Date: June 17 1997
Docket: CR 03399

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

R.D.F.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Appeal from disposition made in Youth Court. Allowed in part.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V. A. SCHULER

Heard at Hay River, Northwest Territories on May 20, 1997

Reasons Filed: June 17, 1997

Counsel for the Appellant: James Brydon

Counsel for the Respondent: Scott Couper

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Reasons for Judgment

[1] This is a summary conviction appeal from a disposition made in Youth Court on a conviction for impaired driving under s. 253(a) of the Criminal Code.

[2] The Youth Court Judge heard the matter with a Youth Panel. At the hearing of this appeal, I was informed by counsel that the involvement of a Youth Panel was adopted by the Youth Court Judge in January of 1997 and has been used since then. There is no written practice or procedure governing the use of the Panel. Twelve students from grades 10 to 12 at the high school in Hay River volunteer to sit on it. They are pre-screened by a teacher for conflicts or associations with those who are to appear before the Youth Court.

[3] In this case, the Youth Panel, along with the Youth Court Judge, heard the facts and submissions from counsel on the Appellant's guilty plea to impaired driving. The Youth Court Judge told the Panel what the usual disposition would be and what an adult would normally receive in the same circumstances.

[4] The Court then adjourned so that the Youth Panel could confer. The Panel's discussions were not on the record. The Youth Court Judge did not take part in the discussions. After the adjournment, the spokesperson for the Panel listed the

Panel's recommendations for the Youth Court Judge. Counsel for the Appellant was asked if he had anything further to say and he made some comments. The Youth Court Judge then clarified certain of the recommendations with the Panel. He then made the disposition under appeal.

[5] The recommendations of the Youth Panel were as follows:

1. minimum nine month suspension of the Appellant's driver's and pilot's licences;

2. probation with counselling, a research paper and a review in six months;

3. a minimal fine; and

4. 150 to 200 hours of community service work.

[6] The disposition made by the Youth Court Judge was as follows:

1. fine of $300.00;

2. nine month prohibition from driving and from operating an aircraft;

3. probation for one year on terms to keep the peace and be of good behaviour, appear before the probation officer when required to do so, substance abuse and anger management counselling, 100 hours of community service work within four months and the preparation of a research paper as to the dangers of drinking and driving and the social cost and effect of such behaviour within four months.

[7] Clearly, the only difference between the disposition made and what was recommended by the Youth Panel is that the disposition included fewer community service hours and no mandatory review.

[8] The Appellant relies on the following grounds in submitting that the Youth Court Judge erred in making the above disposition:

a) that the Youth Court Judge had no jurisdiction to hear recommendations from a Youth Panel and effectively delegated his sentencing function in so doing;
b) that the Panel and therefore the Youth Court Judge took into account matters that were not properly before the Court;
c) that the Youth Court Judge erred in prohibiting the Appellant from operating an aircraft when the circumstances of the offence were restricted to the operation of a motor vehicle;
d) that the Youth Court Judge erred in making the community service work a term of the probation order;
e) that the disposition is outside the range for the offence and specifically is harsher than the sentence an adult would receive in the same circumstances.

[9] The facts of the offence are that the Appellant was driving at a high rate of speed, came up very close to the rear of another vehicle and then raced on ahead. The motorist in the other vehicle was concerned that the Appellant would cause an accident and alerted the police. When stopped, the Appellant was noted with the usual signs of impairment, including staggering when getting out of the vehicle. A breathalyser test was done with both results being 130 milligrams of alcohol in 100 millilitres of blood. The Appellant was 17 years old and had no record. He was under the age at which it is lawful to drink.

A. Jurisdiction to hear from the Youth Panel

[10] Unfortunately, there is no material before me which explains the purpose of the Youth Court in involving, and taking recommendations from, a Youth Panel. I expect that there would have been some explanation when the Youth Court first started sitting with a Youth Panel; it would have been helpful to have a transcript of what was said by the Court to explain why the Panel was present.

[11] If recommendations were sought from a group of elders, for example, one would expect that their maturity and wisdom and perhaps knowledge of the resources of the community might assist the Court. It is more difficult to see how a group of highschool students might be expected to assist the Court in coming to an appropriate disposition.

[12] It may be that the participation of the Youth Panel is aimed at deterrence of youth, by involving them directly in court proceedings or, alternatively, at deterrence of the youth before the Court by making him or her subject to the scrutiny of other youth. It may also be that the recommendation of the Youth Panel

is thought to be a good indication to the Youth Court Judge of what the peers of the young offender would find to be a deterrent disposition and therefore what the young offender might also find to be a deterrent.

[13] Initially, the Youth Panel seemed to me to be comparable to sentencing circles, which are employed in some cases in Yukon and Saskatchewan. It has been pointed out that the sentencing circle generates new information and information not normally available to the court and that it is designed to explore and develop viable sentencing options, drawing, wherever possible, on community-based resources: see R. v. Moses (1992), 11 C.R. (4th) 357 (Yukon Terr. Ct.).

[14] It is not clear whether the Youth Panel fulfills the same functions. In this case, recommendations, not information, were sought from the Panel and it is not clear whether the Panel was expected to recommend anything different from what would be the "usual" sentence, although certainly the Panel was told that it could do so.

[15] There may be a danger that the Youth Panel is perceived as telling the Youth Court Judge what to do. In the absence, however, of any evidence as to how the participation of the Youth Panel has been explained in open court, I am reluctant to comment further in this regard.

[16] I note that during the proceedings in the Youth Court, the Appellant raised no objection or challenge to the participation or composition of the Youth Panel. The Appellant's counsel was invited by the Youth Court Judge to comment after the Youth Panel made its recommendations. His only comment related to a factual issue about how long the Appellant had been in counselling. He said nothing about the recommendations themselves.

[17] It is important to note that the Youth Panel made recommendations only. It did not render the final disposition. There was, accordingly, no delegation by the Youth Court Judge of his sentencing jurisdiction.

[18] I also bear in mind that a sentencing hearing, in which I include a disposition hearing, is a less formal proceeding than a hearing on the adjudication of guilt. I consider that there is room at such a hearing for the participation of a Youth Panel, just as the Saskatchewan Court of Appeal did in relation to circle sentencing, as set out in R. v. Morin (1995), 101 C.C.C. (3d) 124:

> There is no provision in the *Criminal Code* for the use of sentencing circles. The foundations for their use consist, first, of the sentencing hearing, with its wide scope and measure of informality, as set down in *R. v Gardiner* (1982), 68 C.C.C. (2d) 477, 140 D.L.R. (3d) 612, [1982] 2 S.C.R. 368; and, second, of the principles of sentencing as set forth in *R. v Morrissette* (1970), 1 C.C.C. (2d) 307, 12 C.R.N.S. 392, 75 W.W.R. 644, including, in particular, the need to consider the rehabilitation of the offender in determining a fit sentence.

[19] Counsel for the Appellant argued that the Youth Court can obtain information about a young person only by means of a pre-disposition report as provided for in s. 14 of the Young Offenders Act. Section 14(2)(d) provides that there may be included in a pre-disposition report any recommendation that the provincial director considers appropriate.

[20] In my view, the Act does not restrict the Youth Court to obtaining recommendations by means of a pre-disposition report only. Section 14(1) says simply that the Youth Court may, and in some cases, shall, require a pre-disposition report. In my view, this does not preclude the Youth Court from hearing other information and recommendations on a disposition hearing. Nor did the Youth Panel purport in any way to provide a pre-disposition report.

[21] As stated, I find that there was no delegation by the Youth Court Judge of his sentencing function and therefore no issue of jurisdiction to hear recommendations from the Youth Panel. The sole question, then, is whether the ultimate disposition should be set aside. In that regard, the recent case of R. v. McDonnell, [1997] S.C.J. No. 42, requires that I bear in mind "the deference that is owed to sentencing judges by appellate courts". As set out in that case, in the absence of an error of principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, a sentence should only be overturned if the sentence is demonstrably unfit.

B. Whether matters not before the court were taken into account

[22] At the commencement of its recommendations to the Youth Court Judge, the spokesperson for the Panel stated as follows:

> Although this is Robert's first offence, it does not mean it is his first time with such behaviour. This is just an indicator of other difficulties, and the following is recommended ...

[23] The Appellant submits that this comment indicates that the Youth Panel had information which was not before the Court and used that information in arriving at its recommendations.

[24] In my view, this ground has no merit. The Appellant had entered into evidence before the Youth Court a letter from a counsellor. In that letter, the counsellor stated, "there is considerable anger in this young man". The Youth Panel was provided with a copy of the letter before it went to confer and its comment about "other difficulties" may well have been prompted by what the letter said.

[25] Even if the comment about "such behaviour" could be taken to mean the Panel had and took into account other information about the Appellant, there is no reason to think that the experienced Youth Court Judge took the comment into account in making the disposition and of course there is no indication that he knew what information was in the possession of the Panel. He was told by counsel that this was the Appellant's first offence and he repeated that to the Youth Panel when telling them what the usual disposition would be. Nor did he refer to the comment when rendering the disposition. I find no merit in this ground of appeal.

C. Did the Youth Court Judge err in prohibiting the Appellant from operating an aircraft?

[26] The circumstances of the offence did not involve the operation of an aircraft. The Youth Court Judge was told that the Appellant had a pilot=s licence. Crown counsel at the hearing in Youth Court (who was not counsel on the appeal) asked that the Appellant be prohibited from operating motor vehicles, aircraft and vessels. In fairness to the learned Youth Court Judge, I should point out that defence counsel at the hearing (who was not counsel on the appeal) agreed that prohibition of the Appellant=s ability to operate an aircraft was mandatory. The issue raised by the Appellant=s counsel on the appeal is whether that prohibition was indeed mandatory or whether, given that no aircraft was involved in the commission of the offence, the Youth Court Judge lacked jurisdiction to impose the prohibition.

[27] Section 259(1) of the Criminal Code reads as follows:

> 259. (1) Where an offender is convicted of an offence committed under section 253 or 254 or discharged under section 736 of an offence committed under section 253 and, at the time the offence was committed or, in the case of an offence committed under section 254, within the two hours preceding that time, was operating or had the care or control of a motor vehicle, vessel, aircraft or railway equipment or was assisting in the operation of an aircraft or of railway equipment, the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel, aircraft or railway equipment, as the case may be,
>
> (a) for a first offence, during a period of not more than three years and not less than three months;
>
> (b) for a second offence, during a period of not more than three years and not less than six months; and
>
> (c) for each subsequent offence, during a period of not more than three years and not less than one year.

[28] There is no dispute that s. 259 applies to young offenders found guilty of the offences to which it applies.

[29] The section is clearly mandatory.

[30] Counsel for the Appellant relied on the words Aas the case may be@ at the end of the first paragraph in s. 259(1) and argued that they restrict the prohibition to the type of vehicle operated at the time the offence was committed. Counsel for the Crown submitted that the words Aas the case may be@ refer instead to subparagraphs (a), (b) and (c) of s. 259(1). He also pointed out that the words Aas the case may be@ are not found in the French version of s. 259(1).

[31] In my view, the words Aas the case may be@ do not add anything to subparagraphs (a), (b) and (c), which are clear standing on their own. This suggests to me that the words in question must refer back to the type of vehicle to be prohibited, which in turn must have a connection with the type of vehicle involved in the commission of the offence.

[32] There is a presumption that the legislature will avoid stylistic variation, that once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended: Driedger on the Construction of Statutes, 3rd ed. (Butterworths Canada Ltd. 1994), at p. 163.

[33] Elsewhere in the Criminal Code, for example, in s. 86(2)(a) (careless use of a firearm) and s. 100(1) (firearm prohibition order), Parliament has differentiated between first and subsequent offences by using the words Ain the case of@. Thus, s. 86(2)(a) refers to liability to imprisonment, Ain the case of a first offence@ for a certain term and, Ain the case of a second or subsequent offence@ for a specified term. Similarly, s. 100(1) provides for the length of a firearm prohibition order, Ain the case of a first conviction@ and Ain any other case@.

[34] Had Parliament felt it necessary to qualify subsections (a), (b) and (c) of s. 259(1), no doubt it would have done so in the same fashion, rather than by using the words Aas the case may be@. For that reason, and because, in my view, a less awkward reading of s. 259(1) follows, I conclude that the words Aas the case may be@ refer back to what it is that the order shall prohibit.

[35] In the result, the word Aor@ is to be read disjunctively, so that the court shall make the order prohibiting the person convicted from operating a motor vehicle, or operating an aircraft or operating a vessel or operating railway equipment, as the case may be depending on what was involved in the commission of the offence. I am not aware of any reason why the French version, which omits the words Aas the case may be@ but uses the word Aou@, cannot bear the same reading.

[36] I do not view this interpretation of s. 259(1) as being inconsistent with Parliament=s clear intention to protect the public from the dangers of drinking and driving. The words Aas the case may be@ simply indicate to me that a connection is required between the type of vehicle involved in the commission of the offence and the prohibition.

[37] In this case, it follows that I am of the view that the learned Youth Court Judge erred in imposing the prohibition against operation of aircraft. That prohibition is accordingly set aside.

D. Did the Youth Court Judge err in making the community service work a term of the probation order?

[38] As a term of his probation, the Appellant was ordered to perform 100 hours of community service work within four months.

[39] Counsel for the Appellant relied on the case of R. v. K.R.P. (1987), 40 C.C.C. (3d) 376 (B.C.C.A.) in submitting that the Youth Court Judge erred in including the community service requirement in the probation order. In K.R.P., however, the Court was dealing with sections of the Young Offenders Act that were repealed prior to the sentencing in this case. Specifically, what was section 24.1(3), which dealt with the conditions under which a young offender could be committed to secure custody, had the effect that for breach of a probation order, a young person could be committed to secure custody, while for breach of a community service order, a young person could be committed only to open custody. The British Columbia Court of Appeal held that in view of the fact that Parliament had seen fit to deal expressly with the circumstances in which community service work may be ordered and having regard to the fact that a lesser penalty flowed from breach of a community service order than from breach of a probation order, a community service order should not be made part of a probation order .

[40] Subsections 24.1(2) to (4) were replaced in 1995 (Young Offenders Act, S.C. 1995, c. 19, s. 16) with the subsections which were, at the time the disposition was imposed on the Appellant, and are presently, in force and which deal with the factors the Youth Court is to take into account in deciding whether to place a young person in open custody or secure custody. Pursuant to section 26 of the Act, breach of either a community service order or a probation order is a summary conviction offence. There is no difference in the punishment that may be imposed for the two types of breaches and the conditions to be considered for custody are the same in both cases.

[41] I see no reason, therefore, why a community service order should not be included in a probation order. In my view, the reasoning in K.R.P. is no longer applicable because of the amendments to the Young Offenders Act and I find no merit in this ground of appeal.

E. Was the disposition unfit?

[42] I have already referred above to the deference that appellate courts will afford to a sentencing judge.

[43] Counsel for the Appellant argues that the disposition in this case is much more onerous than what an adult would have received. That may be true to an extent. On the other hand, different considerations apply with young offenders than with adults.

[44] In reviewing s. 3(1) of the Young Offenders Act, the Supreme Court of Canada said the following in J.J.M. v. The Queen, [1993] 2 S.C.R. 421:

> Section 3(1) attempts to balance the need to make the young offenders responsible for their crimes while recognizing their vulnerability and special needs. It seeks to chart a course that avoids both the harshness of a pure criminal law approach applied to minors and the paternalistic welfare approach that was emphasized in the old *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. Society must be protected from the violent and criminal acts committed by the young just as much as from those committed by adults. The references to responsibility contained in s.3(1)(a) and to the protection of society in paras. (b), (d) and (f) suggest that a traditional criminal law approach should be taken into account in the sentencing of young offenders. Yet we must approach dispositions imposed on young offenders differently because the needs and requirements of the young are distinct from those of adults.

[45] In J.J.M., Cory J. Also pointed out that , Athe very fact that these are young offenders indicates that they may become long term adult offenders unless they can be reformed to become useful and productive members of society@. I would add that in the case of an adult, the Court may be able to look at the past record or lack thereof and tell from it whether the offender needs guidance or is likely to re-offend. With a youth, there may not be sufficient background for the Court to know. So the sentencing of a youth may focus more on guidance, on prevention, so that the youth does not re-offend. There may be good reason for a more onerous disposition in the case of a young person who risks embarking on a life of crime than in the case of an adult, who, after many years, has come into conflict with the law only once.

[46] Counsel for the Appellant pointed out that an adult would not have been required to write an essay such as was ordered in this case. But in my view, an essay on the dangers of drinking and driving is entirely appropriate for a young person in the situation of this Appellant. What better way for him to learn? An

adult who has twenty years' experience as a driver may be expected to know the dangers just because of that experience. The young driver is lacking in that regard.

[47] The term in the probation order for counselling is also appropriate in light of the Appellant's admission that he had sought counselling and his submission of the counsellor's letter saying that he should continue with same.

[48] Nor do I find the community service work to be inappropriate or excessive. Counsel for the Appellant pointed out that when viewed as a multiple of the minimum wage, the value of the community service hours and the fine actually imposed result in an effective fine of approximately $950.00. But in my view the community service work should not be equated to a fine. There are benefits, such as learning to take responsibility, which may flow from community service work.

[49] That leaves the length of the prohibition against operation of a motor vehicle to be considered. Counsel for the Appellant argues that the nine month prohibition is too long.

[50] The Youth Court Judge told the Youth Panel that if the Appellant had been an adult, the prohibition from driving would be somewhere between three and nine months. In adopting the Panel=s recommendation for nine months, he did not say why he chose what would be the high end of the range for an adult. He did make reference to the Appellant=s driving as not being appropriate.

[51] There was nothing about the facts of the offence or the Appellant=s background as set out for the Youth Court which would justify setting the prohibition at the high end of the range for an adult.

[52] In my view, the learned Youth Court Judge failed to take into account that this was the Appellant=s first offence and over-emphasized the erratic driving. The prohibition is a form of penalty, which in my opinion has to be viewed differently from the essay and the community service work, which are more relevant to guidance of the offender.

[53] The driving prohibition will therefore be reduced to four months from the date that it was imposed.

[54] Other than as set out above, I am unable to say that the disposition is demonstrably unfit. The appeal is therefore allowed only to the extent of (i) setting aside the prohibition against operation of aircraft and (ii) reducing the prohibition against operation of a motor vehicle to a period of four months.

V. A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 17th day of June, 1997

Counsel for the Appellant: James Brydon

Counsel for the Respondent: Scott Couper

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