

YOUTH COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: R. v. B.M., 2004 NSPC 53

Date: 20040913

Case Number: 1071901

Registry: Shubenacadie

Between:

Her Majesty the Queen

v.

B. M.

JUDGE'S DECISION

Editorial Notice

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

Judge: The Honourable Judge Pamela S. Williams

Heard: September 2nd and 3rd, 2004 at Shubenacadie, N.S.

Oral Decision: September 13th, 2004

Subject: Review of suspension of conditional supervision (for second degree murder) pursuant to s. 26.6 of the *Young Offenders Act*

Counsel: Robert Hagell, Crown Attorney
Brian Stephens, Defence Attorney

JUDGE'S DECISION

[1] This is a review of the suspension of a Conditional Supervision Order relating to B.M. under Section 26.6 of the *Young Offenders Act*.

Background

[2] On June 14th, 2002, following a guilty plea and finding of guilt, B.M. was sentenced under the *Young Offenders Act* for the second degree murder of Joshua Doyle, said murder having occurred on May 11th, 2001. B.M. was sentenced to two years' custody to be followed by three years' conditional supervision.

[3] On June 13th, 2004, B.M. was released on the Conditional Supervision Order which contained 33 conditions.

[4] On August 9th, 2004, B.M. was arrested following the issuance of a Warrant of Suspension and Apprehension for allegedly breaching conditions of his Conditional Supervision Order. He was also arrested and charged with two new offences, assault with a weapon and assault causing bodily harm. Those charges arose out of an altercation on August 7th, 2004.

[5] On September 3rd, 2004 following a hearing, this Youth Court was satisfied on reasonable grounds that B.M. had breached four conditions of his Conditional Supervision:

1. Keep the peace and be of good behaviour - He breached that by virtue of his involvement in the alleged incident of August 7th, 2004.
2. Confine himself to his residence at all times save for specified exceptions - B.M. breached the house arrest condition by leaving * and traveling to *.
3. Prohibition against the use, possession or consumption of alcohol - B.M. was in

possession of alcohol in *.

4. Prohibition from the possession of weapons - B.M. used a beer bottle in committing an assault on E. J. in * on August 7, 2004.

The Law

[6] Having made such a finding, the Youth Court must now review the Provincial Director's decision to suspend the Conditional Supervision: s. 26.6(1)(b) of the *Young Offenders Act*. The options available to the Court as outlined in s. 26.6(2) are either:

1. To cancel the suspension, reinstate the Conditional Supervision Order and
 - I. leave the same conditions,
 - ii. vary the conditions, or
 - iii. impose new conditions, or
2. To continue the suspension for up to but not exceeding the remainder of the disposition, as the Court considers appropriate and order that the young person remain in custody and give reasons for that decision.

[7] The *Young Offenders Act* is silent as to factors the Youth Court is to consider in making such a determination. I have looked to the declaration of principles, other provisions of the *Young Offenders Act* as well as the case law for guidance.

[8] The declaration of principles in s. 3 of the *Young Offenders Act* has been described as a balancing of various competing interests. Among other things, it states that crime prevention is essential to the long term protection of society and that the Court should address the underlying causes of crime committed by young persons. Section 3 also talks about the young person being

held accountable but not necessarily in the same manner as adults. Society must be afforded the necessary protection from illegal behaviour. The *Act* specifies that protection of the public is best achieved by rehabilitation where ever possible and, of course, there is to be the least possible interference with the rights of the young person that is consistent with the protection of society.

[9] Sentencing principles established by case law provide further guidance. It is my view that such principles are applicable to all disposition hearings under the *Young Offenders Act* because a disposition, by definition, includes a variation of disposition. It follows that these principles apply equally to a review hearing such as this where the Youth Court considers whether to vary the terms of the original disposition.

[10] The Supreme Court of Canada established several sentencing principles in **J.J.M.**, a 1993 decision found at **81C.C.C.(3d) 487** which have been applied by the Nova Scotia Court of Appeal in a variety of sentence appeals:

1. A proper disposition or sentence must take into account not only the seriousness of the crime but all relevant factors,
2. General deterrence must also be considered although it has a diminished importance in youth matters, and
3. It is appropriate for the trial Judge to take into consideration the availability of an annual review under the review provisions of the *Young Offenders Act*.

[11] The Court is also guided by factors set out in s. 26.1 of the *Young Offenders Act* to be applied on an application for the continued custody of a young person serving a murder sentence who is due to be released on Conditional Supervision. There the Youth Court is called upon to determine the likelihood of that young person committing an offence causing death or serious harm

to another prior to the end of his or her sentence, if released. Similar considerations are relevant in reviewing the Provincial Director's decision to suspend B.M.'s conditional supervision. Section 26.1(2) provides that the Youth Court shall take into consideration any factor that is relevant including:

- (a) evidence of a pattern of persistent violent behaviour and, in particular:
 - I. the number of offences that caused physical or psychological harm to any other person,
 - ii. the young person's difficulty in controlling violent impulses to the point of endangering the safety of any other person,
 - iii. the use of weapons in the commission of any offence,
 - iv. explicit threats of violence,
 - v. behaviour of a brutal nature associated with the commission of any offence, and
 - vi. a substantial degree of indifference on the part of the young person as to the reasonably foreseeable consequences to other persons of the young person's behaviour....
- (d) the availability of supervision programs in the community that would offer adequate protection to the public...

[12] In addition to the guiding principles and factors set out in the *Young Offenders Act*, the *Youth Criminal Justice Act* lends some assistance. I am mindful that this proceeding is under the *Young Offenders Act*, however like the *Young Offenders Act*, the *Youth Criminal Justice Act* sets out factors for consideration in a continuation of custody application which includes

a consideration of the length of time the young person has been subject to the order, whether he or she had previously contravened the order and the nature of the contravention: s. 109(4).

Analysis

Declaration of Principles and Principles of Sentencing

[13] The declaration of principles in the *Young Offenders Act*, as I indicated earlier, involves the balancing of competing interests. There is to be the least possible interference with the freedom of the young person that is consistent with the protection of the public having consideration to rehabilitation, specific deterrence and general deterrence. Rehabilitation is obviously the primary consideration because usually rehabilitation is the best means of ensuring the long term protection of the public. Specific deterrence addresses the issue of accountability of the young person and general deterrence relates to society as a whole, although that consideration has somewhat of a reduced significance when it comes to young people.

[14] In my view, the Youth Court must assess the breaches in light of the conditions that had been imposed to determine if enough structure and supervision are available to ensure the protection of the public and provide for the rehabilitation of the young person.

[15] A very clear message needs to be sent that there will be severe consequences for young persons who choose to breach conditions designed to both rehabilitate them and protect society. If the breach(es) are of a technical nature and have a potential risk of harm to society, it is my view that rehabilitation can still be stressed and that a suspension, if any, can be relatively short. However, if the breach(es) actually interfere with the safety of the community, lengthier suspensions are necessary depending on various factors.

[16] The breaches here were not merely technical, they were extremely serious. The Court was satisfied on reasonable grounds that B.M. was not at his designated residence in * with his mother and her common law husband as required, that he possessed alcohol, that he possessed a weapon, i.e., a beer bottle that was used to seriously injure another young man. It is abundantly clear that the Conditional Supervision Order containing 33 conditions was inadequate to ensure the protection of the public in this instance. Seemingly, B.M. was able to leave * undetected, travel to *, access alcohol, get involved in an altercation which led to a young man receiving nine stitches to the head, all before the authorities were contacted. This occurred in spite of 33 conditions set out in a Conditional Supervision Order, six intensive supervision and support workers assigned to this young person's case (four in *, one in *, and another in *), and constant supervision by his mother and her common law husband.

Other Relevant Factors

[17] In assessing whether these or other conditions may be sufficient in the future to ensure the protection of the public, I look specifically to circumstances relating to B.M. to determine whether he exhibits a pattern of persistent violent behaviour, whether there are adequate and available supervision programs in the community, how long B.M. has been subject to this order, whether there have been previous breaches and if so, the nature of those breaches.

Pattern of Persistent Violent Behaviour:

a. Number of Violent Offences

[18] B.M. is 18 years old. He has committed 11 criminal offences; 10 under the *Criminal Code*

(six of which were crimes of violence) and one pursuant to the *Liquor Control Act*. He was 12 years old when charged with underage drinking. At age 12 he was also charged with assault and was placed on probation for 18 months. Before he turned 13, B.M. was charged with assault with a weapon, possession of a prohibited weapon and was again placed on probation. At age 13, B.M. was charged with common assault and received three months open custody. At age 15 he was sentenced to one month open custody for uttering threats. His sixth violent offence, at the age of 15 years was second degree murder. There are now allegations of further violence for which B.M. has yet to be tried. For such a young person B.M. has acquired both a significant and a very serious record of violent offences.

b. Difficulty Controlling Violent Impulses

[19] As to the issue of whether B.M. has difficulty controlling his violent impulses, I look firstly at the circumstances surrounding his violent convictions. The Crown led evidence on the circumstances of both the second degree murder and the new allegations before the Court for assault with a weapon and assault causing bodily harm. Both incidents involved alcohol and unprovoked attacks on others. The first resulted in death and serious personal injury while the second resulted in serious personal injury.

[20] The July 2003 Progress Report from the Nova Scotia Youth Centre (filed with the Youth Court) outlines an incident involving an assault by B.M. on another youth. The report also speaks of B.M. exhibiting disorderly conduct, although no further particulars are given. Together this suggests that B.M. has difficulty controlling his behaviour which culminates in violent outbursts.

c. Use of Weapons

[21] A baseball bat was used by B.M. when he murdered Joshua Doyle. In relation to the most

recent allegations, he used a beer bottle. B.M. has convictions for possession of a prohibited weapon and assault with a weapon as well.

d. Threats of Violence

[22] A further consideration is threats of violence. B.M. has one conviction for uttering threats dating back to April 2001.

e. Brutal Nature of Crimes

[23] The facts as set out by the Crown in relation to the second degree murder conviction can aptly be described as brutal. The allegations presently facing B.M. amount to an unprovoked assault to the head with a beer bottle. Although only one blow is alleged, it is noted that the head is a particularly vulnerable area of the body and such a blow can have potentially life-threatening consequences, although fortunately that is not the case here.

f. Evidence of Indifference as to the Reasonably Foreseeable Consequences

[24] A final consideration under the heading of “ pattern of persistent violent behaviour” is whether there is any evidence that B.M. is indifferent regarding reasonably foreseeable consequences. The writer of the July 2003 Progress Report, in speaking of the second degree murder conviction, noted that B.M. did not express any thought of consequences prior to or any remorse subsequent to the offence.

Availability of Supervision Programs in the Community

[25] A second consideration is the availability of supervision programs in the community. As indicated earlier, there were a total of six intensive support and supervision workers (in *, in * and *) together with B.M.’s mother and her common law husband who were all tasked with providing supervision of B.M. in the community. Despite this degree of intense supervision, B.M. has

breached his conditional supervision order within 53 days of his release from custody.

[26] There is no history of prior breaches of this Conditional Supervision Order, but there is a history of breaches of other Court orders and conditions. On July 7th, 1999 and on July 18, 1999, there are offences of breaches of Youth Court dispositions. There is also an indication in the July 2003 Progress Report at page 5, that B.M., while in custody for second degree murder, was failing to comply with staff direction. Also of concern, according to the report, was the subject's history of non-compliance with community based supervision, which made supervision and enforcement difficult in the past.

[27] This Court has found that B.M. breached four conditions of his conditional supervision order that led to new charges of assault causing bodily harm and assault with a weapon. This is an extremely serious situation and the Court is deeply troubled by the nature, the number and the seriousness of these breaches, despite all rehabilitative efforts made thus far. Those rehabilitative efforts include traditional native SWEATS and ceremonies, psychological counseling, the CALM program (in the areas of substance abuse, anger management, and reasoning and rehabilitation, some of which had been repeated), and his involvement in Centre 24-7 (which also included a substance abuse workshop and an anger management component).

[28] Given the number of serious breaches so early into the Conditional Supervision Order (despite the 33 stringent conditions imposed) this Court has no confidence whatsoever that B.M. can be released and still be assured that the public can be protected. I stress again that this is a balancing of interests, balancing the protection of the public against the needs of the young person. Given the violent nature of the offender and the offence and given that rehabilitative efforts have not, to date, led to the protection of society, it is therefore my view that a strong message needs to

be sent.

[29] I am mindful of the review provisions which will be available to B.M. in the future. Having considered all the principles and factors set out above, the particulars of the young person as well as the circumstances surrounding the breaches, this Court orders that the suspension of B.M.'s conditional supervision continue for the remainder of the disposition, that is until June 13th, 2007.

[30] I would end by saying that the concern raised by Ms. Winfield in the May 4th, 2004 Progress Report is echoed by the Court and I quote:

Gina Winfield, Probation Officer, was contacted for the purpose of this report. Ms. Winfield noted a concern that the subject's mother does not permanently reside in * where the subject indicated he would live with her. Ms. Winfield also relayed a concern that the subject is returning to his community where drugs and alcohol are prevalent and peers may have a negative influence on him.

It is for all of the reasons outlined above that this Court has determined that the Conditional Supervision Order should be suspended for the remainder of the term.