Date: 2013 01 20
Files: Y-2-YO-2013-000087
Y-2-YO-2013-000061
Y-2-YO-2013-000062

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

R.B.

AND BETWEEN:

HER MAJESTY THE QUEEN

- and -

H.P.

REASONS FOR SENTENCE

of the

HONOURABLE CHIEF JUDGE ROBERT D. GORIN

Heard at:	Yellowknife, Northwest Territories December 17, 2013
Reasons Filed:	January 20, 2014
Counsel for the Crown:	M. Feldthuson
Counsel for the Accused:	T. Amoud

(Both young persons charged under section 434 of the *Criminal Code;* H.P. also charged under section 349(1) & 430(4) of the *Criminal Code*)

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A. Introduction

[1] On December 17th, I sentenced the accused young persons, R.B. and H.P, for a number of offences including arson, contrary to s. 434 of the *Criminal Code*. One of the matters which required determination was whether or not a custody and supervision order was available on the arson count. I determined that in each case custody was available and advised that written reasons would follow on this point. Although the young persons were dealt with separately, I find it appropriate to provide my written reasons in relation to both young persons together.

[2] In order for custody to be imposed under the *Youth Criminal Justice Act (“YCJA”)*, one of the four “gateways to custody” set out in s. 39(1) of the Act must beopen. Both counsel agreed, as did I, that the statutory gateway provided for under s. 39(1)(a) (violent offence) was not open in the case of either young person.

[3] In the case of H.P., who previously had no prior involvement with the justice system, both counsel agreed that the gateways provided in ss. 39(1)(b) (breach of non-custodial sentences) and 39(1)(c) (past pattern) were not open. Once again, I agreed with counsel’s assessment. However Crown counsel submitted that the s. 39(1)(d) (exceptional cases) gateway was open with respect to the arson. Defence counsel on the other hand, argued that s. 39(1)(d) was inapplicable.

[4] In the case of R.B., who had 9 prior convictions including 3 for breaching the same probation order at different times, Crown counsel ultimately took the position that the statutory gateways provided for under ss. 39(1)(b) (breach of non-custodial sentences), 39(1)(c) (past pattern), and 39(1)(d) (exceptional cases) were open. Defence counsel essentially conceded the applicability of ss. 39(1)(b) and 39(1)(c) but again argued that the requirements of s.39(1)(d) were not made out. He also argued that even though ss. 39(1)(b) and 39(1)(c) were applicable, the additional prerequisites for a custodial disposition set out in s. 39(2) had not been fulfilled.

[5] I ultimately held that for both R.B. and H.P. a custodial disposition was available for the arson offence. In each case I also concluded that only a sentence including custody was appropriate. I imposed a 6 month deferred custody order pursuant to s. 42(2)(p), including a term of house arrest on both young persons.

[6] In concluding that a custodial disposition should be imposed in the case of H.P, I found that the requirements of s. 39(1)(d) were satisfied. In the case of R.B.,

I concluded that the requirements of ss. 39(1)(b), 39(1)(c), and 39(1)(d) as well as s. 39(2) were made out. My reasons are set out in the following paragraphs.

Relevant Statutory Provisions.

[7] In order for custody to be imposed, one of the "gateways to custody" provided for under s. 39(1) *YCJA* must be open. S. 39(1) states:

> 39. (1) 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 either extrajudicial sanctions or of findings of guilt or of both 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.

[8] Furthermore subsection (2) of s. 39 states:

> (2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

[9] Section 38 in turn states:

> 38. (1) The purpose of sentencing under section 42 (youth sentences) 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.

Sentencing principles

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

> (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
>
> (b) the 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;
>
> (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
>
> (d) 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;
>
> (e) subject to paragraph (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; and
>
> (f) subject to paragraph (c), the sentence may have the following objectives:
>
> > (i) to denounce unlawful conduct, and
> >
> > (ii) to deter the young person from committing offences.

(3) 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.

Applicability of S.39(1)(b) *YCJA* to R. B.

[10] In determining that custody is available for R.B. under s. 39(1)(b), I have considered that the past convictions for failing to comply with a youth sentence contrary to section 137 were for breaches of the same court order and that the accompanying charge alleging a breach of a subsequent probation order was withdrawn by the Crown after a conviction was entered on the arson count. However, a certified copy of that probation order was filed with the Court as an exhibit in these proceedings. Clearly, by committing the arson, R.B. failed to keep the peace and be of good behaviour as required in the probation order he was under at the time.

[11] I acknowledge that if I were to count only the convictions on the Accused's record, it could not be said that he has "failed to comply with non-custodial sentences" since the convictions were for breaching the same non-custodial sentence. However, s. 39(1)(b) does not speak of past convictions, it simply requires that the Accused "has (previously) failed" to comply. Therefore, the

matter before the court can be counted when determining whether or not the s. 39(1)(b) applies.

[12] Furthermore, I find that the wording of s. 39(1)(b) does not necessarily require a finding of guilt under s. 137 of the YCJA. It simply speaks of an aggravating factor, which like all aggravating factors, must be proved beyond a reasonable doubt. As stated, it is clear in the present case that when R.B. committed the arson, he breached the probation order he was under. Considering the breach convictions for breaching his first probation order that are on his record – and the breach of the subsequent probation order he was placed on, which he committed by committing the arson offence – I conclude that it has been established that he has "failed to comply with non-custodial sentences".

<u>Applicability of s. 39(1)(c) *YCJA* to R.B.</u>

[13] In setting out its requirements, s. 39(1)(c) uses language that is quite distinct from that of s. 39(1)(b). Among other things, s. 39(1)(c) requires that there be a "*history* that indicates a pattern of extrajudicial sanctions or of findings of guilt…". As stated by the Supreme Court of Canada in *R. v. C.(S.A.) [2008] S.C.J. No. 48 (S.C.C.),* s. 39(1)(c) requires that the only findings of guilt to be considered are the ones that were entered prior to the commission of the offence for which the young person has been sentenced. The Supreme Court also held that:

- in order to satisfy the requirements of the subsection, three or more prior convictions would need to be proved;
- there is no requirement that the prior convictions be indictable;

- there is also no requirement that the prior convictions be similar to each other or the matter before the court.; and
- where however there are only two prior convictions, the sentencing court may find that a "pattern of findings of guilt" exists if the prior offences and the matter before the court are sufficiently similar to one another.

[14] In R.B.'s case, the number of prior convictions before the court is well in excess of three. As well, arson is indictable by law. Therefore the requirement that the offence on which the young person is to be sentenced be indictable has been met. The statutory gateway to custody set out in s. 39(1)(c) is also open to R.B.

Applicability of s. 39(1)(d) *YCJA* to both R.B. and H.P

[15] Like s. 39(1)(c), s. 39(1)(d) requires that the matter before the court be indictable. As stated, that requirement has been met. The subsection also requires that the offence must be an exceptional case where a non-custodial sentence would be inconsistent with the purposes and principles of s. 38.

[16] An "exceptional case" does not necessarily require that the offence and its circumstances be rare. Rather, exceptional cases are made out where any disposition, other than custody, would undermine the purposes and principles of sentencing set out in s. 38 or where applying the general rule against a custodial disposition would undermine the purposes of the Youth Criminal Justice Act: *R. v. W.(R.E) (2006), 205 C.C.C. (3d) 183, (O.C.A).* Exceptional cases are limited to

the "clearest of cases" where a custodial disposition is obviously the only disposition can be justified: *R. v. W.(R.E) (supra).*

[17] However, the language of s. 39(1)(d) requires that in determining whether or not the matter before the court is an exceptional case, the focus of the court must be on whether "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". The focus of the court must therefore be on the circumstances of the offence and not the circumstances of the offender or his history: *R. v. W.(R.E.) (supra).*

[18] Whether or not s. 39(1)(d) applies will depend on the circumstances and aggravating factors of each individual case: *R. v. J.(C.D.), [2005] A.J. No. 1190 (A.C.A).* While I do not necessarily find that every case of arson requires custody, I find that the circumstances of the arson committed by R.B. and H.P. do. Specifically, I find that a non-custodial sentence would be inconsistent with the requirements of proportionality, responsibility and rehabilitation set out in section 38.

[19] The offence committed by R.B. and H.P. was very serious. They went into an abandoned house located within the municipal boundaries of Hay River. The house had previously been damaged by a fire and was beyond the point of economical repair. While inside the house, they set it on fire. They were observed leaving the house while hiding their faces with their hoodies. Firefighters were called out and attempted to stop the fire. However, the house completely burned down.

[20] I accept that this arson was not as serious as would have been the case had the house been inhabited or of greater value. However, by starting the fire R.B.

and H.P created a very real danger to the people and property in the vicinity as well as the fire-fighters who were called out to fight the blaze. I do not find the arson to be analogous to mischief. House fires have the potential to spread to other buildings located in their immediate vicinity. The photographs that were entered into evidence show a number of other structures located nearby the burning house. The arson committed by R.B. and H.P. created a very serious threat to those nearby and to the community in general. While I have not sentenced them based on what might have happened, I certainly considered the real and obvious risk that was inherent in their crime.

[21] In examining the applicability of s. 39(1)(d) to arson, I note that the clear majority of the arson cases decided by Youth Justices Courts, have resulted in custodial dispositions; see: *R. v. B.(D.) (2007), 273 Nfld. & P.E.I.R 314 (Nfld. & Lab Prov. Ct.); R. v. T.(S.),[2009] B.C.J. No. 1206 (C.A.); LSJPA-0739 (Re) (2007), 75 W.C.B. (2d) 158 (Q.C.A.).* The only exception I noted was in the case *R. v. R. (K.) (2005), 66 W.C.B. (2d) 481 (Ont. C.J.).* However, in determining that custody was not required, the court in R.(K.) took into account the 48 days which R.(K) had spent in pre-trial custody.

[22] At the end of the day, I feel that the offence committed by both young persons was so serious that the principles of proportionality and denunciation require a custodial disposition. In saying this I recognize the primacy of rehabilitation and reintegration into society as sentencing goals under the Act. However, for reasons I will later articulate, I find that these principles can all be properly addressed through a deferred custody and supervision order.

<u>Applicability of s. 39(2) YCJA to R.B.</u>

[23] I have previously determined that the gateways to custody set out in ss. 39(1)(b) and 39(1)(c) are open. However, before I am able to impose custody pursuant to those sections, I must also find that the requirements of s. 39(2) are met - that there is no reasonable alternative or alternatives to custody that are consistent with the purposes and principles of s. 38.

[24] It is important to note that s. 39(2) applies only to ss. 39(1)(a), (b), and (c) and does not apply to s. 39(1)(d). The reason seems self-evident. S. 39(1)(d) already requires that a non-custodial sentence must be inconsistent with the purpose and principles set out in s. 38. Repeating the same analysis again would be pointless.

[25] For essentially the same reasons I articulated when examining the applicability of s. 39(1)(d), I find that the prerequisites set out in s. 39(2) have been satisfied and that a custody and supervision order is required under ss. 39(1)(b) and 39(1)(c), as well. I acknowledge that s. 39(1)(d) is somewhat different from the other gateways to custody in that the focus is purely on the offence as opposed to the offender. However, regardless of which gateway to custody is open, if after conducting the s. 39(2) analysis the court determines that an offence is so egregious that only a custodial sentence will satisfy the principles contained in s. 38, custody must be imposed.

<u>Personal Background Factors</u>

R.B.

[26] In reaching the conclusion that deferred custody is sufficient in the case of R.B., I have considered many of the background factors referred to in the presentence report prepared prior to sentencing and outlined by defence counsel. R.B. is a 17 year old of Inuvialuit and Metis descent. He lives with his mother. His mother and his natural father separated when R.B. was very young. R.B.'s primary father figure was his stepfather, who also recently separated from his mother. The presentence report indicates that R.B.'s stepfather consumed alcohol to excess and was emotionally abusive toward R.B.'s mother. From the facts set out in the presentence report, it appears that the relationship between R.B.'s mother and stepfather was very destructive.

[27] As a result R.B. left the home and lived on the streets in Edmonton. The presentence report advises that it was during this period that the majority of the offences set out in his criminal record occurred. Defence counsel noted that some of the thefts related to getting food and that the conviction for carrying a concealed weapon was the result of R.B. being found with a knife he carried for protection.

[28] Notwithstanding his difficult past, R.B.'s teacher describes him as being a well-mannered youth with no anger problems. However, the presentence report notes that he also has problems with low self-esteem and depression. He has recently obtained a job in a grocery store and is working 24 hours a week.

[29] I agree with defence counsel that there are case specific factors relating to R.B.'s background as a person of aboriginal descent that must be taken into consideration. R.B.'s stepfather attended residential school and experienced physical, sexual and emotional abuse which, in turn, contributed to the substance and anger issues that R.B. witnessed while growing up.

[30] It is not uncommon for historical injustices, such as those visited on Canada's aboriginal peoples, to reverberate for generations. However, I do not accept that the mere fact that an aboriginal young person's parents have attended residential school will necessarily impact negatively on his upbringing and in turn increase the likelihood of criminal behaviour. Nonetheless, in the present case, I am satisfied that R.B.'s stepfather's experience in residential school has contributed to case specific factors in R.B.'s background which to some degree decrease his moral blameworthiness. While I have concluded that custody is required, I must still pay careful attention to the duration and form of custody to be imposed.

[32] I have concluded that the custodial sentence should be served in the community through a deferred custody order followed by a probation order. I have considered the fact that R.B. has three prior convictions under s. 137. I have also considered that he breached a probation order he was under on the date he committed the offence for which I sentenced him. However, his environment appears to have improved considerably and indications are that he is back on track.

[33] It is for that reason that the sentence which is attached as an appendix to this judgment was ordered.

H.P.

[34] Unlike R.B., H.P. has had no prior involvement in the system. However his case also differs from that of R.B. in that he was being sentenced for a number of offences in addition to the arson matter before the court. These offences included a count of unlawful entry into a dwelling house contrary to section 349(1) of the *Criminal Code* and a count of mischief contrary to section 430. Both offences

occurred on the same day and were carried out 14 days prior to the arson he committed with R.B.

[35] The facts of both offences are straightforward. He entered the “Old Folks’ Home” in Hay River through an open window after visiting hours. He walked around trying doors to approximately 5 rooms and then left after having been in the building for approximately 10 minutes. Later on that same evening, he was caught on video breaking the driver’s side front window of a van owned by a local business. Nothing was taken from the vehicle although afterwards it appeared that someone rummaged through it. H.P was heavily intoxicated while carrying out both offences.

[36] Counsel agree, as do I, that none of the gateways to custody are open for the two offences contrary to ss. 349(1) and 430(4).

[37] H.P was 18 years old on the date of his sentencing and was 17 at the time that he carried out all of the offences before the court including the arson. He is of Dene and Inuvialuit descent. Unlike R.B., his family background has been quite positive. His family is supportive and his mother has had a very constructive role in his life. Alcohol and drugs are not allowed in the home. There is no indication of abuse or violence within his immediate family. Defence counsel has agreed that notwithstanding his aboriginal heritage, there are no case-specific factors that bring his client within the ambit of s. 38(2)(d). I agree with defence counsel that there are no background factors that decrease H.P.’s moral blameworthiness. Still, in analyzing the sentence to be imposed on an aboriginal young person, I must bear in mind that a restorative approach to justice is common in aboriginal cultures: *R. v. Ipeelee* [2012] 1 S.C.R. 433.

[38] H.P. has a grade 9 education and although not enrolled in school he is employed at a full time job. He pays rent at home and is said to be following all the rules of the home. He has stated through counsel that he has been coming home every night and has not drunk since the date of the arson offence.

[39] Like his coaccused, he has pleaded guilty. He is very remorseful for his conduct. As he has stated "I know right from wrong but when I'm drinking I make bad choices and I've disappointed my family".

[40] As in the case of R.B., I have concluded that while custody is necessary for the arson offence, it can and should be served in the community. I also think that the principle of parity outlined in s. 38(2)(b) requires that the sentence imposed on B.H. be similar to that imposed on R.B.

[41] I find that a fine and probation order are appropriate for the offences contrary to s. 349(1) and 430(4) of the Criminal Code. Once again the sentences imposed will be set out in an appendix to this judgment.

[42] I thank counsel for their assistance in this matter.

R.D. Gorin, C.J.T.C.

Dated at Yellowknife, Northwest Territories
this 20 day of January, 2014

APPENDIX

Sentence Imposed on R.B.

Arson - s. 434 CC

Deferred Custody and Supervision Order – 6 months

Statutory Conditions

Curfew for first 4 months 8pm – 7 am;

80 hours of community service at 15 hours per month;

Report to CSO Supervisor and Probation Officer as directed;

Participate in assessments, programs counseling for trauma, drug addiction and grief issues as directed;

Abstain from consumption of alcohol and other non-prescribed drugs;

Work with support persons as directed; and

No contact with H.P unless in the presence of a parent or guardian.

Probation Order – 6 months

Report to Probation Officer as directed;

Participate in assessments, programs counseling for trauma, drug addiction and grief issues as directed;

Abstain from consumption of alcohol and other non-prescribed drugs;

Work with support persons as directed; and

No contact with H.P unless in the presence of a parent or guardian.

Firearms Prohibition Order – 3 years

DNA Authorization

Sentences Imposed on H.P.

Arson - s. 434 CC — Deferred Custody and Supervision Order – 6 months

Statutory Conditions

Curfew for first 4 months 8pm – 7 am;

80 hours of community service at 15 hours per month;

Report to CSO Supervisor and Probation Officer as directed;

Participate in assessments, programs counseling for trauma, drug addiction and grief issues as directed;

Abstain from consumption of alcohol and other non-prescribed drugs;

Work with support persons as directed; and

No contact with B.G. unless in the presence of a parent or guardian.

Probation Order – 6 months (imposed on all three convictions)

Report to Probation Officer as directed;

Participate in assessments, programs counseling for trauma, drug addiction and grief issues as directed;

Abstain from consumption of alcohol and other non-prescribed drugs;

Work with support persons as directed; and

No contact with R.B. unless in the presence of a parent or guardian;

Not to proceed within 10 meters of *specified address 1*;

	Pay restitution to the Clerk of the Territorial Court for the benefit of *specified complainant 1;* Not to proceed within 10 meters of *specified address 2*; Pay restitution to the Clerk of the Territorial Court for the benefit of *specified complainant 2.*
	DNA Authorization
Unlawfully Entering a Dwelling House - s. 349(1) CC	$ 500 Fine plus $ 75 VCS – 6 months TTP
Mischief by Causing Property Damage - s. 430(4) CC	$ 300 Fine plus $ 45 VCS – 6 months TTP

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