he should be contacted at ext. 139.
>
> I am unable to comment at this time on his progress with academic work.

2) [KN's] level of motivation, commitment and/or participation in therapy?

As noted above [KN] has attended and been cooperative in all the sessions that I have scheduled for him attempting to answer all questions and completing all assignments. His early work in the anger management group has been particularly promising. He is basically quite shy but still contributes often to the discussions.

3) Has any other treatment or therapy been offered to [KN]?
No.

4) Have there been any developments that would, in your opinion, impact on Dr. Blood's view that rehabilitation could be accomplished within the time allowed for by the Young Offenders Act?

None

5) Are you able to comment on [KN's] overall behaviour within the Institution?
No. You would need to contact the Deputy Superintendent for such a report.

6) Anything else relating to [KN's] involvement with you which you feel would be relevant to Court's assessment of whether he is a good candidate for rehabilitation?

As described above, [KN] seems motivated to succeed in his programs and participates and contributes appropriately.

[66] There is, in addition, further evidence that suggests that KN has the necessary motivation and commitment, and that is found in the evidence of KN's father, JN. Although JN's evidence was not the subject of specific comment by Justice Ferguson, in my review his evidence is of considerable assistance on the issue of KN's remorse and the issue of the likelihood of KN possessing the necessary commitment to put forth a reasonable effort for rehabilitation.

[67] I am impressed by the efforts made by JN to fulfill his role as father and role model to KN, notwithstanding the difficulties and separation arising from the illness of KN's mother.

[68] It will be remembered that it was JN who spoke to the Crown prosecutor about having the 1998 mischief charge laid against his son. He explained his reasons for doing so:

> Primarily, because of the previous year. That was the year that I had problems with KN. He moved out of the home. He wasn't living with me. He was living with his mother and that was the time he started to get involved with drugs, stopped attending school, and that was the year I was having problems with him.
>
> . . .
>
> I guess I am reasonably strict and have set guidelines and so on and so forth, whereas his second choice was to go and live with his mother, who didn't have much control, mainly because of her illness. It is not really her nature. Had she not been sick, she wouldn't have been like that. But because of her illness, she doesn't have much control and KN had a place to go where he didn't have to comply and he didn't have to do that. He didn't have to go to school or whatever was requested.

[69] He was asked what steps he took to have the charges laid:

> ...I went through different police officers, as far as trying to get charges laid and, ultimately, spoke to the Crown Prosecutor, Mr. Wright, about having charges laid. Subsequently, we ended up going to court. KN ended up pleading guilty to mischief. I spoke and wanted certain conditions in the probation order.

[70] It was apparent, even though KN had earlier moved in with his mother, that JN had a strong sense of responsibility concerning his obligations to his son and attempted to carry them out. He testified:

> His mother lived fairly close by. I would call the house to see that he was up for school. I would on a few occasions actually go down and try to get him up to go to school. I tried to meet with him a couple of times. He avoided me. I wasn't successful in doing that. By the time I would get down there, he would be gone. So I really didn't have much to do with him at that particular time.
>
> . . .
>
> I was able to get a school social worker to go down and speak to him.

[71] KN moved back with his father just before Christmas, 1997. He was asked to describe KN's behaviour while he was residing with him:

> Fair. It was definitely better than what it was when he was living with his mother. He was going to school more regularly. Reasonably cooperative. But, in some ways, he was still in adolescence. I was still having problems with him. . . .If he felt he was being disciplined or reprimanded he could go to his mother's, okay. . . . I thought that if he was living with me, I would have a fairly good control of him.

[72] According to his father, KN behaved quite well during that six-month period with no major problems, complying with most of the conditions of the probation order.

[73] In commenting on his personality, JN testified:

> He is quiet and reserved. He doesn't share his feelings very easily with me. But he has been very truthful. If something were to happen at school or something like that, he was always very truthful and very honest with me. He didn't try to avoid it. If I asked him, he would tell me about it. I always found him to be very honest in that respect.

[74] Since KN was remanded into custody in June of 1999, he has been housed at the Nova Scotia Youth Centre in Waterville. As of September 8, 1999, his father has visited him on ten or eleven occasions, usually every weekend, each visit lasting approximately two hours.

[75] He picked up his son on the afternoon the incident took place and remained with him until they both went to the police.

[76] He described KN's reactions in these words:

> Very upset. Very remorseful. He just had a question. He couldn't understand how he could be involved in this or do what he did. He was pretty hard on himself.

[77] He was asked whether KN's state of mind was comparable to what he had observed on previous occasions, or did it represent a change. JN responded:

> Well, yes, I mean he was, I guess, much more expressive of his feelings because it was a very extreme type of situation. He was very emotional. He was very emotional with me, his sisters, even his brother. And, of course, I'd never seen him in that state before. But, of course, he has never been in that situation before. I was not surprised by his reaction, if that's what you're asking. I know he - well he's a very sensitive person. He hides his feelings but he is very sensitive underneath.

[78] JN observed that for the first month KN was in a depressed state respecting the condition of the victim but that there was a definite improvement once he heard that the victim was improving.

[79] He testified that KN was displaying a more mature attitude and reacted positively to the opportunity to meet with Mr. deStecher and realizes now that "something very serious had occurred and he was largely responsible and he has to deal with it".

Treatment Options Under the Two Regimes

[80] It is appropriate to consider the dispositions made on December 1, 1999, by Justice Gass.

[81] As of December 1, KN had been confined to Waterville on remand for slightly in excess of six months. On December 1 he was sentenced to a further term of two years in Waterville to be served in closed custody, and a further three months in the same facility to be served in open custody. Those dispositions are to be followed by a further nine months' probation with a condition that he continue in whatever counselling or

therapy or further assessment as deemed appropriate, from time to time, by his youth court worker.

[82] The evidence of Mr. deStecher establishes that, at KN's initiative, supportive counselling sessions commenced in August and nine additional sessions took place in the fall of 1999. In the event the disposition of Justice Ferguson is upheld, KN will have been in counselling and rehabilitative assistance in the controlled environment of Waterville for a period in excess of two years and nine months, with a further control exercised for an additional period of nine months' probation..

[83] It will be recalled that in his letter of September 2, 1999, Dr. Blood stated that three years would be ample time for successful rehabilitative treatment provided KN is committed to the treatment process and puts forth a reasonable effort, assuming that no new symptomatology emerges.

[84] Dr. Blood expanded on this estimate in his *viva voce* evidence before the youth court. He testified:

> If everything worked optimally, I think that, you know, a year, a year and a half, 18 months, could get KN to a place where a lot of the issues have been dealt with and resolved in some way. I guess the caveat I would add is that at 16, these are issues that will need to be reworked as he gets older. So this is not an adult. This is an adolescent and there will be changes that occur regardless of what happens. Fundamentally, there will be changes and so . . . at 18 these issues may need to be readdressed in a different form than they have been dealt with at the age of 16.

[85] There is no evidence that any new symptomatology has emerged. Further, Mr. deStecher has opined in his letter of February 1 that KN "seems motivated to succeed in his programs and participates and contributes appropriately".

The Issue of Remorse

[86] The Crown has stressed the equivocal evidence respecting the evidence of true remorse by KN for his actions. Counsel points to Dr. Blood's report where he commented respecting the June 25, 1999, interview with KN:

> [KN] indicated that it had not been his plan to harm the victim so badly and he did express remorse in this regard. However, when asked how he would have felt if the victim had not been so badly injured, [KN] stated that he would have felt "satisfied".

[87] Dr. Blood was obviously concerned about the depth of KN's remorse. He testified:

> For most adolescents, relationships with peers is important and I think that in K.N.'s case, that is true as well but is own difficulties around his sense of self, his poor self-esteem, I think, led him to a peer group that was quite maladapted. His association with a peer group that was very bad for him. It is not an unusual scenario. A sort of delinquent peer group is often very accepting for other troubled adolescents. I guess from that point there was then a ready group there to support the kind of antisocial behaviour that he began to exhibit in the last couple of years. All these things sort of seemed to combine and conspire in a way to a young man who, I think, is quite troubled, has a lot of emotions and issues that have never been dealt with, turned to drug use as a way of self medicating, as a way to not deal with these issues, and was left with a considerable amount of anger and hostility that he sincerely tries to control but isn't always able to do so.
>
> . . .
>
> Q. ... In terms of remorse, the fact that he doesn't understand how he could do it, is that, in your opinion, remorse or is there something other than that statement that he exhibited remorse?
>
> A. No, I think that this is a very peculiar sort of situation in a way. I think that my sense is that K.N. does have sincere remorse over the severity of the injuries that the young man incurred. And I really don't believe it was his intention to cause such severe injuries. And I believe that his remorse in that regard is sincere. But there is this sort of next level in which he is continuing to sort of adhere to the code of delinquent peer group that I spoke of earlier. And, that is, had he just put a beating, a minor beating on this youngster and there had not been the severity of injuries, my sense is that K..N. would have felt that he had evened the score. . . .

[88] Justice Ferguson would have viewed this evidence, in the context that Dr. Blood's assessment of KN occurred on June 25, before KN had entered into any therapeutic treatment, under the type of controlled conditions that exist at Waterville, and would have considered this evidence in the light of the positive evidence of development of genuine feelings of remorse over the summer as related by KN's father. It should also be viewed in light of KN's commitment to treatment and his progress in that treatment, as noted in Mr. deStecher's letter of February I, 2000. Notwithstanding KN's statement to Dr. Blood on June 25, Dr. Blood was of the view that three years "was ample time", and an optimum result could be achieved within as little as eighteen months.

The Issue of General Deterrence

[89] Crown counsel urged Justice Ferguson to take into account the issue of general deterrence as the violence occurred in a public school during school hours when a large number of students were present.

[90] In his written reasons for judgment, Justice Ferguson commented:

> The appropriateness of reflecting on such considerations in an application such as this, is commented on by Justice Chipman in the Nova Scotia Court of Appeal case of **R. v. M. (MJ)** (1989) 47 C.C.C. (3d) 436 where he states [at 449]:
>
> > "...counsel for the accused has submitted that Judge Archibald placed undue emphasis upon the reaction of the public to the period of incarceration in a youth facility should he be convicted, as opposed to the time to be served if convicted in an adult court. I reject this submission and say that it is proper to reflect public abhorrence of a particular crime and the need to maintain public confidence in the administration of justice. Although it is only one of many factors a court must consider, it certainly can have regard to what would be the reaction of an

> informed and dispassionate public. Public denunciation of serious crimes, public confidence in the administration of justice and the reaction of society to such crimes and the penalties stipulated by Parliament for them are all important factors in considering the interests of society."

[91] While it is obvious that Justice Ferguson took into account the issues of public denunciation of serious crimes, public confidence in the administration of justice and the reaction of society to such crimes, all of which were relevant factors in the circumstances of this case, it would appear that he did not specifically take into account the issue of general deterrence.

[92] It would, in my opinion, have been appropriate for him to have considered the principle of general deterrence as a factor in the circumstances of this case. It is an issue which comes within the purview of the phrase "protection of the public". It should be assessed in accordance with the principle that deterring others is of diminished importance in relation to young persons. (See **R. v. Z.(J.L.)**, 2000 NSCA 17.)

The S.16(1.1) Test

[93] The youth court judge considered the offences to be ones "of the most serious nature" and that the circumstances "could hardly reflect more adversely on the accused".

[94] Yet he dismissed the Crown's application to transfer this case to ordinary court. He did so because he concluded that the objectives of affording protection to the public

and rehabilitation of KN could be reconciled by KN remaining under the jurisdiction of the youth court.

[95] In my respectful opinion, Justice Ferguson was correct in reaching this conclusion.

[96] Section 3(1)(c.1) of the **Act** tells us that the protection of society is best served by rehabilitation, wherever possible, and that rehabilitation is best achieved by addressing the needs and circumstances of the young person that are relevant to the young person's behaviour.

[97] I am satisfied that Dr. Blood focused on KN's relevant needs and circumstances, but nevertheless concluded that a period of three years was "ample time" within which the rehabilitative treatment could be effective, provided KN was committed and put forth a reasonable effort. The experience from June, 1999, to the end of January, 2000, at Waterville suggests that KN has the appropriate commitment and that he is putting forth the required effort.

[98] Although Dr. Blood's direct involvement with KN was limited to one five-hour interview, he also interviewed KN's father on two occasions, and had collateral contacts with Diane Wilson, the probation officer, Debbie Balcom, the program worker at Waterville, and three others who had a professional involvement with KN. Furthermore, his conclusions are supported by those reached by Mr. deStecher who had at least ten

sessions with KN. I would adopt the words of Doherty, J.A., dissenting, in **R. v. C. (D.)** at 571:

> The opinions of experts, even when they speak with a single unequivocal voice, does not of course, mean that the youth court judge was relieved of his obligation to make an independent assessment of the evidence according to the test laid down in s. 16(1.1). A determination by the youth court judge which is fully supported by the uncontradicted evidence of such qualified, and I add manifestly impartial, experts, is, however, entitled to a full measure of deference in this court.

[99] The result I have reached should not be taken to mean that in all cases where rehabilitation of the young person is possible within the youth court system that the protection of the public should be automatically presumed to be reconcilable with that rehabilitation.

[100] Each case must be assessed on the facts which are to be viewed in light of the factors set out in s. 16(2).

[101] On the evidence adduced before the youth court, supplemented by the reports introduced at this review hearing, taking into account the factors in s. 16(2), in my opinion, the objectives of the protection of society and the rehabilitation of KN can be reconciled within the youth court system.

[102] I should add that the evidence persuades me that the likelihood of effective rehabilitation within the youth court system is more than a mere possibility. It cannot, of course, nor need it, amount to a certainty. Such a test would constitute “virtually an

automatic ticket to the ordinary court system" (Doherty, J.A. dissenting, on other grounds, in **R. v. D.C.**).

[103] While Justice Ferguson did not appear to have taken into account the issue of general deterrence, which I consider to have been relevant in the circumstances of this case, I am nevertheless satisfied that, based on the factors set out in the **Act**, the decision that KN remain in youth court to be tried on the charges against him is a proper exercise of our discretion.

[104] I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.