IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. D.B., 2015 NSPC 82

Date: November 30, 2015
Docket: 2833033, 2833048, 2833063, 2833078, 833081, 2833109

Registry: Halifax

BETWEEN:

HER MAJESTY THE QUEEN

v.

B.(D.)

DECISION ON SENTENCE

BEFORE THE HONOURABLE JUDGE ANNE S. DERRICK

HEARD: November 12, 2015

DECISION: November 30, 2015

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

COUNSEL: Jamie Van Wart and James Giacomantonio, for the Crown

Trevor McGuigan for B.(D.)

By the Court:

Introduction

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

[2] B.(D.) was one of three young persons who, in the company of a young adult, went into the home. He was seventeen and a half years old. He and his friends, two other young people, one of whom I have sentenced – S.(E.), and one I will be sentencing - 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. B.(D.) was also charged with, and is being sentenced for, a breach of a non-association condition in a Recognizance dated August 15, 2014.

[3] None of the young persons was the shooter. On August 24, 2015, the Crown indicated it was willing to accept guilty pleas from B.(D.) 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, B.(D.) 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 B.(D.) 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 12 months that B.(D.) has spent in the Nova Scotia Youth Facility ("NSYF"). Mr. McGuigan submits that B.(D.)'s sentence should be composed of a one-day CSO followed by 18 months of probation with strict conditions. These are the same positions taken by the Crown and counsel for S.(E.) at his sentencing.

[5] The central issue I must decide is what sentence satisfies the *Youth Criminal Justice Act* ("*YCJA*") requirement that B.(D.) 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 B.(D.)'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 B.(D.) cannot exceed 3 years. Therefore, whether I impose a probation order as part of B.(D.)'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: as with S.(E.), I have reached the conclusion that neither the sentence proposed by the Crown nor the sentence proposed by Mr. McGuigan satisfies the requirements of the *Youth Criminal Justice Act*. I will add that there will necessarily be a certain amount of repetition from the sentencing decision I rendered in relation to S.(E.), with me taking the same position in these reasons on such factors as accountability, denunciation as an objective in youth sentencing, how time in detention is to be taken into account, and the principle of parity. What is included in this sentencing decision is specific to B.(D.)'s sentencing even where I have used precisely the same language as contained in my reasons in *R. v. E.S., 2015 NSPC 81*. Where I have employed the same words it is because they are equally applicable to B.(D.).

Facts

[7] B.(D.) has admitted to facts that are contained in an Agreed Statement of Facts. (*Exhibit 3*) I will summarize these facts briefly with a focus on the essential details.

[8] The {… Drive] residence that B.(D.) broke into on November 30 was the site of an earlier robbery in which he had participated. The first robbery had been committed by B.(D.), S.(E.) and D.(R.) earlier 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. B.(D.) and his confederates got away scot-free. There were no repercussions at the time.

[9] On November 30, B.(D.), S.(E.) 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 B.(D.), S.(E.) and D.(R.) did not know this. However, B.(D.) has 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. (*Agreed Statement of Facts, Exhibit 3, paragraph 47*)

[10] The four intruders did not all enter the home together. S.(E.), D.(R.) and the gunman went in through the unlocked front door. One of the perpetrators then let B.(D.) in through the back door which ensured the occupants would not be able to slip out that way once they realized what was happening.

[11] The intruders 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] When the gun was produced and the shooting started, B.(D.) was in the hallway outside the bedroom with D.(R.) According to the Agreed Statement of Facts, J.L. recalls the gunman directing S.(E.), B.(D.) and D.(R.) out of the bedroom prior to the shooting. L.S.'s recollection is of them "going back and forth and talking to each other" while the gunman was in the bedroom holding the gun on him and his friends. (*Agreed Statement of Facts, Exhibit 3, paragraph 14*) S.(E.) has admitted to being in the bedroom when the gunman pulled out the gun. The description in the Agreed Statement of Facts of B.(D.)'s role does not contain this admission. (*Agreed Statement of Facts, Exhibit 3, paragraphs 44 – 48*)

[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. 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] As I have noted, the Crown and Defence agree that a custodial sentence is appropriate in this case given the seriousness of the offences and the nature of the harm caused. The difference is in the duration. As with S.(E.), the Crown wants B.(D.) to serve a two- to three-year Custody and Supervision Order on top of the time he has already spent in detention. Mr. McGuigan seeks a nominal CSO – one day – followed by a lengthy period of probation, 18 months, with stringent conditions to be gradually relaxed. It is Mr. McGuigan's submission that B.(D.) 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 suggests that it "may be appropriate to consider" a DCSO but even without evaluating its suitability in any particular case, it is statutorily unavailable on a conviction for aggravated assault.

Documentary Evidence at Sentencing

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

- A pre-sentence report dated June 9, 2015 prepared for B.(D.)'s sentencing on the prior robbery;
- An undated *Gladue* Report prepared for the prior robbery sentencing (*Exhibit 9*);
- A section 34 psychological assessment dated October 16, 2015 and authored by Dr. Simeon Hanson, a forensic psychologist, and Dr. Jose Mejia, Clinical Lead, Youth Forensic Services at the IWK;
- Updates from B.(D.)'s teacher at the NSYF (*Exhibit 12*) and his Youth Worker dated November 6, 2015 (*Exhibit 13*);

[18] I have also received a copy of B.(D.)'s youth record (*Exhibit 11*) and a CD of the Judge Gregory Lenehan's oral reasons for conviction, delivered on April 29, 2015, following the trial in the Halifax Youth Court of S.(E.), B.(D.) and D.(R.) for the first robbery.

The Victim Impact Statement

[19] 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.

[20] 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."

[21] 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.

[22] 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."

[23] 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. B.(D.)'s aunt thanked Ms. Kearse for giving the families an opportunity to say something to her and her family. 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

[24] 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*)

[25] 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)*)

[26] The *YCJA* requires that the sentence imposed on B.(D.):

- 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)*)

[27] 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)*

[28] 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.

[29] 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*)

[30] 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.

[31] 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.

[32] 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

[33] 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?

[34] 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*)

[35] 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*)

[36] 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*)

[37] 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*)

[38] 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. It, and the objective of specific deterrence, exist now on a discretionary basis – the sentence imposed "may" have denunciation and specific deterrence as objectives. (*section 38(2)(f)(i) and (ii)*) While it was the Crown's submission that this is an appropriate case for me to exercise my discretion to factor denunciation into the sentencing mix, Mr. Van Wart indicated that he would have been seeking the same sentence for B.(D.) even without consideration of the principle of denunciation.

Denunciation

[39] I will repeat here what I said in my reasons for S.(E.)'s sentence: I do not regard the inclusion of denunciation to the objectives of youth sentencing as having added anything that assists the sentencing analysis. What follows are my reasons for holding this view.

[40] Denunciation is a sentencing objective traditionally associated with adult sentencing. There is nothing to indicate that any evidence underpinned the importation of this adult sentencing objective into the *YCJA*. There is nothing to

explain what denunciation adds to the requirement of accountability, the objective that "drives" the youth criminal justice system. (*R. v. A.O., paragraph 59*) When 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*) Their inclusion ignored section 50 of the *YCJA* which expressly excludes from youth sentencing the application of adult sentencing principles.

[41] 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*)

[42] 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*)

[43] As I said in my reasons in S.(E.)'s sentencing, 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.

[44] 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 B.(D.)'s case.

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

[45] 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.

[46] I will now discuss these factors in relation to B.(D.).

B.(D.)'s Degree of Participation in the Commission of the Offence

[47] Like S.(E.), B.(D.) was an active participant in everything that happened on November 30 at [… Drive] except the shooting. Although not the shooter, he was fully participant in a home invasion-type robbery that was on an escalated footing from the previous robbery. B.(D.) knew he was participating in a break and enter and robbery that carried a heightened risk over the earlier one. 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 B.(D.)'s accomplices could have been armed – and in fact was. It is not uncommon for such robberies to go wrong. B.(D.) went along, focused on making another easy score. He 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.

[48] B.(D.) 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

[49] B.(D.) did not intend for anyone to get hurt on November 30 but he has admitted he ought to have known that someone being assaulted by one of his co-perpetrators was a probable consequence of the robbery. He and D.(R.) had assaulted L.S. during the prior robbery. He was found to have held a knife to L.S.'s

throat for a few seconds. D.(R.) had brandished a bong at L.S. An assault of some kind was readily foreseeable on November 30.

[50] B.(D.) has acknowledged that the [… Drive] victims were seriously harmed. They were badly shot up, a horrifying experience. It is reasonable to infer that the psychological effects experienced by L.S. and J.L. have not resolved as readily as their physical wounds.

[51] 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.

[52] 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.

[53] 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

[54] B.(D.) has been detained for the November 30 offences for a 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. Mr. McGuigan calculates this at a 1.5 to 1 ratio as the equivalent of 18 months which he submits is the duration of custody required to hold B.(D.) accountable.

Previous Findings of Guilt

[55] B.(D.) had no prior record on November 30, 2014. The first [… Drive] robbery, which had not been reported yet, did not result in convictions for B.(D.), S.(E.) and D.(R.) until April 2015.

Aggravating Factors

[56] 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. B.(D.), S.(E.) and D.(R.) all knew L.S. who lived at the [… Drive] residence. L.S. acknowledged in his evidence at their trial for the first robbery that his home had become known in the neighbourhood as a "drug house." He smoked and sometimes sold marijuana. It is reasonable to infer that when B.(D.), S.(E.) 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.

[57] During the first robbery B.(D.), S.(E.) 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.

[58] The November 30 robbery was an escalated drug "rip". There were four perpetrators this time – B.(D.), S.(E.) and D.(R.) and the gunman. They sought to hide their identities with bandanas and this time 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 unknown to B.(D.), S.(E.) and D.(R.) until the robbery was well underway.

[59] The success of the first robbery fueled the decision to return. As B.(D.) explained in the section 34 psychological assessment, it had been simple the first time: "…we went in, got the money and the drugs and left." (*page 6*) The victims were seen as easy targets to be picked over again with impunity. There was very little likelihood that the police would be called. Everything had gone smoothly and there had been no consequences.

[60] The context in which the November 30 offences occurred is aggravating. The aggravated assaults and robbery were perpetrated in L.S.'s home. B.(D.) 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.

[61] 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

[62] It is mitigating that B.(D.) 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.

[63] In addition to the acknowledgement of responsibility his guilty pleas represent, I accept that B.(D.) 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, B.(D.) read from a written statement he had prepared. He said he wanted to say to Ms. Kearse, her friends and family, L.S. and J.L. that he was "very sorry". He told her: "I feel really bad for what happened…and I wish I could take things back." As S.(E.) had also said, B.(D.) indicated he had learned that he needed to change his lifestyle or he would end up "in jail or dead forever." While this statement was focused on the potential consequences he faced if he didn't change, I believe B.(D.) was also trying to tell Ms. Kearse that what had happened to her had been the impetus for him confronting the extremely bad choices he had been making.

[64] B.(D.)'s remorse is also evident in the section 34 assessment which reports him expressing how "very sorry" he is for the harm caused to the victims, particularly Ms. Kearse.

Rehabilitation and Reintegration

[65] 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 assessment is relevant to the objectives of successful rehabilitation and reintegration. It also discloses how B.(D.) is being held to account for his offences.

[66] I will note there is no separate psychiatric assessment for B.(D.) because Dr. Meija co-authored the section 34 psychological assessment.

The Pre-sentence and Gladue Reports and the section 34 Psychological Assessment

[67] There are three documents I will be discussing in this section of my reasons –the pre-sentence and *Gladue* reports and the section 34 psychological assessment. The section 34 assessment contains the most recent information about B.(D.).

[68] All the reports indicate that B.(D.) was brought up by a responsible, devoted single mother. B.(D.)'s father lived away from Nova Scotia for most of his life, returning only recently and re-connecting with his son. (*Gladue Report, page 27*) The *Gladue* Report notes that B.(D.)'s mother stated that she "made a point to be a hands-on mother, and stayed home to give [her children] the best chance of success." (*page 28*) Money was tight and B.(D.)'s mother supported B.(D.) and his younger sister through social assistance and by using food banks.

[69] B.(D.)'s mother told the section 34 assessors that B.(D.) was brought up in a family that emphasized the importance of "family values, education and work encompassed within the spirituality of the African Baptist movement." (*page 10*)

[70] Although B.(D.)'s immediate and extended family were pro-social, violent crime intruded into their lives when, in 2009, B.(D.)'s 19-year-old cousin was murdered in a drive-by shooting in North Preston. At the time, B.(D.) and the cousin were living with their grandparents. B.(D.)'s mother reports that B.(D.) looked up to his cousin and took his death "very hard." (*Gladue Report, page 30*) Another young cousin with whom B.(D.) had a close relationship was also shot to death in North Preston. And B.(D.) told the section 34 assessors that he lost a close friend to gun violence. (*section 34 assessment, page 26*)

[71] In 2013 B.(D.) experienced the trauma of witnessing his grandfather suffer a heart attack and dying despite B.(D.)'s efforts to save him using CPR. B.(D.)'s

mother reports that B.(D.) cried for days afterwards. (*Gladue Report, page 30*) He had been very close to his grandfather whom he viewed as a father figure, his own father being absent. (*section 34 assessment, page 10*)

[72] At the time of the pre-sentence report in June 2015 B.(D.)'s mother seems to have been either unaware or unwilling to admit that her son had drifted away from the family's pro-social values. How he was described by his mother to the author of the pre-sentence report, as a "really good kid" strongly attached to his family, was not the complete picture. The reports indicate that outside the home B.(D.) was not being a "good kid" at all in 2014. According to the section 34 assessment once B.(D.) entered high school, his mother became worried about his associates and activities. (*section 34 assessment, page 10*)

[73] The pre-sentence report noted that while B.(D.) had behavioural issues in school that led to multiple suspensions, including two long term suspensions, he was performing well academically at the NSYF. His NSYF teacher described him as very well behaved and working well in class. He indicated that B.(D.) was using his free time effectively to complete his work and said he was great to work with. (*page 4*) This continues to be the case.

[74] At the time of the pre-sentence report, B.(D.) was not in counselling at the NSYF although he always willingly met with the clinical social worker when she checked in on him every two to three weeks. Although not overly talkative he was polite and never refused to see her. (*page 5*) The author of the pre-sentence report found B.(D.) to be more forthcoming and answered in detail all questions put to him. B.(D.) received high praise from his unit supervisor at the NSYF who described him as "a star performer" who was polite and had a great rapport with staff. He noted that B.(D.) was a leader in his unit and revealed himself to be quite mature. B.(D.) was participating in all programs available to him as well as the leisure activities available. (*page 6*) More recent reports make similarly positive comments.

[75] Interviewed for the *Gladue* Report, B.(D.) spoke of his goals: to go to college, play basketball, get a job to take care of his family and his younger sister. (*page 31*) By the time the *Gladue* Report was prepared, B.(D.) was thinking about helping other young people avoid getting into trouble, (*Gladue Report, page 32*) an aspiration he also talked about with the section 34 assessors. (*page 7*) He was, however, unable to explain to the author of the *Gladue* Report why he had been getting into conflict with the law. (*page 32*)

[76] The section 34 psychological assessment indicates that B.(D.) has considerably more insight now into his law-breaking than revealed by his interview for the *Gladue* report. In the section 34 assessment, B.(D.) disclosed that at around the age of 17 he began to want consumer items his family could not afford. He felt the pressure to conform to the material success of peers who had more. B.(D.) saw crime as a way to make money by stealing from people who as drug dealers were already criminally involved. He was also seduced by music videos that glamorized the "gangsta" lifestyle. He felt drawn toward people he knew in North Preston who were involved in drugs and crime, people he had previously avoided. He found it hard to disengage once he became more integrated with this subculture. He knew that violence and intimidation were used to maintain loyalty to the group and its values. (*page 5*)

[77] B.(D.)'s choice of friends in high school concerned his mother. She thought he was being exposed to bad influences. She suspected he was becoming involved with older and more anti-social peers in the community. (*section 34 assessment, pages 10 and 12*) This was also noted by B.(D.)'s high school principal who observed B.(D.) becoming invested in a well-entrenched and loyal group who were known to be anti-social. (*section 34 assessment, page 14*)

[78] The section 34 assessment comments on B.(D.)'s rationalization for robbing drug dealers who were committing offences themselves and notes that his detention at the NSYF has caused him to reflect on his "erroneous thinking" and change his perspective. He has shown "significant thoughts, values and attitudes" that have enabled him to justify being involved in crime and the potential use of weapons and instrumental violence to obtain money and drugs. (*page 6*) But B.(D.)'s thinking has evolved. He told the section 34 assessors that he now regretted his actions and views his criminal activities as "not the right way to go." He expressed his interest in working with at-risk youth to try and guide them away from becoming involved in crime. (*page 7*)

[79] The section 34 assessment diagnosed B.(D.) with Conduct Disorder, Childhood Onset Type, noting his history of behavioural difficulties from early childhood and his involvement in criminality. (*page 25*) B.(D.)'s problems with emotional regulation started when he began school and were evident there and at home. (*page 16*) He was bullied at school which provoked angry outbursts. (*page 16*)

[80] The section 34 assessment endorses a connection between B.(D.)'s conduct disorder and the assessment diagnoses of Specific Learning Disorders in reading, written expression and mathematics. That connection is revealed by the fact that B.(D.)'s behavioural issues emerged when he started school and experienced difficulties learning. (*page 10*) The section 34 assessment indicates that research has established a link between "…speech and language difficulties and behavioural difficulties." (*page 25*) The assessors note that B.(D.) "was to some extent labelled as a child with behavioural difficulties instead of a child with significant learning issues that resulted in behavioural difficulties." (*page 26*)

[81] A psychiatric note from the IWK when B.(D.) was nine excerpted in the section 34 psychological assessment indicates that, "… Problems began for [B.(D.)] when he started school, he had problems learning and was becoming frustrated that he was not able to understand his subjects." (*page 11*) An IWK "comprehensive assessment report" prepared in May 2005 reported that B.(D.) was showing defiance and anger at home and physical aggression at school and associating with children who were bad influences. Mental health interventions achieved some positive results although not of a lasting nature. (*section 34 assessment, page 16*)

[82] Although as an elementary school student B.(D.) became "visibly upset in response to frustration", he also showed contrasting qualities of kindness, sensitivity and caring toward others and was quick to help in class. (*section 34 assessment, page 13*) His "significantly underdeveloped" academic skills (*page 14*) continued to represent a very considerable challenge.

[83] B.(D.)'s academic and behavioural difficulties had led to him being placed on an Individualized Program Plan (IPP) in all areas of the curriculum since Grade 1. (*section 34 assessment, page 12*) Interviewed for the section 34 assessment, his high school principal expressed concerns that IPP programming, by disproportionately removing African Nova Scotian youth from regular programming, limited their educational and vocational options. In his view, this had the potential of alienating African Nova Scotian youth from school and causing them to seek out other, sometimes negative alternatives. (*page 15*) The section 34 assessors pick up this theme and remark that the disproportionate use of the IPP alternative with African Nova Scotian youth "could further exacerbate some problems or decrease social development." (*page 26*)

[84] B.(D.) is also noted as having a historical diagnosis (made when he was nine) of Attention Deficit Hyperactivity Disorder (ADHD) although the section 34 assessors did not see, in their interviews with B.(D.), "strong clinical evidence of attention or concentration difficulties." (*page 25*)

[85] The section 34 assessment involved B.(D.) taking several tests to assess personality, emotional and behavioural problems and mental health functioning. The assessors noted results that indicated B.(D.)'s readiness to modify his behaviour to gain approval from others, a feature that is positive in the context of pro-social influences but is also evident in B.(D.)'s participation in criminal activities with anti-social peers. (*page 19*) While an assessment inventory indicates that B.(D.) has no significant mood, anxieties or mental health difficulties and a "very positive self concept", he acknowledged on another assessment tool being emotionally affected by the murder of his cousins and the death of his beloved grandfather.

[86] The section 34 assessment notes that B.(D.) has held attitudes that condoned violence and justified criminality. (*page 22*) The assessors saw the possibility that B.(D.)'s involvement in crime "could have been affected by his vulnerabilities stemming in part from a significant learning disability, the misplaced sense of loyalty and as a follower rather than a leader." (*page 21*)

[87] According to the section 34 assessment, B.(D.)'s current risk of reoffending is in the low/moderate to moderate range. His risk of future serious violence is assessed as moderate although the assessment notes: "His risk of violence is greatly increased when he is surrounded by anti-social and pro-criminal peers and substance misuse." (*pages 24 and 23*) (I will note that B.(D.) told the section 34 assessors that he had steadied himself prior to the November 30 robbery with marijuana and ecstasy.(*page 6*))

[88] Importantly, the section 34 assessment adds that B.(D.) exhibits some important protective factors such as his close attachment to his mother and father, both of whom are involved in his life, the demonstration at the NSYF of a positive attitude towards authority, and a recent strong commitment to his education. (*page 23*) It is noted that he will require "a good deal of support and guidance" in achieving his pro-social career goals. (*page 23*)

[89] The section 34 assessment describes B.(D.)'s association with "a small group of pro-criminal and anti-social peers which represent his co-accused" as "critical to his risk of reoffending". Association with "negative peer influences" is

identified as the "most significant" concern for B.(D.)'s return to the community. (*page 24*)

[90] At the conclusion of the section 34 assessment are a number of recommendations that include: a long period of probation with strict conditions to monitor B.(D.)'s progress, hold him accountable and promote his rehabilitation; conditions of curfew and electronic monitoring; a case conference to address issues associated with B.(D.)'s return to the community; community service; access to a youth mentor; completion of high school and access to a career or school guidance counsellor; access to pro-social and recreational activities that include basketball; and a referral to the IWK's Youth Forensic Rehabilitation Service for individual treatment. (*page 28*)

B.(D.)'s Behaviour and Progress in the Nova Scotia Youth Facility

[91] B.(D.) has made good use of his time in custody at the NSYF. A recent update from his teacher (*Exhibit 12*) indicates B.(D.) has continued to perform consistently well, coming to class ready to work and "generally" with a good attitude. He has been using his free time in the evenings to complete school assignments "when he can." His marks have been very good and he is presently working on two of the three final courses he needs to obtain his high school diploma.

[92] B.(D.)'s youth worker at the NSYF has also provided a very positive update. (*Exhibit 13*) He is described as having "good manners", is respectful toward staff and his peers and has a good relationship with staff. He continues to be fully engaged with programming and leisure activities. Programming includes the Reasoning and Rehabilitation module, Substance Abuse, and the CALM (Controlling Anger & Learning to Manage It) program. B.(D.) contributes effectively to group discussions and demonstrates a solid understanding of the material. He has obtained a certificate for completing the Substance Abuse program where his participation is described as "always positive". His youth worker reports that B.(D.)'s involvement in the CALM program has "helped shape his attitude toward stressful situations."

[93] Interviewed for the section 34 assessment, B.(D.)'s unit manager described him as a model youth and saying that when he leaves he will be missed by the facility staff. (*section 34 assessment, pages 17 and 18*) This is high praise for B.(D.)'s ability to be pro-social.

[94] There have been some disciplinary issues this fall with B.(D.) receiving one Level III incident report (assault on another resident), two Level II's (detrimental behaviour and damage to property), and one Level I (detrimental behaviour.) His youth worker reports that B.(D.) "accepted responsibility for his actions in each case and learned from them."

[95] An assault by B.(D.) on a youth at the NSYF is referenced in the section 34 assessment where it is indicated that the assault was retaliation against unprovoked racial abuse. (*page 17*) A property damage incident described in the section 34 assessment occurred after B.(D.) had an emotionally difficult conversation with his girlfriend. B.(D.) immediately took responsibility for damaging the wall of the telephone area and wanted to pay for the repairs out of his own funds. (*page 18*)

Racial and Cultural Factors

[96] B.(D.) is of both African Nova Scotian and Aboriginal heritage. The *Gladue* report notes that B.(D.) has been raised to believe that a great-great-grandmother was Mi'kmaq. B.(D.)'s great-grandmother interviewed for the *Gladue* report confirmed this belief. (*Gladue Report, page 6*) Although the authenticity of this claim cannot be established, the *Gladue* Report notes that in Nova Scotia there have been "numerous marriages and friendships between the Mi'kmaq and Black people historically." (*page 13*) The section 34 assessment notes that B.(D.) identifies "on a day to day level" more with being a member of the African Nova Scotian community. (*page 8*)

[97] Race and culture are expressly referenced in the methodology and content of the section 34 assessment. At the start of the assessment report, its methodological approach is described in a section entitled: "Methodological Approach for a Culturally Informed Assessment." The Cultural Formulation Interview (CFI) is a "person centred method of conducting interviews from a constructionist perspective that jointly builds a narrative of understanding the world from the perspective of the interviewee." The CFI, recommended for use by the American Psychiatric Association in the forensic field, "is well researched as a tool for elucidating racial and cultural explanations of the world." The assessment notes: "Research has indicated that cultural evaluations in forensics remain poorly understood and neglected despite culture, race and ethnicity being shown to have a significant effect on young people's interaction with the legal system." (*page 4*)

[98] B.(D.) grew up in North Preston and spent a considerable amount of time there even once his mother moved the family to Dartmouth and then […]. It is the

community he identifies as "his community of reference…" (*section 34 assessment, page 8*) The section 34 assessment reports that B.(D.) spoke with pride to the assessors about his family's long connection to North Preston. The assessment describes North Preston as "one of Canada's largest and most historic Afro-Canadian communities." It developed "relatively independently from other non-black communities…for reasons of geographical isolation, constraints placed upon the residents and systemic discrimination and racism." The assessment cites Robert Wright (who provided a Race and Culture Assessment for the sentencing of B.(D.)'s co-accused, S.(E.)), and references his description of a community that "in recent years…has gained notoriety as a location of increased gun violence and as the home of individuals who participate in criminal activity." (*page 8*)

[99] B.(D.) told the assessors that while growing up in North Preston he was very aware of the young people and adults involved in criminal activities. The assessment notes that B.(D.) at age 17 "began to identify increasingly with the façade of the "glamorized" lifestyle of these pro-criminal peers who had access to money, weapons and drugs." B.(D.) became influenced by these antisocial peers and was unable to distance himself due to feeling intimidated by them. (*section 34 assessment, page 8*)

[100] B.(D.)'s connection to North Preston has exposed him to the violent criminal sub-culture that exists there. As I mentioned, two of his older cousins who lived in his household were murdered in North Preston as was a close friend. His best friend, one of the co-accused in the [… Drive] robbery, was the victim of an attempted murder in the community. The section 34 assessment notes that B.(D.) was "familiar and to some extent enmeshed within a sub-culture of violence and crime." (*page 26*)

[101] As I found in S.(E.)'s case, B.(D.)'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 for him. The section 34 assessment recognizes the significance of 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.))*

[102] 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)* What I said in S.(E.)'s sentencing is equally valid here. The emphasis on accountability is not diminished by considerations of B.(D.)'s experience as a racialized youth drawn into the orbit of criminally-inclined peers. It is informed by this reality. The section 34 assessment and the *Gladue* Report suggest that B.(D.)'s exposure to a criminally-affected racialized community has contributed to his involvement in the very serious offences for which I am sentencing him. The Supreme Court of Canada in *R. v. B.W.P.* has recognized the individualized nature of youth sentencing:

> …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*)

[103] 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

[104] As I noted in S.(E.)'s sentencing, parity, one of the sentencing principles in section 38(2) of the *YCJA*, is an elusive goal. 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.

[105] At paragraphs 121 – 127 of my decision on S.(E.)'s sentence (*R. v. E.S., 2015 NSPC 81*) I discussed cases the Crown has provided for my consideration on the issue of parity. I have reviewed the same cases in relation to B.(D.)'s sentencing. It is unnecessary for me to repeat my discussion of those cases as reference can be readily made to those paragraphs in *R. v. E.S.*. All the cases produced longer custodial sentences than I will be imposing on B.(D.). The particular mix of factors in B.(D.)'s case do not characterize the cases the Crown has asked me to view as similar. The Crown's cases are most useful in supporting its 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 on B.(D.). 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.

[106] Application of the parity principle in sentencing B.(D.) necessarily draws in consideration of the sentence I imposed on S.(E.) and the similarities in the offending and these two young persons. I find nothing in the facts to distinguish their respective levels of moral culpability and their individual backgrounds and current circumstances are similar in many respects. (On the issue of their roles in the [… Drive] robbery, while, unlike S.(E.), B.(D.) has not admitted to being present when the gun was produced, his part of the robbery plan ensured the victims would not be able to escape through the back door.)

Determining the Appropriate Sentence for B.(D.)

[107] The determination of a just sanction for B.(D.) requires me to consider the section 38(3) factors I discussed in paragraphs 46 to 64 of these reasons. Like S.(E.), B.(D.) 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 probability of the victims being injured. But he did not foresee that there would be an attempt to murder them, an attempt that left Ms. Kearse with such terrible injuries.

[108] I find this is a case where accountability requires that B.(D.) 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: B.(D.)'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 B.(D.) did not pull the trigger and did not intend the victims to be harmed.

[109] Assessing the issue of how much custody is required for accountability leads me to the issue of B.(D.)'s time in detention. I have determined that this should be factored into my sentencing analysis on the basis that I analyzed it in sentencing of S.(E.)

[110] This means I have determined the fact that the Crown factored B.(D.)'s time in detention into its decision to abandon its application for an adult sentence does not relieve me of the obligation to consider it in fashioning his sentence. The *YCJA* mandates me to consider B.(D.)'s remand time irrespective of the Crown's approach.

[111] As I explained in S.(E.)'s sentencing, I am satisfied I have a broad discretion when it comes to taking pre-sentence detention into account in the crafting of an appropriate sentence under the *YCJA*. I base this view on the flexible discretion endorsed by our Court of Appeal 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 top of a significant amount of remand time.

[112] The approach favoured in *J.R.L.* does not require that actual credit be given for the time a young person has spent in detention. There are other ways of taking this time "into account." In *J.R.L.*, Roscoe, J.A., after discussing conflicting appellate decisions, reached the conclusion that 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*)

[113] 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 B.(D.)'s case is the relationship between his time in detention and the duration of youth sentence required to hold him accountable. It is the same factor I considered in sentencing S.(E.).

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

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

[116] The year that B.(D.) has spent at the NSYF has value in the accountability calculus which I find should not be reflected by an arithmetic calculation. During his time in detention B.(D.) has been held to account for his involvement in the terrible events of November 30, 2014. It is appropriate to treat this time and very significantly, the use B.(D.) has made of it, as a contribution by him toward the accountability that he must be made to shoulder. He has demonstrated commitment to rehabilitative goals and achieved results that are noteworthy. He has worked hard to make progress, like S.(E.), 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 B.(D.) and promotes his rehabilitation and reintegration.

[117] As with S.(E.), I do not find an arithmetical approach to B.(D.)'s time in detention to be useful in determining his sentence. I see the issue in the same terms as 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*)

[118] Like S.(E.), accountability for B.(D.) 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 B.(D.) is not exclusively achieved through a loss of liberty. He has disappointed his pro-social parents and other members of his family. The pre-sentence report quoted B.(D.) saying his mother "is the one that you do not want to disappoint." (*page 3*) B.(D.) was present when his mother and his aunt made emotional statements to Ms. Kearse apologizing for what had happened to her and acknowledging the pain and trauma she is having to endure. The section 34 assessment notes that B.(D.) feels ashamed because his criminal involvement is contrary to how he was raised. (*page 7*)

[119] Another source of accountability for B.(D.) is his own remorse and guilt which I previously discussed. I view the written statement he prepared for Ms. Kearse as an indication of his determination, in the context of a history of facing challenges associated with language and expression, to get it right, to make sure he did his best in what he knew would be difficult circumstances.

[120] As I said in sentencing S.(E.), 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 B.(D.) 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.

[121] B.(D.) arrived at the NSYF having become invested in an anti-social peer group which included his co-accused. His community was struggling with the effects of racialization and criminality. Like S.(E.), maladaptive and criminal choices were becoming normalized for him. Like S.(E.), B.(D.) has struggled 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. This is the context in which his crimes occurred. Understanding this matters in the

sentencing exercise. Assessing accountability cannot be formulaic: it must produce a sentence that does not merely punish. B.(D.)'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.

[122] The sentence I am imposing is my assessment of how to balance the considerations in B.(D.)'s case. As with S.(E.), while I am not persuaded to order B.(D.)'s immediate release from custody even on strict conditions, an option suggested in the section 34 assessment, that support for release now does speak to the progress B.(D.) has made towards rehabilitation and the importance of his timely reintegration.

[123] I find that the just sanction for B.(D.), the sanction that represents the proportionate meaningful consequence and promotes his rehabilitation and reintegration, is a 267-day Custody and Supervision Order followed by 12 months of probation with conditions I will detail shortly. A 267-day CSO and 12 months' probation is, for B.(D.), effectively the equivalent sentence to the sentence I imposed on S.(E.).

[124] At the conclusion of reading my written reasons into the record, I asked Crown and Defence to assist in addressing the issue of how to ensure that B.(D.)'s sentence will be the same as S.(E.)'s notwithstanding the fact that his sentencing has occurred a week later. Simply saying that B.(D.) should receive a nine-month CSO followed by 12 months' probation would extend B.(D.)'s sentence past the expiry date of S.(E.)'s sentence. I appreciate the very helpful efforts counsel made to address this issue. I determined that B.(D.)'s entire sentence – CSO and probation together – should be of the same duration as S.(E.)'s. Therefore B.(D.)'s Custody and Supervision Order will be 267 days, that is 178 further days in custody and 89 days served under supervision in the community. The result is that B.(D.) will remain in custody at the NSYF a few days after S.(E.) has been released but their sentences, including probation, will end at the same time. This, I concluded, best complies with the principle of parity.

[125] The sentence I am imposing holds B.(D.) to account through a further deprivation of his liberty (178 days of further custody) and then releases him into the community under conditions set by the Provincial Director (89 days of supervision in the community) 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. As with S.(E.), B.(D.)'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.

[126] B.(D.) has shown growth and maturity in custody. I accept Mr. McGuigan's submission that he is taking the responsibility of rehabilitation seriously and has been trying very hard at the NSYF. He will have to translate his achievements from that setting to the community when he is released. He will have to make good on what he said to me in court, that he will never break the law again. He will be confronted with challenges to this commitment, both during his remaining months in custody and once he returns home under conditions. He cannot change what has happened although he wishes he could but he can demonstrate that he is no longer the young man who took on the "gangsta" identity. He needs to appreciate that if the terrible events of November 30, 2014 do not turn his life around, it is likely nothing can.

[127] The timelines for B.(D.) are essentially the same as for S.(E.). B.(D.) turned 18 in May. He will return to the community around his 19th birthday. By the time his full sentence has been served, he will be a few months past his 20th birthday. He will have spent nearly three years under the control of the state being held to account. These numbers became obvious to me only after I had determined his sentence. I want to be explicit as I was in sentencing S.(E.): I have reached my determination of B.(D)'s sentence based on an application of the principles under the *YCJA*, not by various numerical calculations. I simply note, as I did with S.(E.), that a sentence of this duration and scope is freighted with a considerable amount of accountability.

[128] The probationary terms that B.(D.) 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 B.(D.)'s youth worker to approve a change of residence;

- A requirement that B.(D.) 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 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 B.(D.)'s co-accused and M.J.D., except as incidental to school, work or counselling or, in relation to D.(R.), with the permission of his youth worker; (I have indicated this in light of Mr. McGuigan's indication that B.(D.) and D.(R.) are related.)
- Attendance for counselling, treatment or programming as directed by his youth worker;
- A clause requiring B.(D.) 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.

[129] I will hear submissions from counsel if there are any changes or additional conditions that I should consider and will adjust or add to the wording in these reasons of the probationary conditions accordingly.

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