2006 NWTTC 17

Y-1-YO-2006000195/Y-1-YO-2006000196/Y-1-YO-2006000197
Y-1-YO-2006000198/Y-2-YO-2006000129/Y-2-YO-2006000130

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

P.G. (A Young Person)

Transcript of the Oral Reasons for Sentence delivered by the Honourable Judge R.D. Gorin, sitting at Yellowknife, in the Northwest Territories, on September 29th, A.D. 2006.

APPEARANCES:

Mr. B. Hubley: Counsel for the Crown

Mr. M. Hansen Amicus Curiae

(Charges under s.145(5.1) X 3, 348(1)(b) X 7 CC, 137 YCJA)

Official Court Reporters

THE COURT: In the case before me the young person, P.G., has pleaded guilty to and been found guilty of a number of serious offences. These findings of guilt include a finding of guilt for wilfully failing or refusing to comply with a non-custodial sentence imposed under the Youth Criminal Justice Act contrary to section 137 of the Act.

The young person has a short criminal record. The record contains one previous finding of guilt for an offence contrary to section 137 of the Act. The finding of guilt contrary to section 137 which I have before me for sentencing is a breach of a different non-custodial sentence than that which led to the prior finding of guilt on the young person's criminal record.

In the case before me, the Crown submits that given the young person's record and the findings of guilt presently before me for sentencing this Court has the jurisdiction to impose custody.

The young person's original counsel took no position, although Mr. Hansen, who has appeared today as amicus curiae, has ably argued that the Court does not have the jurisdiction to impose custody. He further takes the position that none of the statutory gateways to custody provided for

through section 39 of the Act have been opened. Clearly, I must have the jurisdiction to impose custody before doing so.

The issue which I must first determine is: Does section 39(1)(b) of the Youth Criminal Justice Act require prior findings of guilt for offences entailing breaches of non-custodial sentences before custody can be imposed?

The issue can alternatively be put as: Is the statutory gateway to custody provided for under section 39(1)(b) opened where the "findings" of guilt for offences entailing breaches of different non-custodial sentences include those which are before the Court for sentencing? This question has been the topic of significant debate.

Section 39(1) of the Act provides:

> "A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
> (a) the young person has committed a violent offence;
> (b) the young person has failed to comply with non-custodial sentences;
> (c) the young person has committed an indictable offence for which an

adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

In order to decide the issue I have before me, I must attempt to determine the intention of Parliament contained in section 39(1)(b). I remind myself that the rule of law requires that I not be overly creative in my interpretation. Section 39(1)(b), as well as the rest of the Youth Criminal Justice Act, reflects the will of a democratically elected government. I, as a Judge who has received my office through appointment, am not to interpret the statute in a manner inconsistent with the will of Parliament.

In determining the intention of Parliament, the primary rule of interpretation is that of literal construction. This rule of construction is, "to intend the legislature to have meant what it has actually expressed": R. v. Branbury (Inhabitants) (1834) as per Parker, C.J., page 142.

There are other rules of statutory interpretation which some have argued as having applicability to the correct interpretation of section 39(1)(b). One such rule provides that a statute is to be read as a whole. The rule requires that the interpreter, "... make construction on all the parts together and not of one part only by itself": Case of Lincoln College (1595) 3 Co. Rep. 58b, at 58b.

Every clause of a statute must, "be construed with reference to the context and other clauses of the Act so far as possible to make a consistent enactment of the whole statute": Canada Sugar Refining Co., Ltd. v. R. [1898] A.C. 735 per Lord Davey at p. 741.

Another applicable rule of construction is the "consequences to be considered" principle of statutory interpretation. This principle simply

provides that before adopting any proposed construction of a passage susceptible of more than one meaning it is important to consider the effects or consequences which would result from that construction.

In Gartside v. I.R.C. [1968] A.C. 553, at p. 612 Lord Reid stated:

> "It is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent and in light of the reasonableness of the consequences which follow from giving it a particular construction."

As one of the statutory gateways to custody, subsection 39(1)(b) requires that before custody can be imposed it must be the case that the young person, "has failed to comply with non-custodial sentences." What the wording requires is simply a failure to comply with separate non-custodial sentences. The subsection does not require prior findings of guilt. Although it is true that the wording, "has failed to comply," clearly contemplates past events, the past event required is simply a failure to comply with non-custodial

sentences and not a prior finding or findings of guilt for offences entailing breaches of non-custodial sentences. Since it only requires a past failure to comply with non-custodial sentences and not a past finding of guilt, the statutory gateway to custody set out in subsection 39(1)(b) would be available in this case under that section's plain wording.

I find that the contrasting language used in other parts of subsection 39(1) bolsters the argument in favour of the literal interpretation I have set out in the foregoing paragraph. Section 39(1)(a) requires, "the young person has committed a violent offence."* (emphasis mine)

Subsection 39(1)(c) also sets out a separate gateway to custody which requires that the young person, "has committed an indictable offence,"* punishable in adult court by more than two years' imprisonment and, "has a history that indicates a pattern of findings of guilt."* (emphasis mine.)

Clearly, the wording of section 39(1)(a) of the Act, "has committed a violent offence," is speaking of the matter before the Court for sentencing. Equally clear is that the wording of subsection 39(1)(c), "has committed an indictable offence," is speaking of the matter presently before the Court for sentencing and not an

earlier finding of guilt.

It follows that where subsection 39(1)(b) uses the wording, "has failed to comply with non-custodial sentences," the words, "has failed," cover either a matter presently before the Court for sentencing or past finding of guilt entailing such a failure.

As well, it is also clear that subsection 39(1)(c) requires past findings of guilt where it states, "and has a history that indicates a pattern of findings of guilt." Surely if Parliament had wished subsection 39(1)(b) to require prior findings of guilt entailing failures to comply with non-custodial sentences, it would have clearly referred to, "findings of guilt," in the same manner that it has in section 39(1)(c).

I find that there is no ambiguity in the wording of subsection 39(1)(b). Therefore, the "Consequences to be Considered" principle of statutory interpretation does not apply. Certainly it cannot be said that a literal interpretation of subsection 39(1)(b) leads to an absurd result.

In my view, it is quite apparent that in enacting subsection 39(1)(b) of the Youth Criminal Justice Act it was Parliament's

intention to not necessarily require past findings of guilt entailing breaches of non-custodial sentences in order to open the statutory gateway to custody provided through that subsection. Parliament intended that the findings of guilt for offences entailing a failure to comply with non-custodial sentences could be those presently before the Court for sentencing in order for custody to be available as a sentence.

In arriving at this conclusion, I have carefully considered the cases I have found which deal with the issue. In the case of R. v. J.H. [2004] O.J. No. 5151, the Ontario Court of Justice, sitting as a Youth Justice Court, came to a conclusion which is opposite to mine. The judgment sets out the arguments often referred to by those who maintain that section 39(1)(b) requires two or more past findings of guilt for offences entailing breaches of non-custodial sentences imposed under the Act before custody is available.

In J.H. the young person had pleaded guilty to three breaches of two probation orders. The Court was presented with a joint submission for a 90-day custody and supervision order. The custody was to be divided into 60 days of open

custody and 30 days of community supervision. The sentencing Judge in J.H. rejected the joint submission, holding that none of the statutory gateways to custody had been opened.

In J.H. it was held, in my view correctly, that whether or not a young person has failed to comply with the same non-custodial sentence on one or several occasions was irrelevant when considering whether section 39(1)(b) was triggered. The Court held that the language of section 39(1)(b) is unequivocal in requiring non-compliances of more than one non-custodial sentence. Once again, I agree. However, beginning at paragraph 19 the Court in J.H. held:

> "The more critical question for J.H., however, remains whether the non-compliance(s) with the sentence imposed November 5th, 2002, that is, whether the finding of guilt on each of the breach offences presently before the court, count for purposes of section 39(1)(b) YCJA. My view is that these do not. For a non-compliance of a non-custodial sentence to count for purposes of section 39(1)(b), the non-compliance must be other than the one that is

> the basis for, or arising out of, the offence currently before the Court for sentencing. My view is that these do not. For a non-compliance of a non-custodial sentence to count for the purpose of section 39(1)(b) the non-compliance must be other than the one that is the basis for or arising out of the offence currently before the Court for sentencing. It should be noted at the outset that this view is simply a matter of judicial interpretation of statutory wording that is equivocal. It could be taken either way."

J.H. held that there had to be two prior findings of guilt for offences each entailing a failure to comply with a separate non-custodial sentence in order for custody to be available under section 39(1)(b). In requiring the two prior findings of guilt for offences entailing breaches, J.H. held that the "equivocal" language of the legislators in section 39(1)(b) reasonably permitted either interpretation. At paragraph 29 the Court went on to say:

"Fourthly, is the consideration of why clause (b) exists in s. 39(1) YCJA. An analysis of the YCJA plainly shows a bias in favour of dealing with youth crime by sanctions that are non-custodial, by requiring the court to first consider all possible reasonable alternatives to custody and rejecting them, and by reserving custodial sentences for the most serious offences and those involving violence. How does the criterion for custody contained in section 39(1)(b) reconcile with such an anti-custody bias in the YCJA?"

At paragraph 31 the Court in J.H. also stated:

"In other words, section 39(1)(b) represents the attitude that "enough is enough" with some offenders. For some offenders, sanctions that do not take away their freedom don't work. Some just thumb their noses at non-custodial sanctions, and some ignore the conditions of their sentences. For such offenders the

availability of a custodial sanction is essential to meet the objectives of the YCJA. Without a custodial sanction for such offenders, the youth justice system cannot fully impose meaningful consequences. It cannot adequately emphasize fair and proportionate accountability. It will fail in the rehabilitation of such offenders, and reinforce for them that they can disobey and ignore court imposed sanctions with relative impunity."

However, at paragraph 35 and paragraph 36 the Court in J.H. concluded its interpretation of subsection 39(1)(b) stating:

"It seems inappropriately low to set the minimum threshold for custody at one prior instance of non-compliance with a non-custodial sentence apart from any non-compliance which might be inferred from the facts of the offence that is before the court. This is hardly a history at all. It seems to open the door to custody too readily when one considers the

bias against custody contained in the YCJA. For me, one single prior non-compliance is not enough. There should be a minimum of two separate non-compliances. Two separate sentences before custody becomes a possibility on any subsequent offence.

What section 39(1)(b) does is simply set a threshold. I interpret section 39(1)(b) YCJA as a three strikes rule. A young person is still in the game with two strikes against him or her. The third strike is what may result in custodial consequences under this rule."

J.H. was considered by the Newfoundland and Labrador Provincial Court in the case of R. v. M.S. (2005), N.J. No. 199. In that case the conclusion reached in J.H. was specifically rejected. In coming to a conclusion contrary to that set out in J.H., Gorman, Prov. Ct. J., held that:

"The practical effect of J.H. is the redrafting of section 39(1)(b) so

that it reads as follows:

> The young person has on two previous occasions failed to comply with non-custodial sentences."

I would go further. In my view, the practical effect of J.H. is a redrafting of section 39(1)(b) in the following or similar language:

> "The young person has on two previous occasions been found guilty of an offence entailing a failure to comply with separate non-custodial sentences."

However, Parliament did not use the foregoing or similar wording. For reasons I have already provided, I agree completely with Judge Gorman where he states at paragraph 23 of M.S.:

> "There is, however, no need to add such artificial prerequisites to the application of section 39(1)(b) as the words used in that section of the YCJA are clear and unambiguous. Two breaches of section 137 of the YCJA, regardless of when they

occurred, constitutes a failure to comply with non-custodial sentences if they relate to separate probation orders."

Because of the lack of ambiguity in what I view to be the clearly expressed intention of Parliament, I conclude that the approach taken by the Court in J.H. is unduly constructive.

However, while I have rejected the ultimate interpretation reached in J.H., I am of the view that much of what is said in other parts of the judgment has considerable merit. The Court in J.H. is correct in pointing out that the Youth Criminal Justice Act contains a number of provisions which demonstrate that custody should only be imposed as a last resort. However, I am of the view that the provisions in question, in particular those contained in sections 3 and 38 of the Act, do not permit an interpretation of section 39(1)(b) which is inconsistent with its clear and unambiguous wording.

I also agree completely with the judgment in J.H. where it states that if one of the four conditions precedent in section 39(1) of the Act are present, custody will not necessarily result and that the Court still retains a discretion as

to whether or not custody is imposed. In fact, I would go somewhat further and state that even where one or more of the gateways to custody contained in section 39(1) are open, it may well be the case that upon consideration of other provisions of the Act, including sections 3 and 38, it will become apparent that custody is still not available as a fit sentence.

Even where one or more of the gateways are open, there remains the question of fitness. Clearly, the Act's "Declaration of Principle" and the purpose and principles of sentencing set out in the Act must be taken into account when arriving at a proper sentence and in determining whether a given sentence is fit. The satisfaction of one of the conditions precedent contained in section 39(1) simply removes one of the barriers to custody which would otherwise exist. It may well be the case that even with that barrier removed the Court still lacks the "discretion" to impose custody as part of a fit sentence.

Finally, I agree with the Court in J.H. where it states that section 39(1)(b), "represents the attitude that enough is enough," and that there will be cases where it will be necessary to impose custody on offenders who have

repeatedly demonstrated that their behaviour is ungovernable through anything less than a custodial sentence. However, the clear wording of section 39(1)(b) is measured in its approach by simply requiring that two or more non-custodial sentences have been previously imposed and breached before custody is imposed.

Like the Court in M.S., I conclude that the wording of section 39(1)(b) of the Youth Criminal Justice Act is clear and unambiguous. A finding or findings of guilt entailing a failure to comply with non-custodial sentences which are presently before the Court for sentencing is enough to open the statutory gateway to custody provided for in section 39(1)(b) so long as different non-custodial sentences have been breached.

The next question I have to ask myself is whether custody is available as a fit sentence in this case. For the reasons I have given, it is clear that the gateway to custody provided for under section 39(1)(b) is open in this case. However, as I have said, before I can impose custody I must be satisfied that a sentence which includes custody would be fit under all of the circumstances.

I do not intend to review all of the

relevant provisions, including sections 3 and 38 of the Act at this point. However, I will point out rehabilitation and reintegration into society are the primary sentencing principles which I have to address. As well, the sentence cannot be disparate from other sentences imposed in the Northwest Territories on similar young persons found guilty of the same offence or offences as Mr. G. in similar circumstances. The principle of proportionality has to be considered, although section 3(b)(ii) provides that in addressing proportionality the Court must take into account the greater dependency of young persons and their reduced level of maturity.

Of particular importance is subsection 38(2)(d) and (e). Subsection 38(2)(d) requires that:

> "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of Aboriginal young persons.

Subsection 38(2)(e) requires that subject to the principle of proportionality set out in

subsection 38(2)(c) the sentence must:

> "(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
> (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
> (iii) promote a sense of responsibility in the young person and an acknowledgement of the harm done to victims and the community.

Subsection 38(3) provides that:

> "In determining a youth sentence, the youth justice court shall take into account
> (a) the degree of participation by the young person in the commission of the offence;
> (b) the harm done to 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 and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

I am not allowed to take into account a number of things. I am not allowed to take into account protection of the public in the narrow sense. I am not allowed to impose custody for the purpose of protecting the public by warehousing a young person for an extended period of time.

Also, in the decision of R. v. C.D., R. v. C.D.K. [2005] S.C.C. 668, the Supreme Court of Canada made it clear that since deterrence is not referred to as a sentencing principle in the Youth Criminal Justice Act, neither general deterrence nor specific deterrence in the narrow sense are a valid purpose when sentencing a young person. However, the Supreme Court allowed that proper sentences

imposed for valid reasons might well have a deterrent effect.

In the case before me, P.G. has a record for a number of findings of guilt. There is a finding of guilt for assault which was entered in August, 2005 for which he received five months' probation as a sentence. In February of 2006 he was found guilty of wilfully failing or refusing to comply with the probation order previously imposed and was sentenced to a community service order requiring that he perform 60 hours of community service work.

He has pleaded guilty to and been found guilty of a number of offences on which I will shortly impose sentence. The following is a summary of those findings of guilt:

1) Wilfully failing to comply with a Youth Court sentence contrary to section 137 of the Youth Criminal Justice Act. Mr. G. has admitted that he did none of the community service hours which were ordered by Judge Schmaltz on February the 21st of this year prior to the expiration of that order.

2) Breaking and entering into the Fort Providence Hamlet office on May 18th and committing theft therein contrary to section 348(1)(b) of the Criminal Code. Mr. G. admits

that he participated in a break and enter where stationery, food and a digital camera were stolen.

3) Breaking and entering into the Snowstar Mechanical Garage on June the 16th and committing theft therein contrary to section 348(1)(b) of the Criminal Code. He admits that he participated in the break and enter and the theft of a compact disc player and eight or nine beers which were taken from a refrigerator inside that garage.

4) Breaking and entering the Northern Store warehouse on or between July 18 and 19 and committing the indictable offence of theft not exceeding $5,000 contrary to section 348(1)(b) of the Criminal Code. He admits he participated in the break and enter and the theft of five pellet handguns and several bags of potato chips. The total amount of property taken amounts to $287.45. Four individuals participated in this break and enter.

5) Breaking and entering a private garage on July the 20th and committing theft contrary to section 348(1)(b) of the Criminal Code. He participated in the break and enter by using a pry bar to get into the garage and stealing keys once inside the garage.

6) Breaking and entering into the Snowstar Mechanical Garage and committing theft on July 20th, once again, contrary to section 348(1)(b) of the Criminal Code. Mr. G. admits that he participated in a break and enter where the keys stolen earlier that day were used to get into the Snowstar Mechanical Garage once again where pop and a DVD movie were taken.

7) Failing to comply with an undertaking entered into before a peace officer in charge contrary to section 145(5.1) of the Criminal Code. Mr. G. admits that on July the 17th he was placed on an undertaking by a peace officer. One of the conditions of the undertaking was to have no contact with a certain named individual and he breached that condition on the date charged.

For the reasons which I have already provided, the statutory gateway to custody contained in section 39(1)(b) is opened. Mr. G. is now 17 years old. He was 16 throughout the time that he committed the offences on which he has been found guilty. He has been in pre-trial detention since July 27th, a period of two months.

The pre-sentence report which has been prepared and filed is of assistance. It points

out that a custodial disposition would place Mr. G. in a well supervised setting with a required education program. His behaviour would be monitored and he would be given the opportunity to participate in programs offered by the receiving facility. The author of the report appears to recommend custody, given Mr. G.'s escalation in crimes, lack of parental support and lack of services within the community of Fort Providence. However, the report also advises that Mr. G., at least at the time immediately prior to the report, was not doing well in custody.

In any event, I have to take into account the fact that the Youth Criminal Justice Act provides that sentencing under the Act is not to be a substitute for child protection proceedings.

In this case I am taking into account the fact that the break and enter offences were into places other than dwelling houses. I am taking into account the fact that it appears that neither the value of the items stolen nor the harm suffered by Mr. G.'s victims appears to have been great. I am taking into account the fact that there are no prior property related findings of guilt indicated on the criminal record.

However, in relation to the present finding

of guilt contrary to section 137 of the Act and the finding of guilt contrary to section 145(5.1) of the Criminal Code, I am taking into account the single prior entry which was entered in February of this year when Mr. G. breached the probation order he was previously under. I am taking into account the fact that he has never received a custodial sentence before and I am taking into account the fair and appropriate position of the Crown, as well as what has been said on Mr. G.'s behalf by Mr. Hansen as amicus curiae in his able submissions.

Finally, I am taking into account all of the statutory provisions and the case law dealing with the sentencing of young persons which I have already referred to.

Mr. G., stand up. Is there anything you would like to say at this particular point?

THE YOUNG PERSON: No.

THE COURT: All right. Sit down. In my view, given P.G.'s age and the lack of any previous custodial sentences, there have already been meaningful consequences imposed on Mr. G. as a result of his criminal behaviour and nothing more of a punitive nature need be imposed at this particular point in time.

There will be a probation order. It will be

for a period of nine months on all of the findings of guilt presently before the Court. The terms of the probation order, in addition to the statutory term, one of which, I should point out, requires that he keep the peace and be of good behaviour, will be as follows: He is to report to his youth worker forthwith - I see that she is here present in the courtroom - and he is to report to her or whoever is assigned to his case thereafter as directed. He is to take all counselling as directed by his youth worker, and that counselling will include, but is not limited to, counselling for alcohol abuse and counselling for marijuana abuse. He is to reside at the home of his sister, A.G., in Fort Providence. He is not to be outside the residence of A.G. between the hours of 10 p.m. and 7 a.m. each and every day throughout the duration of the probation order except in the company of either A.G. or G.B.?

MR. HANSEN: Yes, sir.

THE COURT: Or with the written permission of either of those two individuals. He is to attend school each and every day that school is held unless Mr. G. is too ill to attend school.

Now, Mr. G., you indicated to the author of the pre-sentence report that one of the reasons

you have committed all of the crimes that I am sentencing you on here today is because you have friends that persuade you to do bad things. Is that right?

THE YOUNG PERSON: (No verbal response).

THE COURT: Well, you are 17 years old now. You are a big boy. You are going to have to be careful who you hang around with. Do you understand that?

THE YOUNG PERSON: Yeah.

THE COURT: You are also on probation. If you breach this probation order by committing a further crime or not doing any of the things that I have ordered that you do, you can expect that there will be a real likelihood that you will go back to custody. Do you understand that?

THE YOUNG PERSON: Yeah.

THE COURT: All right. I am not going to make any order of restitution at this particular point, Mr. Hubley. From what I have observed of Mr. G., I don't really see the point.

MR. HUBLEY: That's correct, Your Honour.

THE COURT: Anything else?

MR. HUBLEY: There were three individuals who these crimes were committed with. I'm not sure --

THE COURT: I don't have the names of

those individuals. If you could give them to me.

MR. HUBLEY: I have the names here, Your Honour.

THE COURT: Yes.

MR. HUBLEY: The first individual is C.L., S.P. and K.B., K. spelled with a K. As Your Honour is no doubt aware, S.P. was one of the individuals who he was to remain away from under the second 145 finding of guilt.

MR. HANSEN: Sir, perhaps added to the list, P. has indicated that one of the primary motivators in these matters was a young person by the name of A.J.E. So perhaps no contact with him either.

THE COURT: What is the first name?

THE YOUNG PERSON: A.

MR. HANSEN: A. He goes by A.J.

THE COURT: A. is fine. E.?

MR. HANSEN: Yes.

THE COURT: All right. There will be a term in the probation order that Mr. G. have no contact whatsoever either directly or indirectly with any of those named individuals; A.E., C.L., S.P., K.B.

MR. HUBLEY: Your Honour, if I may, I am not sure about those youths, whether or not they're attending the same school. Perhaps a

condition that unless absolutely necessary if they are going to school.

THE COURT: Well, I am not saying that it is a bad suggestion, Mr. Hubley, but whenever it comes to terms on a probation order one can think of a million and one possible exceptions if you turn your mind to it. I could think of many. In fact, I could be here until next Monday thinking up all of the possible exceptions one might want to ideally impose. I am going to leave it to the discretion of the police on whether to charge him in case any of these conditions are breached where breaches are practicably unavoidable, and I will leave it to your office in the case such a charge is laid on whether or not to actually prosecute. How does that sound?

MR. HUBLEY: That is a great idea, Your Honour.

.....

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules.

_____

Jill MacDonald, CSR(A), RPR
Court Reporter