IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. E. S., 2015 NSPC 81

Date: November 23, 2015
Docket: 2833034, 2833049, 2833064, 2833079, 833082

Registry: Halifax

BETWEEN:

HER MAJESTY THE QUEEN

v.

S.(E)

DECISION ON SENTENCE

BEFORE THE HONOURABLE JUDGE ANNE S. DERRICK

HEARD: November 9 and 12, 2015

DECISION: November 23, 2015

CHARGES: sections 268 x 3, 348(1)(b), 351(2), *Criminal Code*

COUNSEL: Jamie Van Wart and James Giacomantonio, for the Crown
Christa Thompson for S.(E.)

By the Court:

Introduction

[1] On November 30, 2014 the suppertime break-in of an occupied home left three teenagers with gunshot wounds. One of those teenagers, Ashley Kearse, was paralyzed as a result of being shot. A robbery that went terribly wrong is what brought the three teenagers and four masked intruders together with catastrophic consequences.

[2] S.(E.) was one of three young persons who, in the company of a young adult, went into the home. He was just a few months past his 17th birthday. He and his friends, two other young people whom I will also be sentencing, B.(D.) and D.(R.), were arrested within 24 hours. They were all charged with attempted murder of the three victims, break and enter and robbery, and having their faces masked during the break-in and robbery.

[3] None of the young persons was the shooter. On August 24, 2015, the Crown indicated it was willing to accept guilty pleas from S.(E.) and the two other youths to three counts of aggravated assault, break and enter, and the charge of having their faces masked. At the time of his guilty pleas and the section 36 findings that followed, S.(E.) had been detained at the Nova Scotia Youth Facility for almost nine months. The Crown took this into account in ultimately deciding to withdraw its application to seek an adult sentence.

[4] The sentencing of S.(E.) and the other young persons is contested: the Crown seeks a lengthy Custody and Supervision sentence ("CSO") of 2 – 3 years on top of the now nearly 12 months that S.(E.) has spent in the Nova Scotia Youth Facility ("NSYF") since being denied bail. Ms. Thompson submits that S.(E.)'s sentence should be composed of a one-day CSO followed by 18 months of probation with strict conditions.

[5] The central issue I must decide is what sentence satisfies the *Youth Criminal Justice Act* ("*YCJA*") requirement that S.(E.) be held accountable for his role in the offences he committed. There is agreement that accountability requires a custodial sentence: the issue is the length of the custodial sentence. In determining S.(E.)'s sentence I must calibrate a number of factors that the *YCJA* requires me to consider. Section 42(15) of the *YCJA* establishes that the total sentence for S.(E.) cannot exceed 3 years. Therefore, whether I impose a probation order as part of S.(E.)'s sentence will depend on the length of his Custody and Supervision Order.

[6] This is a lengthy decision. I will be explaining my reasoning in detail and will say this much now: I have reached the conclusion that neither sentence being proposed satisfies the requirements of the *Youth Criminal Justice Act*.

Facts

[7] S.(E.) has admitted to facts that are contained in an Agreed Statement of Facts. (*Exhibit 2*) I will summarize these facts briefly with a focus on the essential details.

[8] The [… Drive] residence that S.(E.) broke into on November 30 was the site of an earlier robbery in which he had participated. The first robbery had been committed by S.(E.) and the other two young persons that November. It had been a success. Drugs and money were located and taken and no one got hurt. Better still, it was never reported. S.(E.) and his confederates got away scot-free. There were no repercussions at the time.

[9] On November 30, S.(E.), B.(D.) and D.(R.) went back to [… Drive] with a young adult, whom I shall refer to as the gunman. They all wore bandanas that covered the lower half of their faces. The gunman had a revolver. It has been accepted by the Crown that S.(E.), B.(D.) and D.(R.) did not know this. However, S.(E.) has admitted "it was reasonably foreseeable that during the course of the robbery someone else might introduce a firearm." S.(E.) admits that he "took no steps to ensure that nobody had a weapon of this nature." (*Exhibit 2*)

[10] S.(E.) has also admitted that:

> … his intention was to commit a robbery at [the residence] and to assist his co-perpetrators in committing a robbery. Though he did not intend to cause injury to the victims of the robbery, he ought to have known that assaultive actions by one of his co-perpetrators was a probable consequence of the robbery.

[11] S.(E.) entered the home with D.(R.) and the gunman through the unlocked front door. They confronted two teenagers, L.S. and J.L., in the living room and made demands for "money" and "anything of value." They directed L.S. and J.L. into a bedroom where Ashley Kearse was playing video games. While all three teenagers were on the bed, the gunman produced the gun. There was a verbal exchange between Ms. Kearse and the gunman. She knew the gunman and courageously tried to defuse the situation, urging him not to shoot and to consider the consequences. She told him: "You're just going to get yourself in trouble." She

recalls the gunman's response: "I'm not going to get in trouble because none of you guys are going to make it out of here alive." Quite understandably, Ms. Kearse became extremely upset. She started screaming at the gunman not to shoot. The gunman opened fire at the three teenagers on the bed.

[12] S.(E.) was in the bedroom looking for valuables when the gunman produced the gun. Shortly after he pulled out the gun he directed S.(E.) out of the bedroom. S.(E.)., B.(D.) and D.(R.) were in the hallway outside when the victims were shot. The Agreed Statement of Facts indicate that once he saw the gun S.(E.) wished the robbery would end so he and the others could leave. He didn't leave.

[13] The robbery ended with the shootings. The cell phone that had been taken from L.S. and some cigarettes were later found on the front lawn of the residence.

[14] L.S. and J.L. have made a full recovery from being shot at close range. Ashley Kearse did not. She was shot twice, taking bullets to the top of her neck. The damage to her spinal cord has left her permanently paralyzed. She faces a lifetime of physical and psychological challenges, including complications that are common for spinal cord injuries. In her victim impact statement which I will discuss later, Ms. Kearse gave a searing account of her life as a 19-year-old quadriplegic.

Crown and Defence Positions on Sentence

[15] The Crown is seeking a two to three year Custody and Supervision Order "going forward" taking into account the time S.(E.) has spent in detention, that is, his time on remand. Ms. Thompson says that S.(E.)'s youth record should indicate that a Custody and Supervision Order is being imposed but submits it should be a nominal order – one day – followed by a lengthy period of probation, 18 months, with stringent conditions to be gradually relaxed. It is Ms. Thompson's submission that S.(E.) has already spent the equivalent of 18 months in custody, that is, 12 months on remand calculated on a 1.5 to 1 ratio.

[16] There is agreement that section 42(5) of the *YCJA* precludes a Deferred Custody and Supervision Order ("DCSO"). The section 34 psychological assessment recommends a DCSO but, even without consideration of its suitability in any particular case, it is statutorily not available on a conviction for aggravated assault.

[17] A short-lived submission was made by Ms. Thompson for an IRCS assessment to be ordered if I determined that a CSO of more than the one day

should be imposed. Mr. Van Wart noted in response that S.(E.) cannot qualify for an IRCS (intensive rehabilitative custody and supervision order) sentence because he does not satisfy the legislative requirements. Specifically, although S.(E.) pleaded guilty to aggravated assault, he would also have to have been "previously…found guilty at least twice of such an offence." (*section 42(7)(a)(ii), YCJA*)

Documentary Evidence at Sentencing

[18] Extensive documentary material has been filed for this sentencing. I have reviewed:

- A pre-sentence report dated July 22, 2015 prepared for S.(E.)'s sentencing on the prior robbery;
- A *Gladue* Report dated August 21, 2015 prepared for the prior robbery sentencing (*Exhibit 7*);
- A section 34 psychological assessment dated October 16, 2015 and authored by Dr. Naomi Doucette, a registered psychologist;
- A psychiatric assessment dated November 6, 2015;
- An Impact of Race and Culture Assessment by Robert Wright, MSW, RSW, dated November 1, 2015 (*Exhibit 5*), filed with the Crown's consent.

[19] I have also received a copy of S.(E.)'s prior youth record (*Exhibit 6*) and a CD of the judge's oral reasons for conviction, delivered on April 29, 2015, following the trial of S.(E.), B.(D.) and D.(R.) for the first robbery.

The Victim Impact Statement

[20] Only Ms. Kearse prepared a victim impact statement. L.S. and J.L. were given the opportunity but chose not to provide statements. Even without their statements, I know they sustained significant injuries from being shot multiple times and I am prepared to infer that the experience of being accosted by masked robbers in L.S.'s home and then being subject to, and witnessing, the shootings will have had a profound psychological effect on them.

[21] Ms. Kearse read her victim impact statement in the presence of S.(E.), B.(D.) and D.(R.) and members of their families. She described in crystalline words all that she has lost – "I lost everything" - and what she endures. She spoke of how she had put off writing her statement as long as she could. In her words: "I guess I thought the more I procrastinated and ignored it maybe this would all go

away and things could go back to the way they were." Ms. Kearse described the horror of being shot, feeling that she was dying and being in terrible pain. When she learned that she was paralyzed and saw the pain on everyone's face she said it felt "like my heart was ripped out of my chest." Since then Ms. Kearse has been living with the reality of quadriplegia. She talked about the devastating burden of being paralyzed: "I hate waking up most days I don't even get out of bed I hate going out I hate myself I don't see the point to anything anymore I feel weak because this happened to me I feel ugly I hate looking at myself. I lost everything that night I lost who I was." Ms. Kearse nailed her experience with these heartrending words: "everything I knew now doesn't apply to me I have to find new ways and it's so hard to see everyone I love able to go and do things I can't they ripped me away from everyone and everything…" As Ms. Kearse said later in her statement: "…its such a horrible feeling seeing your friends and being used to just going with them and now you have to watch them go and there's nothing you can do."

[22] Ms. Kearse identified the losses she has endured and the enormous challenges she continues to face: she lost her boyfriend and close friends and the ability to have a carefree relationship with her little brother and her cousins. Her changed circumstances have either overwhelmed relationships or fundamentally altered them. She struggles to adapt to her life as it is now: "…I never imagined I would ever of ended up so helpless it breaks my heart every day I don't ever feel happy or excited about anything anymore I constantly fight back crying all day everyday it feels like someone is constantly sitting on my chest choking me I feel alone whether there's people there or not…I just want my life back with everything in me I can't do anything I love anymore…" Ms. Kearse missed out on her final year at high school, and could not attend either the graduation of her friends or the prom. These are huge events in the life of a teenager. Ms. Kearse talked about how excited she had been to go to prom and graduate with her friends.

[23] Ms. Kearse has become wholly dependent in all aspects of her life. Her world is one where, as she has said, "I have no independence anymore I can't be alone I can't live on my own I need help with everything..." She said of herself, "…the biggest thing about me was I loved my independence and doing everything myself…" She is acutely aware of what her future does not hold anymore, the option of having her own children, uncomplicated relationships and employment without accommodations for her profound disabilities. Ms. Kearse spoke of feeling as though she has been "imprisoned" in her body for the rest of her life. "I feel like

I'm in a nightmare I just want to wake up…I feel like a completely different person and I hate it."

[24] When Ms. Kearse was finished reading her victim impact statement, each of S.(E.), B.(D.) and D.(R.) spoke to her as did members of their families. The family members who spoke were heartfelt in their emotional expressions of grief and sorrow for what happened to Ms. Kearse in particular, and the other victims. Ms. Kearse was urged to believe in herself and the value of her life. The powerful effect of Ms. Kearse's presence and her words resonated in the courtroom.

The Purpose and Principles of the Youth Criminal Justice System and Sentencing

[25] Parliament has mandated that the youth criminal justice system "must be separate from that of adults" (*section 3(1)(b), YCJA*) which reflects that young persons, even those who commit or are party to violent offences, are not adults and cannot be treated as though they are unless certain presumptions are displaced. The Supreme Court of Canada has held that young persons are entitled to a presumption of diminished moral blameworthiness that reflects - as a consequence of their age - their heightened vulnerability, immaturity, and reduced capacity for moral judgment. (*R. v. D.B., [2008] S.C.J. No. 25, paragraph 41*)

[26] The Declaration of Principle under the *YCJA* indicates that the "…youth criminal justice system is intended to protect the public by holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person" (*section 3(1)(a)(i)* and through "promoting the rehabilitation and reintegration of young persons who have committed offences."*(section 3(1)(a)(ii)*)

[27] The *YCJA* requires that the sentence imposed on S.(E.):

- Reinforce respect for societal values;
- Encourage the repair of harm done to victims and the community; and
- Be meaningful for him given his needs and level of development and, involve parents and extended family, where appropriate, and the community and social or other agencies in his rehabilitation and reintegration. (*subsection 3(1)(c)*)

[28] An underlying premise of the *YCJA* is that "… with some exceptions, young persons who commit crimes can be rehabilitated and successfully reintegrated into society so they commit no further crimes…" (*R. v. T.P.D., [2009] N.S.J. No. 556, paragraph 128 (S.C.))* As is expressed in subsections 3(1)(a)(i) and (ii) of the legislation, the *YCJA* sentencing regime is designed by Parliament to

> ... promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. (*R. v. B.W.P.,[2006] S.C.J. No. 27; R. v. B.V.N., [2006] S.C.J. No. 27, paragraph 4)*

[29] Section 38(1) of the *YCJA* is the statutory home for these objectives. It states:

> The purpose of sentencing ... is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

[30] It has been determined by the Supreme Court of Canada that, a "plain reading of s. 38(1)" makes it apparent that:

> …"protection of the public" is expressed, not as an immediate objective of sentencing, but rather as the long-term effect of a successful youth sentence. (*R. v. B.W.P., paragraph 31*)

[31] The relevant sentencing principles referenced in subsections 38(2)(a) through (e) of the *YCJA* include: parity -- that a young person's sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances; proportionality -- that the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence; and, subject to the proportionality principle, that the sentence be the least restrictive sentence that is capable of achieving the overall purpose of sentencing; that it be the one most

likely to rehabilitate the young person and reintegrate him or her into society; and that it promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

[32] The principles referenced in section 38(2)(e) of the *YCJA* - the least restrictive sentence principle - the requirement for a sentence that is "most likely" to serve rehabilitation and reintegration, and promote a sense of responsibility in the young person and an acknowledgement of the harm caused - are principles that are subject to the requirement for a proportionate sentence, a sentence that reflects the seriousness of the offence and the degree of responsibility of the young person.

[33] That being said, as stated by Judge Campbell (as he then was) in *R. v. Smith*, [2010] N.S.J. No. 461, the *YCJA* "encourages an approach that takes into account the reality that public safety is best served by dealing with problems while there is still time and that strict punishment may not be the best answer in the long run." (*paragraph 110*)

Accountability

[34] The *YCJA* has embedded accountability as the fundamental principle of sentencing. In the words of the Ontario Court of Appeal accountability "drives the entire YCJA sentencing regime." (*R. v. A.O., [2007] O.J. No. 800, paragraph 59*) What are we to understand accountability means?

[35] Accountability for young persons under the *YCJA* must be "fair and proportionate" and "consistent with the greater dependency of young persons and their reduced level of maturity." (*section 3(1)(b)(ii), YCJA*) The consensus is that accountability is to be regarded as having equivalency to "the adult sentencing principle of retribution" discussed by the Supreme Court of Canada:

> Retribution in a criminal context ... represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and

> appropriate punishment, and nothing more. (*R. v. M.(C.A.), [1996] S.C.J. No. 28, paragraph 80; emphasis in the original*)

[36] In *A.O.*, the Ontario Court of Appeal recognized rehabilitation as one of the important factors that must be considered in determining what constitutes accountability for the particular young person, "…one, but only one…" is how the Court characterized it. (*R. v. A.O., paragraph 57*) The Manitoba Court of Appeal has agreed with this analysis, holding that its Ontario counterpart,

> …correctly realized that both proportionality and rehabilitation concerns have to be considered when determining accountability under the *YCJA*, reaffirming that the "meaningful consequences" aspect of accountability looks toward proportionality…(*R. v. A.A.Z., [2013] M.J. No. 130, paragraph 57*)

[37] In its decision in *A.A.Z.*, the Manitoba Court of Appeal observed that "…where serious offences have been committed, the concepts of proportionality, meaningful consequences and retribution may take precedence over rehabilitation and can result in significant custodial sentences." (*paragraph 65*) This is reflected in a decision from our Youth Justice Court where Judge Campbell noted that while a young person's rehabilitation and reintegration are "important considerations", they "have not driven measured and legally restrained punishment from the field." (*R. v. A.S., [2012] N.S.J. No. 634, paragraph 95*)

[38] The British Columbia Court of Appeal decision of *R. v. S.N.J.S.*, [2013] B.C.J. No. 1847 is the most recent appellate decision I could find that discusses the meaning of accountability in the context of a youth sentence. In *S.N.J.S.*, the Court held that a youth sentence must satisfy the requirements of proportionality, stating that, "…to the extent there is any hierarchy within the principles laid down in s. 38(2) [of the *YCJA*], it is (c) [the proportionality principle] which is at the top of that hierarchy…" (*R. v. S.N.J.S., paragraph 27*) The Court went on to talk about accountability which it said:

> …must be understood in part to be concerned with the severity of the sentence in relationship to the seriousness of the offence. Holding a young person "accountable" must also be understood to include consideration of whether the sentence meets the goal of ensuring a person is rehabilitated and reintegrated into society...This notion of accountability includes consideration of

> the seriousness of the offence and requires a sentencing judge to balance and match the rehabilitative needs of the young person, with the other purposes and principles of sentencing… (*paragraph 29*)

[39] Amendments to the *YCJA* in 2012 permit, although do not mandate, the objectives of a youth sentence to now include denunciation and specific deterrence, again subject to the proportionality principle. (*section 38(2)(f)(i) and (ii)*) In the Crown's submission, this is an appropriate case for me to exercise my discretion to take the principle of denunciation into account although Mr. Van Wart indicated that he would have been seeking the same sentence for S.(E.) even in the absence of denunciation as a principle to be considered.

Denunciation

[40] This is as good a time as any in these reasons for me to discuss denunciation as a discretionary objective in youth sentencing. It is a sentencing objective traditionally associated with adult sentencing. It, and the objective of specific deterrence, exist now on a discretionary basis – the sentence imposed on a young person "may" have denunciation and specific deterrence as objectives.

[41] There is nothing to indicate that any evidence underpinned the importation of these adult sentencing objectives into the *YCJA*. There is nothing to explain what these objectives add to the requirement of accountability, the objective that "drives" the youth criminal justice system. (*R. v. A.O., paragraph 59*) When they were first introduced in Parliament in a Government bill containing other proposed amendments to the *YCJA*, then Justice Minister Rob Nicholson stated that, "Canadians lose confidence in the justice system when a sentence is insufficient to hold offenders accountable for their actions or to protect society." This statement was the basis for "broadening" the sentencing principles in the *YCJA* to include denunciation and specific deterrence. (*House of Commons Debates March 19, 2010, Vol. 145, No. 013, 3rd Session, 40th Parliament*) The inclusion of denunciation and deterrence in the *YCJA* ignored section 50 of the *YCJA* which expressly excludes from youth sentencing the application of adult sentencing principles.

[42] The youth criminal justice system does not mean that young persons are less accountable for the serious offences they commit. They are "decidedly but differently accountable." (*R. v. D.B., [2008] S.C.J. No. 25, paragraph 1*) The Supreme Court of Canada has commented on the social science research on young

persons and punishment, noting that "…young persons respond differently to punishment than adults, and…harsher penalties do not, by themselves, reduce youth crime." (*R. v. D.B., paragraph 64*)

[43] Accountability is the lodestar of youth sentencing. It requires the imposition of "a just and appropriate punishment, and nothing more." (*R. v. A.O., paragraph 46,* citing *R. v. C.A.M., [1996] S.C.J. No. 28*) Denunciation comes late to the table of youth justice: the table was already fully set with accountability. All the "tools" required for crafting a young person's sentence for a serious offence were already available. Nothing was missing, a point illustrated by the Supreme Court of Canada's comments about specific deterrence in *B.W.P.*, a decision that pre-dated section 38(2)(f):

> …Parliament has specifically and expressly directed how preventing the young offender from re-offending should be achieved, namely by addressing the circumstances underlying a young person's offending behaviour through rehabilitation and reintegration and by reserving custodial sanctions solely for the most serious crimes. In my view, nothing further would be gained in trying to fit specific deterrence, as a distinct factor, by implying it in some way under the new regime. (*paragraph 39*)

[44] This is my point exactly. In the same vein, nothing useful has been achieved by introducing denunciation into the youth sentence mix. Young persons who commit serious offences are held accountable for violating societal norms and their sentences are intended to "reinforce respect for societal values." (*section 3(1)(c)(i), YCJA*) Although framed for compatibility with the "differently accountable" ethos of the youth criminal justice system, this is in keeping with the notion of punishment for encroachment "on our society's basic code of values as enshrined within our substantive criminal law." (*R. v. C.A.M., paragraph 81*) It is not as though the framers of the *YCJA* forgot to reference society's collective concern that, within the youth sentencing regime, fundamental shared values are to be respected.

[45] I fail to see what denunciation and deterrence add to what youth sentencing is mandated to achieve, especially as they are subject to the requirement that a young person's sentence "must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence." (*section 38(2)(c), YCJA*) Their inclusion in the *YCJA* has the potential to disrupt the balance

of sentencing principles in the legislation. They are not useful to the sentencing calculus in S.(E.)'s case.

What Section 38(3) of the YCJA Requires Me to Consider

[46] In section 38(3), the *YCJA* is explicit about the factors to be taken into account in crafting the appropriate sentence for a young person:

> (a) The degree of participation by the young person in the commission of the offence;
> (b) The harm done to the victims and whether it was intentional or reasonably foreseeable
> (c) Any reparation made by the young person to the victim or the community;
> (d) The time spent in detention by the young person as a result of the offence;
> (e) The previous findings of guilt of the young person; and
> (f) Any other aggravating or mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in section 38.

[47] I will now discuss these factors in relation to S.(E.).

S.(E.)'s Degree of Participation in the Commission of the Offence

[48] S.(E.) was an active participant in everything that happened on November 30 at […Drive] except the shooting. He was not the shooter but he was fully participant in a home invasion-type robbery that was on an escalated footing from the previous robbery. He saw the gunman pull out the revolver and he knew then of the probability that everything could go very badly wrong. And it did.

[49] S.(E.) knew he was participating in a break and enter and robbery that carried a heightened risk over the earlier one. The very nature of what he signed on for was fraught with risk: breaking into an occupied dwelling as a masked intruder with three other accomplices. The occupants could have armed themselves after the earlier robbery. One of S.(E.)'s accomplices could have been carrying a gun – and in fact was. It is not uncommon for such robberies to go wrong. S.(E.) went along, focused on scoring some spoils as before. S.(E.) was a committed member

of the group, breaking into the home to commit robbery, a robbery which culminated in his adult accomplice shooting the witnesses.

[50] S.(E.) is caught by section 21(2) of the *Criminal Code*, the common unlawful purpose provision. It imposes a broad liability:

> …It applies where one person commits an offence beyond the one which the parties had originally planned to assist one another. It imposes liability on the other person if that person knew or ought to have known that the offence committed would be a probable consequence of carrying out the original common unlawful purpose. The Supreme Court explained in *R. v. Logan* [*cite omitted*] that the objective of s. 21(2) "is to deter joint criminal enterprises and to encourage persons who do participate to ensure that their accomplices do not commit offences beyond the planned and unlawful purpose." (*R. v. Cadeddu, [2013] O.J. No. 5523, paragraph 50 (C.A.)*)

The Harm Done to the Victims and Whether it Was Intentional or Reasonably Foreseeable

[51] S.(E.) did not intend for anyone to get hurt on November 30 but he has acknowledged it was reasonably foreseeable that a gun might be produced during the robbery by someone at the scene. He knew an assault on the victims was a probable consequence of the robbery. I note that although he had not himself assaulted anyone during the earlier robbery, his accomplices did: B.(D.) was found to have held a knife to the throat of L.S. for a few seconds and D.(R.) threatened L.S. by brandishing a bong at him when it was determined he had lied about there being nothing to steal.

[52] Considerable harm was done to L.S. and J.L. during the November 30 robbery. They were badly shot up, a horrifying experience. It is reasonable to infer that the psychological effects have not resolved as readily as their physical wounds.

[53] The Agreed Statement of Facts describe L.S.'s gunshot entry and exit wounds: two holes in the right side of his face; a wound in the right front chest, with right upper and lower back wounds; wounds to his right upper leg and right forearm. A chest tube had to be inserted at the hospital to drain fluid as a collapsed

lung was suspected. He was discharged from hospital several days later with oral pain medication.

[54] J.L. sustained gunshot wounds to his right finger and was diagnosed at the hospital with a skull fracture caused by a ricocheting bullet. He was discharged from hospital on December 1.

[55] As I have already noted, Ms. Kearse was catastrophically injured. She experienced a complete spinal cord injury and has been permanently disabled by quadriplegia. The Agreed Statement of Facts documents that she required a number of interventions that are typical for a spinal injury patient, including a tracheostomy, a urinary catheter insertion and a feeding tube. Transferred in January 2015 to the Rehabilitation Centre, she developed pneumonia and sepsis and was urgently transferred back to Intensive Care in March. She is susceptible to numerous types of complications that are very common with spinal cord injuries. Her specialist is quoted in the Agreed Statement of Facts: "…the likelihood of meaningful motor recovery at this time is extremely unlikely." (*Exhibit 3, paragraph 58*) She has a reduced life expectancy.

Time Spent in Detention as a Result of the Offence

[56] S.(E.) has been detained for the November 30 offences for one week short of a year. Rather than quibble, I will be treating this as a remand of one year. Both Crown and Defence view this as a lengthy period of custody for a young person. The Crown took it into account in abandoning its application for an adult sentence. Ms. Thompson says a 1.5 to 1 ratio should be applied and the 18 months this calculation produces should represent the duration of custody required to hold E.(S.) accountable.

Previous Findings of Guilt

[57] S.(E.) does not have a significant history of conflict with the law. On January 29, 2015 he received a conditional discharge on a charge of resisting/obstructing a peace officer in relation to an incident that occurred in August 2014. At the time of the November 30 robbery, this was the only previous finding of guilt against S.(E.)

[58] Prior to his remand for the November 30 robbery, S.(E.) had never spent any time in custody.

Aggravating Factors

[59] The prior robbery in early November 2014 is an aggravating factor in this sentencing. The November 30 robbery targeted the same home and the same victim. S.(E.), B.(D.) and D.(R.) all knew L.S. who lived at the [… Drive] residence. L.S. acknowledged in his evidence at the trial of S.(E.), B.(D.) and D.(R.) for the first robbery that a lot of people came and went from his home and it became known in the neighbourhood as a "drug house." He smoked and sometimes sold marijuana. It is reasonable to infer that when S.(E.), B.(D.) and D.(R.) robbed L.S. in early November of $220 and a few grams of marijuana that they located in his bedroom, they got what they had come for.

[60] During the first robbery E.(S.), B.(D.) and D.(R.) did not have their faces covered. L.S. recognized them all and his evidence led to the convictions. Judge Lenehan noted in his oral decision that L.S. did not disclose the first robbery to the police until after the November 30 robbery because not much was stolen and no one got hurt. That changed when L.S., J.L. and Ms. Kearse were shot. L.S. testified before Judge Lenehan that he was then prepared to do whatever it took to get justice for Ms. Kearse.

[61] The November 30 robbery was an escalated drug "rip". There were four perpetrators this time – S.(E.), B.(D.) and D.(R.) and the gunman. They sought to hide their identities with bandanas. This time they came with weapons – the Agreed Statement of Facts indicates that J.L. saw three cans of bear spray during the course of the robbery. And there was the gun, although its presence was not known to S.(E.) until the gunman pulled it out.

[62] It is obvious that the success of the first robbery fueled the decision to return. (And S.(E.) acknowledged this in the section 34 assessment: "go there, get some weed and money, and not hurt anyone." (*page 2*)) Everything pointed to the victims being easy targets to be picked over again with impunity. Getting into and leaving the house had gone smoothly. No resistance had been encountered. Money and drugs were located as expected. And nothing happened afterwards – no police, no arrests.

[63] The context in which the November 30 offences occurred is aggravating. The aggravated assaults and robbery were perpetrated in L.S.'s home. S.(E.) and the other perpetrators knew the house would be occupied. They came prepared for it, wearing masks and carrying bear spray. L.S. and his teenaged friends – J.L. and Ms. Kearse – were having a quiet night, minding their own business in comfort and safety, so they thought. Their peace and security was violently disrupted by four

masked intruders. These facts accord with what is often described as a "home invasion." Even if that term had not been coined, the gravity of such a break and enter would be the same. The victims were entitled to feel and be safe at L.S.'s house. Instead they were subjected to a harrowing encounter with robbers dressed in black and wearing bandanas. It is a truism of ancient lineage that a person's home is their sanctuary and refuge. The law reflects this principle by making break and enter by an adult into a dwelling house punishable by life imprisonment.

[64] Other features of the November 30 offences are aggravating but have been addressed already – the presence of the bear spray and the injuries to the victims.

Mitigating Factors

[65] It is mitigating that S.(E.) pleaded guilty to very serious charges, sparing the state from having to put him on trial and the victims the anguish and stress of testifying. Re-living the traumatic events of November 30, their injuries and medical treatments, would undoubtedly have exacted a significant psychological toll on each of L.S., J.L. and Ms. Kearse. Giving evidence would also have placed significant physical demands on Ms. Kearse.

[66] S.(E.) not only pleaded guilty, he admitted responsibility as soon as he was arrested by making a confession to police on December 1, 2014. He admitted to being present during the robbery but said he did not know about the gun or that there would be a shooting.

[67] In addition to his acknowledgements of responsibility, I accept that S.(E.) is genuinely remorseful for his role in what happened on November 30. Given the opportunity to address Ms. Kearse after she delivered her victim impact statement in court on November 12, S.(E.) told her he was sorry to all the victims for the harm he caused them and that he wanted them to know that what had happened had changed his life "for the better." I understood him to be saying that he had learned from these terrible events and wanted Ms. Kearse, L.S. and J.L. to know that. I regard this as S.(E.) recognizing that he must atone for his role in the harm done to the victims by being a different and better person.

[68] S.(E.)'s parents also spoke tearfully to Ms. Kearse about their son's efforts to change and remarked on the fact that he experiences nightmares and insomnia associated with what happened to the victims on November 30.

[69] In the section 34 psychological assessment it is noted that S.(E.) reported having a hard time thinking about what happened to the victims. He feels "terrible"

that Ms. Kearse is paralyzed. He thinks now that he could have done something more to avoid the harm that ensued from the robbery. (*page 3*)

Rehabilitation and Reintegration

[70] As I have already discussed, the just sanctions imposed on a young person at sentencing must have meaningful consequences and must promote his rehabilitation and reintegration. The section 34 psychological and psychiatric assessments are relevant to the objectives of successful rehabilitation and reintegration. They also disclose how S.(E.) is being held to account for his offences.

The section 34 Psychological Assessment

[71] The section 34 psychological assessment is 29 pages long and documents interviews conducted, including with S.(E.), his parents and various adults in positions of authority – probation officer, NSYF teacher, social workers, NSYF unit supervisor, and school principals – psychological and cognitive testing and the review of pertinent documentation. I do not intend to summarize it and will be concentrating on its most salient points.

[72] S.(E.) is clearly loved deeply by his parents who continue to be supportive of him. They are not his biological parents although his adoptive mother is family – his great-aunt. S.(E.) was taken into care at the age of 14 months and adopted at age 2. He had been subject to severe neglect in his birth home. This appears to have been transgenerational. According to the *Gladue* report, abuse and neglect had been the unhappy experience of S.(E.)'s birth mother. (*Gladue report, page 5*)

[73] S.(E.) had a hard start to life. His biological mother had used alcohol and marijuana during the pregnancy and S.(E.) was premature and severely malnourished. Medical, psychological and speech and occupational therapy interventions were necessary.

[74] There has been some suggestion of Foetal Alcohol Spectrum (FAS) but no authoritative diagnosis. The section 34 psychological assessment notes that "…no psychological testing had been completed to support the diagnoses [of FAS, Mild Global Developmental Delay and Attention Deficit Hyperactivity Disorder] and later collateral documentation notes that it was uncertain whether the assessment was based on a full diagnostic work-up." (*page 13*)

[75] Furthermore, the section 34 assessment references a 2005 psychological assessment of S.(E.) which concluded that, with the exception of hyperactivity, S.E. "did not appear to present with obvious signs of FAS symptomatology." (*page 13*)

[76] S.(E.) exhibited significant behaviour problems from an early age, including extreme temper tantrums. These settled down although he continued to experience behavioural challenges – irritability, emotional sensitivity, destructive behaviours, impulsivity and difficulty with transitions. The 2005 assessment identified significant concerns with frustration tolerance and emotion regulation. The section 34 psychological assessment observes that: "Given his early history, these issues may reflect a reaction to his early trauma experience." (*page 11*)

[77] Impulsivity and not learning from consequences continued to be significant issues for S.(E.) in his pre-teen years. And although he was able, throughout elementary and junior high, to meet some or most of the learning objectives in his classes, his grades and attendance began to slip in Grade 9 and through high school. It was not thought that he lacked ability. The section 34 assessment notes collateral sources describing S.(E.) as: "…a capable student who was able to complete the work with support." (*page 15*) The 2005 assessment concluded that S.(E.) had average-range learning abilities and did not appear to have a specific learning disability.

[78] S.(E.) began to receive suspensions from school in December 2012. Up to his arrest in December 2014, he was suspended multiple times. The suspensions were for physical violence, being under the influence of a controlled substance, cyber-bullying, disruption to school operations, and insubordination.

[79] S.(E.) had also been having problems at home. By the time he was 15 – 16, S.(E.)'s parents could not allow him to be at home unless they were there. He was stealing from family members, using and selling drugs, bringing girls home for sex, being inconsiderate and unmanageable. Disciplinary measures were having no effect.

[80] It was at this point, when S.(E.) was 15 – 16, that his peer group changed. He started to spend time with B.(D.) and D.(R.) and the gunman. They were not a good influence on each other. S.(E.) began smoking more marijuana and skipping school altogether. By January 2014, S.(E.), who had started using marijuana when he was 14, was smoking a couple of grams per day.

[81] In January 2014 S.(E.)'s world shifted off its axis. His parents separated and his mother moved out of the family home. He continued to live with his father but was refusing to abide by a curfew and not consume drugs. He decided to leave home and spent some time in 2014 living first with his biological mother and then in Toronto with his biological father. Neither arrangement was successful and S.(E.)'s biological father represented a negative influence as a drug dealer and a pimp. S.(E.) returned home in the fall of 2014 a few weeks before his arrest for the November 30 robbery.

[82] The section 34 assessment involved S.(E.) taking several tests - the Million Adolescent Clinical Inventory (MACI) and the Resiliency Scales for Children and Adolescents (RSCA) producing the most notable results. S.(E.)'s MACI responses suggested to the assessors that he may struggle with trust and confidence issues in the context of relationships. This is identified as having a potential impact on therapeutic relationships such that S.(E.) may experience difficulty sustaining them. The section 34 assessment notes that S.(E.)'s MACI profile "suggests that he would benefit from a therapeutic relationship that may require exploring a variety of techniques that seek to build trust, focus on positive traits, and increase his self-confidence." (*page 22*)

[83] S.(E.)'s RSCA responses suggest that his problem-solving ability, reception to criticism, and ability to learn from mistakes are all average. The section 34 assessors found responses that suggest average ratings for his threshold for getting upset, his ability to bounce back and his ability to maintain his emotional equilibrium when upset. (*page 23*)

[84] The section 34 assessment diagnosed S.(E.) with Conduct Disorder, Adolescent Onset Type. It appears uncertain that S.(E.) has ADHD. And as I have indicated already, the FAS/FASD diagnosis he received as a child is suspect.

[85] According to the section 34 assessment, S.(E.)'s overall risk of general recidivism in the absence of interventions is moderate. S.(E.)'s risk of future violence is also assessed as moderate although the assessment notes: "…it is likely that the moderate risk rating for violence may in fact represent an underestimate given that [S.(E.)] was in a structured custodial facility at the time of the assessment." Importantly, the assessment adds that S.(E.) "exhibits some important protective factors such as strong social supports, strong attachment to prosocial adults, and a positive attitude towards intervention/authority." (*page 25*)

[86] As the section 34 assessment indicates, there is no known criminal history for S.(E.)'s adoptive family. However, S.(E.) advised the assessors that although he was raised primarily in […], he spent a great deal of time in North Preston which is home to his adoptive father's family. S.(E.) explained that in North Preston he was exposed to both pro-social and pro-criminal lifestyles and that he often admired and idolized individuals whom he later learned were involved in crime. The section 34 assessment reports: "One collateral source noted that [S.(E.)] began to believe that carrying weapons and consuming drugs was normal within his community." (*section 34 psychological assessment, page 7*) The assessment observes that the community of North Preston "struggles with issues related to crime/violence, substance abuse, poverty, and racism." (*page 7*)

[87] The section 34 assessment notes collateral information that suggests when S.(E.) was in the community and associating with individuals involved in a pro-criminal lifestyle he was also struggling with "the lack of African Canadian role models who represented his interests" and was facing issues "related to the normalization of criminality within his community." (*page 26*) The assessment states:

> It is possible that S.(E.) struggled with balancing his desire to have a prosocial lifestyle, as modeled by his adoptive family, and engaging in a more criminal lifestyle that he witnessed in his community, with his peers, and with his birth father. (*page 26*)

[88] The section 34 assessment views S.(E.)'s antisocial peers as "a significant risk factor for future criminal offending" and states: "As such, [S.(E.)] would benefit from reduced contact with his co-accused and the development of prosocial relationships." (*page 27*) This concern is also reflected in the July 22 pre-sentence report. (*page 6*)

[89] S.(E.) is noted by the section 34 assessors to have "needs across multiple domains, including prior and current offences, education/employment, peer relations, substance abuse, leisure/recreation, and personality/behaviour." (*page 27*) It is the conclusion of the section 34 assessors that S.(E.)'s "current risk and treatment needs" can be met in the community under a sentence with strict conditions. The assessment recommends: house arrest, electronic monitoring, participation in individual therapy "to address his risk factors, identity confusion, antisocial behaviour, and substance use", participation in an educational program,

and non-association with his co-accused or any other antisocial peers "with any breaches resulting in a swift return to custody." Also recommended is a case conference once S.(E.) has returned to the community to discuss "treatment, risk management, and options for education." A "…comprehensive neuropsychological assessment to explore his FASD diagnosis" is also suggested. (*page 28*)

[90] More effective structuring of S.(E.)'s free time in the community is identified as beneficial for him and connection to "a male mentor to assist him with the development/participation in prosocial leisure activities." (*page 29*) Supporting his interest in resuming an involvement in church activities is seen as a worthwhile objective. (I note the *Gladue* report indicates that S.(E.)'s family is "very religious" and that, "Their strong involvement in the Church provided the basis for the structure and strict rules of their household." (*Gladue report, page 7*)

[91] The section 34 assessment recommends consideration of factors such as race and culture that may influence S.(E.)'s "exposure to other risk factors (i.e. community disorganization, academic struggles) and [his] world view…" (*page 28*) The assessment offers that S.(E.) "would benefit from being connected to community agencies that would facilitate his exploration of both his African Canadian and Aboriginal background." (*page 29*)

[92] I will note here that Robert Wright, whose report I will be discussing, supports the recommendations of the section 34 psychological assessment, emphasizing the need for culturally appropriate supports and interventions for S.(E.).

The section 34 Psychiatric Assessment

[93] The psychiatric assessment was ordered on August 24 at the same time as the section 34 psychological assessment. It was prepared by Dr. Jose Mejia, Clinical Lead, IWK Youth Forensic Services. It arrived later in the afternoon of Friday, November 6 and was seen by the Court and counsel on November 9, the morning of S.(E.)'s sentencing hearing. Dr. Mejia documents interviewing S.(E.) on six occasions, three of them after the report was ordered – August 27, October 13, and November 5.

[94] Dr. Mejia found no "signs or symptoms of psychopathology." He also found S.(E.) to have made progress through therapy with his clinical social worker and to be expressing a desire to change. (*page 3*) Dr. Mejia does not endorse a diagnosis of FAS/FASD although his articulation of this issue is difficult to follow. The

report does not explain the basis for Dr. Mejia's diagnosis under the DSM 5 nomenclature of Neurodevelopmental Disorder Associated with Prenatal Alcohol and Drugs Exposure. (*page 3*) I know that S.(E.)'s birth mother is said to have used alcohol and drugs while pregnant but I assume something more than simply this fact is required to ground a DSM 5 diagnosis.

[95] And with respect, I do not see support in the comprehensive section 34 assessment for a diagnosis made by Dr. Mejia of Severe Substance Abuse Disorder (Cannabis). (*psychiatric assessment, page 3*) S.(E.) told the section 34 assessors that he does not intend to use marijuana when he returns to the community. He has said it "kills motivation" and he wants to accomplish his goals when he is released from custody. (*page 18*) The section 34 assessment notes that while S.(E.)'s responses to *The How I Think About Drugs and Alcohol Questionnaire* (HIT-D&A) indicate some mild problematic drug related behaviours, he did not present with problematic attitudes about drug use. (*page 18*)

[96] Dr. Mejia concurs with the section 34 assessment in finding that S.(E.) meets the criteria for a conduct disorder (adolescent onset) although he assesses this as a Severe Conduct Disorder (adolescent onset). (*page 4*) He does not explain why he endorses the "severe" qualifier other than referencing "the presence of such behaviours such as theft, serious violation of other rules, aggression to people, etc." This is no different from the behaviours discussed in detail in the section 34 psychological assessment so I am not persuaded to choose Dr. Mejia's "Severe Conduct Disorder" diagnosis over simply "conduct disorder", not that anything seems to turn on this. Dr. Mejia indicates he has "little to add if anything" to the recommendations of the section 34 psychological assessment. He also notes the need to "implement culturally compatible programs that are congruent with [S.(E.)'s] cultural background." (*page 4*)

S.(E.)'s Behaviour and Progress in the Nova Scotia Youth Facility

[97] S.(E.) has done well at the NSYF. Both the July 22 pre-sentence report and the more recent section 34 assessment note that he is making good progress in school. Interviewed for the section 34 assessment, S.(E.)'s teacher at the NSYF described him as "a great student in the classroom who responds to directions, has manners, and is not a behavioural concern." He went on to say that S.(E.) is "focused when in the classroom, asks good questions, and appears to be curious about the subject matter." (*page 15*) It is indicated in both the pre-sentence report

and the section 34 assessment that S.(E.) would like to train as a welder through the Nova Scotia Community College.

[98] S.(E.)'s disciplinary record at the NSYF is quite good. When he has been in trouble he has been forthcoming and has taken responsibility for his actions. (*section 34 assessment, page 20*) The section 34 assessment notes that early on NSYF staff observed S.(E.) being deliberately provoked by a youth using racial slurs. (*page 20*)

[99] S.(E.) has been making efforts to learn how to control his temper through the CALM (Controlling Anger & Learning to Manage It) program. He reported in the section 34 assessment that if his anger results in him getting into a fight he later regrets it and feels remorse. (*page 21*) S.(E.) has stated he is enjoying the programming at the NSYF and is benefitting from the CALM program which he says has helped him deal with relationships as well as anger (*PSR, page 5*) The clinical social worker at the NSYF told the author of the pre-sentence report that S.(E.) seems to be learning from the CALM program and is "taking in some of the behavioural messages." (*PSR, page 5*)

[100] S.(E.) has continued to attend counselling with a clinical social worker attached to the IWK Youth Forensic Services at the NSYF. When the pre-sentence report was prepared the clinical social worker described S.(E.) as "willing to address anything" and "quite motivated toward change." She indicated that S.(E.) has "a lot of goals" that include getting his high school education, getting a good job and getting out of the criminal lifestyle. (*PSR, page 5*) These were also the observations she shared with the section 34 assessors. She stated that she believes S.(E.) is "genuine in his desire to change" but noted that "his co-accused still have a strong pull over his behaviour." (*page 14*)

[101] S.(E.)'s unit supervisor at the NSYF also spoke to the author of the pre-sentence report and described S.(E.) as "polite and cooperative" and participating in all programs offered. (*PSR, page 6*) This has included sports, which S.(E.) avoided as a teenager. S.(E.) has also been participating in the Red Road Cultural Program designed to enhance access by NSYF youth to Aboriginal culture.

Racial and Cultural Factors

[102] S.(E.) is of both African Nova Scotian and Aboriginal heritage. A *Gladue* report was prepared for his sentencing on the first robbery. It notes that S.(E.)'s great great great grandmother on his mother's side was Cherokee. The Cherokee

had what the *Gladue* report describes in detail as "a difficult history" that included forced relocation and re-settlement by the American government. (*page 3*)

[103] As the *Gladue* report observes, African Nova Scotians "have long felt the burden of systemic racism in Nova Scotia." North Preston, an African-Nova Scotian community with which S.(E.) has familial ties, is a long-established community, one that the *Gladue* report indicates "continues to wrestle with persistent violence, substance abuse, poverty and systemic racism." (*page 5*) This accords with what is found in the section 34 assessment.

[104] Consistent with its comments on systemic racism, the *Gladue* report ties S.(E.)'s educational experience and the challenges he encountered in school to a "lack of cultural sensitivity and inclusion" in the education system. (*page 9*)

[105] Prepared for S.(E.)'s sentencing on August 21, the *Gladue* report provides information about S.(E.)'s history and circumstances that have been comprehensively examined in the subsequent section 34 psychological assessment. Certain aspects of the *Gladue* report I have not taken into consideration, notably its acceptance of an FAS/FASD diagnosis for S.(E.) and the description of certain facts alleged about the first robbery. I find there is no authoritative basis currently for concluding that S.(E.) has FAS/FASD. As for the first robbery at [… Drive], which led to the sentencing for which the *Gladue* report was prepared, the relevant facts were described by Judge Lenehan in his April 29, 2015 decision following the trial of S.(E.), B.(D.) and D.(R.) for that robbery. (The FAS/FASD diagnosis issue also features in Robert Wright's "Race and Culture Assessment" and similarly, I have not considered his opinions in relation to it either.)

[106] The section 34 psychological assessment contains a section on "Race and Culture." It records that S.(E.)'s mother has told him he faces greater challenges because he is African Nova Scotian and will "always have to try harder" because of this. (*page 8*) S.(E.)'s experience confirms his mother's concerns. He told the section 34 assessors that he has experienced racism as far back as Grade 2. He has felt stigmatized because he is racialized, with assumptions being made that he was in a store to steal or was part of a gang when he was with a group of other African Nova Scotian kids.

[107] S.(E.)'s clinical social worker at the NSYF told the section 34 assessors that S.(E.) "would benefit from working on developing his identity and working against structural factors telling him what he should do…" (*page 9*) These comments were

made in connection with S.(E.) experiencing some difficulty finding peers who share his interests in history and education.

[108] The section 34 assessment referenced the *Gladue* report observing that it had

> …noted that [S.(E.)] had personally experienced many factors that have had a negative impact on Aboriginal communities (and similarly, many African Nova Scotian communities), including substance abuse, racism, family disintegration, lack of employment opportunities due to lack of education, and exposure to family violence. (*page 9*)

[109] Robert Wright's "Culture and Race Assessment (the "Wright report" – Exhibit 5) deals more comprehensively with racial and cultural issues and the context in which S.(E.) has been living.

[110] Mr. Wright's report notes that S.(E.) has lived in locations where "…issues of race and class are palpable influences." (*page 2*) He comments on North Preston, the African Nova Scotian community with which S.(E.) is "most closely affiliated." He describes the community in these terms:

> North Preston has a long and rich history as a cohesive, self-sufficient, though isolated community. Until recent decades its members had high rates of home ownership and participation in employment and community life. It has a large youth population. Sadly, in recent years, it has gained notoriety as a location of increased gun violence and as the home of individuals who participate in criminal activity. This criminalization appears not to be limited just to those people still resident in North Preston, but [is] also true for those who hail from this community who have taken up residence elsewhere…(*page 6*)

[111] Mr. Wright offers the following opinion:

> …Though the criminal justice system holds people individually accountable for the crimes they commit, there is a recognition that social forces are at the root causes of crime. Understanding these social forces, however, are critical to properly understanding and adjudicating persons of ANS descent. (*page 6*)

[112] In his report Mr. Wright discusses factors that in his opinion "form a basis for considering how race may influence the social foundation of crime." (*page 6*) The factors he describes relate to the "unique patterns of criminal activity that have been seen in recent years in ANS communities…" (*page 6*) One of these communities, North Preston, is the community where S.(E.) is said to have experienced the normalization of criminality (*section 34 psychological assessment, page 26*) which I have already referenced. (*see paragraph 86 of this Decision*) Mr. Wright describes this community, "like all other ANS communities", as being under "significant stress" resulting in "a dramatic disproportionate participation in criminal behavior and violence by members of this community at home and abroad." (*page 13*)

[113] Mr. Wright uses an example of S.(E.) absorbing the ethos of the African Nova Scotian "tough guy", as related to him by S.(E.):

> … He described an incident of stealing the phone from a white youth in the mall which illustrates this. While in the mall with a friend he saw a youth at the mall alone using his phone. [S.(E.)] simply walked up to the youth and took the phone. He described that he and his friends just walked away and laughed. He explained that he could tell by the look of the youth that he wouldn't do anything. This is a form of cultural intimidation that is a part of the racialized, criminal disposition. As an ANS, male youth of a certain size, [S.(E.)] was exercising his power over others. (*page 11*)

[114] Mr. Wright makes an observation in his report that parallels an inference drawn about S.(E.) by Dr. Doucette in the section 34 psychological assessment. (*see paragraph 87 of this Decision*) As Mr. Wright expresses it:

> …As [S.(E.)] struggled with attachment to education, and social success with his pro-social peers it would appear that he gravitated to more racially criminalized peers and even to the racially criminalized members of his birth family. (*page 13*)

[115] Mr. Wright concludes that there is a "clear connection between social forces, including racism and historical discrimination, and crime. That such forces were and are in play in [S.(E.)'s] life is clear." (*page 14*)

[116] Like Dr. Doucette, Mr. Wright does not view an additional period of custody as necessary in S.(E.)'s case. He states his agreement that S.(E.)'s risks can be "adequately… managed in the community with the kind of supports and monitoring that are available as part of the youth criminal justice sentence…" (*page 16*) He too endorses strict conditions for S.(E.) in the community with the following comments:

> Recognizing that the "pull of the street" is quite powerful and that [S.(E.)] has demonstrated a disconnection from the pro social influences of his adopted family in [the] months preceding his offense, his sentence would need to have strict conditions that limited his access to criminal influences and required him to participate in prosocial activities. Given his reduced ability to perceive risks and consequences, [S.(E.)] would need to be powerfully corrected from any deviations from such activities…(*page 16*)

[117] S.(E.)'s moral culpability and his rehabilitation and reintegration must be examined through the lens of his racialization and his experiences as a member of a community where criminal activity has been, to some extent, normalized. As I have discussed, the section 34 assessment and Mr. Wright's report both recognize this. Race and culture are relevant considerations in sentencing, as I noted in *R. v. "X"*, [2014] N.S.J. No. 609:

> [195] The Ontario Court of Appeal has recognized, in the context of sentencing an adult offender, that the sentencing principles,
>
> … generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offense and the values of the community from which the offender comes. (*R. v. Q.B., [2003] O.J. No. 354, paragraph 32 (C.A.))*

[118] The *YCJA* expressly states that: "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should…respect gender, ethnic, cultural and linguistic differences…" (*section 3(1)(c)(iv),YCJA)* The emphasis on accountability is not diminished by

considerations of S.(E.)'s experience as a racialized youth. It is informed by this reality. The assessments reveal that S.(E.)'s exposure to a criminally-affected racialized community has contributed to his involvement in the very serious offences for which I am sentencing him. As the Supreme Court of Canada has held in *R. v. B.W.P.*, dismissing the notion that the youth criminal justice system seeks to achieve general deterrence,

> …the means of promoting the long-term protection of the public describe an individualized process by focusing on underlying causes, rehabilitation, reintegration and meaningful consequences *for the offender*. (*paragraph 31, emphasis in the original*)

[119] Later, in the same judgment, the Court stated: "A consideration of all relevant factors about the offence and the offender forms part of the sentencing process." (*R. v. B.W.P., paragraph 38*)

Parity

[120] The sentencing exercise even with its emphasis on the individual also looks to the sentences levied in other cases. Both Crown and defence offered cases for me to consider in the context of parity, one of the principles under section 38(2) of the *YCJA*. Parity is an elusive sentencing principle. Cases are never going to be the same. There are cases that are similar, but usually only to a limited extent. The fact that parity contemplates sentencing coherence in cases that are similar does not make its application any more straightforward. There are cases that share some similar features but, typically, there are other features, whether relating to the facts of the offence or the circumstances and background of the young person that make the cases quite dissimilar.

[121] The Crown's cases included *R. v. F.C.C.*, [2004] M.J. No. 393, decided by the Manitoba Court of Appeal. F.C.C. had a "lengthy and concerning" youth record, committing offences while on probation or pending sentence. He was a participant in a violent assault with four other accomplices and had hit the 67-year-old victim over the head with a steel bar sending him to hospital for a month. A two-year CSO followed by a year of probation was upheld on appeal.

[122] The Crown referred me to *R. v. S.N.G.*, [2007] N.S.J. No. 297 from our Court of Appeal. S.N.G. also had engaged in hands-on violence, hitting the victim with a baseball bat which inflicted a head wound requiring 11 stitches. S.N.G.'s

response to police when arrested was callous: "Buddy wasn't beat that bad. He only got one shot. The guy is lucky he isn't dead." (*paragraph 6*) S.N.G.'s assault on the victim occurred in the context of a dispute over a car. S.N.G. had set out to repossess the vehicle with his father and two other adults. He ensured the victim would be home and entered the house where the victim was asleep on the sofa. He was sentenced for break and enter into a dwelling house and committing assault causing bodily harm and possession of a weapon, the baseball bat, for the purpose of committing an indictable offence. His total sentence, an 18-month CSO, was upheld by the Court of Appeal.

[123] In *R. v. J.S.*, [2006] O.J. No. 2654, the Ontario Court of Appeal substituted a sentence of a 15-month CSO for a two-year CSO in a case of a home invasion-type robbery where J.S. had been one of three males who forced their way into an occupied townhouse in search of valuables. No one was physically injured although J.S. was armed with a machete and one of his accomplices was carrying a shotgun. The Court found the youth court judge to have been "completely justified in characterizing the home invasion as "an horrendous crime" and underscoring its gravity." (*paragraph 39*) The Court viewed the offence as "so serious that nothing less than a custodial sentence would suffice" even taking into account the greater dependency of young persons and their reduced level of maturity. (*paragraph 49*) The Court accepted a number of mitigating factors in deciding to reduce the sentence imposed by the youth court judge – J.S. was only 16 at the time of the offences, he had no record, his family was supportive and he had conducted himself very responsibly both in custody and while on release prior to trial and pending his appeal.

[124] The Crown provided me with the more recent case of *R. v. L.K.S.-L.*, [2011] B.C.J. No. 2396, where the British Columbia Court of Appeal upheld a 15-month CSO followed by a 12-month Intensive Support and Supervision Order ("ISSP"). (This is a sentence option under section 42(2)(l) of the *YCJA*: I am not aware this program is available in Nova Scotia.) The Crown in *L.K.S.* had sought a 17 – 19 month CSO and 12-month ISSP. The Defence asked for a 6-month Deferred Custody and Supervision Order followed by "appropriate probation." (*paragraph 10*)

[125] L.K.S., aged 15, had participated with three adults in the home invasion of a basement apartment. He had helped kick down the door, pushed the occupant down when he rose out of bed in response to the noise, and covered him with bed

covers after he was beaten and struck with the butt of a gun by one of the other perpetrators. They had not expected anyone to be home. For his participation, L.K.S. had been promised $30,000, to be shared with his 18-year-old brother. L.K.S. had no prior record and had been released on bail on conditions that the sentencing judge described as "not particularly restrictive." (*paragraph 11*)

[126] The Court of Appeal noted the sentencing judge's recital of the aggravating factors: a planned and premeditated joint enterprise that involved intimidation with a firearm and the use of violence that caused bodily harm, foreseeable harm and recklessness about the risk, L.K.S.'s active participation in breaking down the door and subduing the victim, the many opportunities to back out of the plan and the failure to do so, and the sole motivation being money. (*paragraph 12*) The sentencing judge had also emphasized the violation of the 'sanctity" of the victim's home and the absence of anything "mitigating in the circumstances or in [L.K.S's] background." She found that it was "not a case where the offender has made great strides while awaiting sentence…" (*paragraph 11*)

[127] The sentencing judge in *L.K.S.* found the Ontario Court of Appeal decision in *R. v. J.S.* that I referred to above to be the most helpful of the cases she was provided. In finding no error in her approach to L.K.S.'s sentencing or in the sentence imposed, the British Columbia Court of Appeal stated the following:

> In coming to her decision, the judge examined the analysis in *J.S.* Applying its reasoning to the case before her, she concluded that a custodial sentence was required "as a meaningful consequence, and in order to secure [L.K.S.'s] reintegration and rehabilitation for the long term protection of the public. (*paragraph 67*)

[128] Ms. Thompson asked me to consider two unreported decisions from our Youth Justice Court – R. v. M.S. and R. v. T.M. These young persons were sentenced in the Halifax Youth Court on April 15 and June 3, 2015 respectively. They had participated together in a planned home invasion-style robbery along with an adult accomplice. They were masked and M.S. held a loaded sawed-off shotgun. No one was injured. M.S. and T.S. pleaded guilty which was viewed at sentencing as a mitigating factor.

[129] M.S., who had served less than a week on remand, received a 1-year CSO followed by 12 months of probation. T.S., who was Aboriginal and was given a 1.5

to 1 credit for 23 days of pre-sentence detention, received a 9-month CSO and 12 months' probation. Both M.S. and T.S. had more serious prior records than S.(E.).

[130] To understand the facts, I listened to the recordings of the two sentencings. M.S. was sentenced in accordance with a joint recommendation which makes the case of very limited usefulness. In T.S.'s case, the sentencing was contested: the Crown was seeking a one-year CSO and Defence counsel asked for a Deferred Custody and Supervision Order. Judge Lenehan emphasized the seriousness of home invasion robbery offences in imposing the nine-month CSO.

Determining the Appropriate Sentence for S.(E.)

[131] The determination of a just sanction for S.(E.) requires me to consider the section 38(3) factors I discussed in paragraphs 48 to 69 of these reasons. S.(E.) has a high degree of responsibility for the events of November 30. But he was not the shooter. He did not intend to injure anyone. He did not try to injure anyone. He did not know about the gun although he should have foreseen the possibility someone would be carrying one. And while he should have foreseen that the victims might be injured, he did not foresee that there would be an attempt to murder them, an attempt that left Ms. Kearse with such terrible injuries.

[132] The Crown says it only takes S.(E.) "so far" that he was not the shooter. I agree that it does not mean S.(E.) should receive only a minimal amount of additional time in custody. I find this is a case where accountability requires that S.(E.) serve significantly more than a nominal custodial sentence. The "least restrictive" sentence principle in section 38(2)(e)(i) of the *YCJA* is subject to the proportionality principle: S.(E.)'s sentence must reflect the seriousness of his offences and his level of responsibility for them. Accountability demands custody here. But accountability must recognize that S.(E.) did not pull the trigger and did not intend the victims to be harmed.

[133] Assessing the issue of how much custody is required for accountability leads me to the issue of the time he has already spent in custody – his pre-sentence detention. How should that be factored into the sentencing analysis?

[134] Before I discuss pre-sentence detention, I want to comment on an issue I mentioned earlier in these reasons. As I have noted, the Crown indicated in submissions that it took S.(E.)'s time in detention into account when it decided to withdraw its application for an adult sentence. To what extent is that relevant to my deliberations? I have decided it is not relevant in this case. The *YCJA* does not tell

me that this exercise of Crown discretion relieves me of the obligation to "take into account" S.(E.)'s time in detention. Irrespective of the Crown's approach, I am mandated to take the time in detention into account in determining S.(E.)'s sentence. The question is how should I take it into account?

[135] I am satisfied I have a broad discretion when it comes to how I take S.(E.)'s pre-sentence detention into account in the context of crafting an appropriate sentence for him. I base this view on what our Court of Appeal has said in *R. v. J.R.L.* [2007] N.S.J. No. 214, and what appears to me to have been the approach taken by the Supreme Court of Canada in *R. v. D.B.*, [2008] S.C.J. No. 25 where the Court upheld a maximum sentence that had been imposed on a young person on top of a significant amount of remand time.

[136] The approach favoured in *J.R.L.* acknowledges a flexible discretion with respect to the section 38(3)(d) requirement to "take into account" the time spent in detention by the young person. Actual credit for remand time does not have to be given. There are other ways to take it "into account." In *J.R.L.*, Roscoe, J.A., after discussing conflicting appellate decisions, reached the following conclusion:

> ... In my view, the time spent in pre-sentence detention can be "taken into account" without expressly giving specific credit for time served by deducting the number of days or some ratio of that number from the number of days of a custodial sentence. When the sentence imposed is not a custodial sentence to be served in an institution, taking the remand time into account does not necessarily have to result in a deduction in the length of sentence. It can be taken into account by reducing the type or severity of the sentence. (*J.R.L., paragraph 47*)

[137] The Manitoba Court of Appeal in *R. v. A.A.Z.* examined how appellate courts in Canada have treated pre-sentence detention in reviewing youth sentences. (*paragraphs 144 to 149*) There appears to be a wide acceptance of the flexible approach endorsed in *J.R.L.* The *A.A.Z.* decision also enumerates a range of factors that appellate courts have considered in determining the pre-sentence detention issue. (*paragraph 150*) The factor on which I am focused in S.(E.)'s case is the relationship between his time in detention and the duration of youth sentence required to hold him accountable.

[138] S.(E.)'s total sentence cannot exceed three years. (*section 42(15), YCJA*) Ms. Thompson's proposal, a nominal custodial sentence achieved by crediting S.(E.) with 18 months in pre-sentence detention, and followed by an 18-month probation order, produces a sentence of 3 years and contemplates S.(E.) being released immediately back to the community on probation, albeit with strict conditions. I view this as a sentence that represents too little accountability.

[139] I find however that the Crown's proposal for a two- to three-year Custody and Supervision Order in addition to the time S.(E.) has already spent in detention is, taking everything into account, a disproportionate amount of accountability. It relies exclusively on custody for S.(E.)'s accountability.

[140] S.(E.) has spent a year in detention. That time has value in the accountability calculus. S.(E.), detained at the Nova Scotia Youth Facility, has been being held to account for his involvement in the terrible events of November 30, 2014. It is appropriate to treat S.(E.)'s time in detention and very importantly, the use he has made of that time, as a contribution by him toward the accountability that he must be made to shoulder. The commitment and progress he has demonstrated toward his rehabilitation as reflected in the evidence before me is significant. And it is not incidental to S.(E.)'s time in detention: he has worked hard to make gains, to be a different young man than he was. I am taking that into account in assessing the sentence that will be a "just sanction" with meaningful consequences for S.(E.) and promotes his rehabilitation and reintegration.

[141] I do not find it appropriate to apply a number to represent the value of S.(E.)'s time in detention. An arithmetical approach does not assist the determination of his sentence. As noted by the Saskatchewan Court of Appeal in *R. v. J.E.O.*, [2013] S.J. No 484, which, at paragraph 26, referred to the *J.R.L.* decision as "instructive",

> …A young person's time on remand is not a mere number to be mechanically backed out of a sentencing equation. The search for a proper sentence is necessarily more dynamic than what is permitted by a simple arithmetic calculation. (*paragraph 39*)

[142] Accountability for S.(E.) is not starting with the sentence I am imposing. His time in detention has meant an already significant loss of liberty. A year in detention is a long time in the life of a teenager. And accountability for S.(E.) is not exclusively achieved through a loss of liberty. He has disappointed his pro-social family. There have been painful consequences for S.(E.) as a result. His

adoptive mother's reaction, which she described when she addressed the court on November 12 after Ms. Kearse's victim impact statement, reveals how deeply S.(E.) offended his adoptive family's codes of behaviour and morality. His mother was unable to bring herself to see S.(E.) after she learned about his involvement in the [… Drive] robbery. Although there was some communication between them while he was at the NSYF, S.(E.)'s mother did not visit him until August 2015 – eight months into his remand there. S.(E.) will have felt this estrangement sharply, as a young person whose early life was an experience in abandonment. Ms. Thompson noted this in her submissions.

[143] S.(E.) is being held accountable in his relationships with his family and his girlfriend of 18 months. She has told him that if he should ever be incarcerated again, she would end their relationship. The section 34 assessment noted this information from S.(E.) with the following comment: "thus [she] appears to be attempting to deter him from further antisocial involvement. (*page 18*)

[144] S.(E.)'s own remorse and guilt is holding him accountable. As I noted earlier in these reasons, S.(E.) has experienced nightmares and insomnia over what happened on the evening of November 30, 2014.

[145] It is to be remembered that sentencing is not about matching the sentence to the victim's loss. Nothing can restore Ms. Kearse to who she was in the moments before she was shot and paralyzed. Holding S.(E.) to account for his role in what happened inside [… Drive] on November 30, 2014 must reflect his level of responsibility for a home-invasion style robbery gone terribly wrong but it must do so with restraint and taking into account everything I know, including everything I know about him and his prospects for rehabilitation and reintegration.

[146] S.(E.) arrived at the NSYF a year ago having drifted away from the loving, supportive, pro-social family that raised him. He had been destabilized by the separation of his parents. He experienced a fraught reconnection with his biological family. He was identifying with an anti-social peer group which included his co-accused. His community was struggling with the effects of racialization and criminality. Maladaptive and criminal choices were becoming normalized for him.

[147] The particular mix of factors in S.(E.)'s case do not characterize the cases I have been asked to view as similar, cases such as *J.S.* and *L.K.S.* Sentencing S.(E.) requires me to take into account the context in which his offending occurred – the "clear connection" that Mr. Wright has described that exists "between social

forces, including racism and historical discrimination, and crime." S.(E.)'s struggle to find his footing as a racialized teen in the conflicted dimensions of his existence – his pro-social family and his troubled community with its criminalizing influences – is a relevant consideration in sentencing him. Assessing accountability cannot be a formulaic exercise: it must produce a sentence that does not merely punish. S.(E.)'s sentence needs to balance accountability with his rehabilitation and reintegration by not delaying too long his return to his family and pro-social community supports.

[148] The sentence I am imposing is my assessment of how to balance the considerations in S.(E.)'s case. While I am not persuaded to order S.(E.)'s immediate release from custody even on strict conditions, an option suggested by both Dr. Doucette and Mr. Wright, their support for release now does speak to the importance of S.(E.)'s reintegration and the progress he has made towards rehabilitation.

[149] I earlier reviewed cases provided by the Crown for me to consider in relation to the principle of parity. All the cases produced longer custodial sentences than I will be imposing on S.(E.). They are most useful in supporting the Crown's position that accountability for young persons in home invasion-type robbery cases requires a significant loss of liberty. Otherwise the dissimilarities are significant enough that they are not determinative of the duration of the CSO that should be imposed in S.(E.)'s case. I have made that determination by carefully considering all the factors and principles I have reviewed in these reasons and balancing them in accordance with the requirements of accountability.

[150] I find that the just sanction for S.(E.), the sanction that represents the proportionate meaningful consequence and promotes his rehabilitation and reintegration, is a nine-month Custody and Supervision Order followed by 12 months of probation with conditions I will detail shortly.

[151] The sentence I am imposing holds S.(E.) to account through a further deprivation of his liberty for six months. It then releases him into the community under conditions set by the Provincial Director for three months which if breached can result in his immediate return to custody. It then requires him to follow the conditions of a probation order for a year as he continues to reintegrate into the community. S.(E.)'s sentence will support his reconnection with pro-social values and institutions and will test him in the community, before too much time has passed and too much institutionalization has set in.

[152] S.(E.) will have to maintain his resolve throughout and continue to demonstrate that he is committed to change and growth. He will face challenges during a further period of custody and once he returns home under conditions. His responsibility is to meet and overcome those challenges.

[153] S.(E.) is now 18. As it happens, by the time his full sentence has been served, he will be 20. He will have spent nearly 3 years under the control of the state being held to account. These numbers became obvious to me only after I had determined S.(E.)'s sentence. I want to be explicit: I have reached my determination of S.(E.)'s sentence based on an application of the principles under the *YCJA*, not by various numerical calculations. I simply note that a sentence of this duration and scope is freighted with a considerable amount of accountability.

[154] The probationary terms that S.(E.) will be subject to will include:

- A keep the peace and be of good behaviour clause;
- A requirement to appear before the Youth Justice Court when required to do so;
- Reporting to a youth worker within two days of the start of the probation order and thereafter as required;
- A positive residence requirement with the ability of S.(E.)'s youth worker to approve a change of residence;
- A requirement that S.(E.) make his best efforts to enroll in an education or training program or make reasonable efforts to locate and maintain suitable employment;
- A daily curfew between 9 p.m. and 6 a.m. except when in the company of his adoptive mother or father or an adult approved by his youth worker or with the prior approval of his youth worker;
- The curfew to be reviewed after six months;
- No direct or indirect contact with the victims at any time for any reason and remain away from the [… Drive] residence;
- A non-association clause naming S.(E.)'s co-accused and M.J.D., except as incidental to school, work or counselling;
- Attendance for counselling, treatment or programming as directed by his youth worker;

- A clause requiring S.(E.) to participate in and cooperate with the counselling, treatment or programming as directed by his youth worker;
- A weapons prohibition clause;
- Not to take, use or possess drugs;
- 100 hours of community service work, a feature of the sentence that falls under the accountability column even if it also serves the objectives of rehabilitation and reintegration.
- A compliance condition for the curfew.

[155] I am asking Crown and Defence to prepare a form for the probation order that reflects what I have just indicated. I will hear submissions from counsel if there are any additional conditions that I should consider including. [Note: the recital in these reasons of the conditions of S.(E.)'s probation has been tweaked to reflect the probation order that was prepared upon Crown and Defence having the opportunity during a recess to confer about what should be included and wording.]

[156] There will also be a DNA order and a section 109(2) *Criminal Code*/section 51 *YCJA* weapons prohibition order for 10 years.