

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. A.S., 2012 NSPC 104

Date: November 26, 2012

Docket: 2399529

Registry: Halifax

Her Majesty the Queen

v.

A.S., a young person

DECISION

Judge: The Honourable Judge Jamie S. Campbell

Heard: November 26, 2012

Decision: November 30, 2012

Charge: cc 234

Counsel: Jamie VanWart and Terri Lipton - Crown Attorneys
Megan Longley and Brad Sarson - Defence Counsel

By the Court:

Introduction:

[1] People have every reason to be angry about this case.

[2] Lavinia Campbell was brutally murdered in her own home almost a year ago. In their victim impact statements the members of Ms. Campbell's family and one of her close friends have each spoken of their deep sense of loss. It must be unspeakably difficult to sit in the same courtroom with a person who was present when she was murdered, who heard her last cries for help and who bears some responsibility for her death.

[3] I said that people have every reason to feel angry about this case. There are more than enough reasons to justify it. Those reasons may be broader than they at first appear.

[4] Jamie Gallant, who was 18 years old at the time of Ms. Campbell's death, has been sentenced to life imprisonment for her murder. A.S. has pleaded guilty to manslaughter. He will be sentenced, as a young person, for his involvement. It would be easier to respond to this horrific incident by leaving it at that. It would be easier to consider just what happened that day. Justice, in perhaps some imperfect form would be seen by some to have been done. For some people, no sentence however harsh would ever be enough to reflect justice. But there is more to this.

Background of A.S.:

[5] There are reasons to reflect on what brings a young person to a point where he can become involved in such things as this. That reflection will not

answer the fundamental question of why this happened. It may only serve to raise more questions than it answers. Those are questions that should be, and have to be asked.

[6] The death of Lavinia Campbell and life of A.S., to date, are in some ways an indictment. Something is wrong. Something is dreadfully wrong. And there is more than enough blame to go around.

[7] A.S. was born in December 1995. Ms. Campbell was killed when he was still 15 years old. He will soon turn 17. He already has a child of his own, born while he was in custody. He has still not seen that child.

[8] He is of Maliseet ancestry from a First Nation community in New Brunswick. The Maliseet people are closely related to the Mi'kmaq. While the experiences on New Brunswick reserves are not identical to those in Nova Scotia there are many similarities.

[9] That community like many other First Nations communities in Canada has been ravaged by drugs and alcohol. That didn't just happen on its own. Government control of aboriginal life across Canada was characterized by less than benign neglect. The residential schooling system is one example of how assimilationist government policies have had far reaching implications.

[10] Generations of young parents were left with child rearing responsibilities while having no reference points and no traditional teaching. People learn to parent from their parents. Even well-meaning school administrators are not an adequate substitute. Physically, sexually and emotionally abusive ones leave a pernicious legacy for subsequent generations.

[11] From the 1950's through to the 1970's a great many children from First Nations communities were taken away from their families and placed in state care. A disproportionate number of First Nations children are even now born with developmental issues due to problems with substance abuse experienced by their mothers. Poverty rates remain far worse than they are among other groups within the population. Levels of educational attainment remain behind those in other communities. Housing and infrastructure in many First Nations communities are at third world standards. A hugely disproportionate number of aboriginal people are in jails across the country.

[12] First Nations communities in Canada are trying to find ways to cope with the effects of years of social disruption and dislocation.

[13] A.S. was born into this context. His father was born into this context. His grandparents were born into this context. And now, his son has been born into this context.

[14] When A.S. was born his mother, who is not of aboriginal ancestry, was herself a child of 16. His father was 19 at the time. His father has been in and out of jail for robbery and other violent offences. He describes his father this way. "Dad acts like a prick. Did then. Does now."

[15] At the time of his birth, his parents were living with his maternal grandfather and great grandmother. Family members said that "they were kicked out because they were drinking and partying all the time." The relationship between his parents was described as "highly conflicted".

[16] Until he was about 2 years old A.S. lived with his mother, his grandfather and his great-grandmother. His mother had a difficult relationship with her own father. That resulted in her leaving the home for periods of time. Sometimes she took the baby and sometimes she didn't.

[17] When A.S. was about 4 years old his mother got her own apartment. Not long afterward she got into trouble with the law. She went to jail. He was sent to live with his aunt, then briefly with his father and then with his grandfather. He developed a close relationship with his grandfather who treated him like a son. They spent time together fishing and hunting. Those times seem to have been the happiest and most secure of A.S.' life.

[18] When he was 12 years old his grandfather died. It was widely acknowledged that he was hugely affected. One family member said that she had never seen a child so traumatized by the loss of a grandparent. In an interview A.S. said that at the time, "I felt like no one loved me...I didn't give a shit."

[19] After that he stayed with his great grandmother. She died only 13 months later. When that happened he went to live with an aunt. His mother moved to Dartmouth so that she could resume a relationship with a man who had just been released from jail. A.S. left New Brunswick to live in Dartmouth with his mother around this time. That lasted all of one month. He returned to his aunt in New Brunswick, then, two months later, he was back with his mother in Nova Scotia.

[20] When he did go to live with his mother things went downhill. One family member said that "every time she would bring him back, that poor kid had it hard, no love, no affection, she blamed everything on him."

[21] His mother moved frequently, including a trip out west to be with another new boyfriend. She called her sister regularly, looking for money. She was evicted for not paying rent, had her power shut off and often had no money for food. A.S.' aunt reported that at one point his mother was living above a bar and would go down to the bar and leave the children on their own.

[22] The same sister reported that his mother didn't like to get up in the morning so the children were rarely in school. He was involved with drugs and alcohol by the time he was about 12. He was described as a regular user of marijuana during his late elementary school years. It was reported that through this time, he basically did whatever he wanted to do. Essentially, there was no one to tell him anything different. There was no parental control or authority and, it seems, very little direction of any kind.

[23] A.S. was taken into care by the Department of Community Services in March 2009. He was placed at the Reigh Allen Centre, Wood Street Centre and Jubien House. He frequently went to his mother's home without permission. There were serious behavioral issues while he was in those placements.

[24] His mother made arrangements to go back to New Brunswick in July 2009 and he was returned to her care on the understanding that the family would be moving. The move happened in August of that year. The very next month, September 2009, his mother dropped him off with his father in New Brunswick and came back to Nova Scotia with her daughter. He left his father's care. He came back to Nova Scotia yet again when his father went to jail.

[25] There was another cycle of A.S. coming to Nova Scotia and returning to New Brunswick before he finally came to Dartmouth in the spring of 2011.

[26] His mother and her boyfriend were charged with trafficking in crack cocaine around this time. The Department of Community Services became involved with the family once again when his mother made a complaint of assault against her son. He said that his mother told him that he could no longer live with her because his younger sister would be removed from her care. He stayed with his girlfriend for a while but her family was also on social assistance and could not afford to keep him.

[27] During the late fall of 2011 he called his aunt. She recalled that she was very upset by it. He said that he had no place to stay and it was getting cold. She called two shelters but was told that because of his age he was not eligible for a space in either of them. A.S. said that at this point he resorted to dealing in drugs. His mother served as a role model in that. He said "I saw all the money mom had in the apartment before they got caught".

[28] He met up with a man named Bill, who he describes as an "old crack head". He stayed with Bill at his apartment. They were not related in any way and the person known only as Bill, provided nothing other than a place to stay. A few weeks later he was introduced to Jamie Gallant through his connections with Bill.

[29] He described the routine while staying at that apartment as "wake and bake." He and his friends would start smoking marijuana immediately on getting up. They would spend the day texting, getting stoned and watching television. They would go out when it got dark. When asked how he financed that lifestyle,

he said that he would steal from parked cars with his friends. During another interview he said that one of his friends was selling crack and that he was the runner.

[30] This was the situation in which A.S. was living when he became involved with Gallant and eventually in the death of Lavinia Campbell. He was then 15 years old. He had been moved around so much that his education had been severely disrupted. He was not going to school. He was living in a strange city with no family support. His father's life had been punctuated by bouts with drug addiction, violent crime and jail. His mother's only real role modeling was as a drug dealer and a vagrant. His grandfather and great grandmother who had provided some kind of stability for him were both dead. His aunts were in New Brunswick. He was living between the streets and couch surfing in a crack den.

[31] This was the life of a 15 year old child. The Youth Criminal Justice Act refers to people under 18 as young persons. Sometimes though, they are children, as much as it hurts to recognize that.

[32] Seeing A.S.' mother in court, it is difficult not to make comments that are at once both hurtful and uninformed. It would be tempting to suggest that had she been as concerned a parent as she is a histrionic court spectator, her son might not have found himself where he is today. She is animated and loud in pronouncing her love for her son each time he is lead away from the courtroom. But the sad and increasingly complex story surrounding Lavinia Campbell's death involves her as well.

[33] As a parent she has essentially not been able to provide anything for her son. Their relationship is not particularly close. It has been described as toxic and volatile. Unlike some parents, she is not someone of whom it can be said, that she will be there for him no matter what. She certainly hasn't been. She has not been able to provide for him in any of the ways that parents provide for their children. Moral, emotional, and financial support have been entirely absent.

[34] Again, it would be easy to blame her. But she has a context as well. She is now about 34 years old. Her mother abandoned her when she was only 17 days old. Her mother was addicted to drugs and alcohol and died at 38. By the time A.S.' mother was 12 or 13, she was already disappearing for days at a time and involved with drugs and alcohol. She only got as far as Grade 7 or Grade 8. Her relationship with her own father was characterized by constant conflict. A.S. was born when she was 16. She has never really had a steady place to live or it would seem any kind of stable life.

[35] When children are living on the streets by 13 and having their own children by 16, it should come as no surprise, much less as a shock, that life holds bleak prospects for their children.

[36] A.S. is not being sentenced as a member of a racial group. He is not being sentenced as a victim of his own life circumstances. He is being sentenced as an individual who is and was responsible for his own actions. Treating him otherwise would be, among other things, patronizing. He is a moral agent responsible for what he does or does not do. At the same time, he is not being sentenced in a vacuum. Context matters. That will include the horrific circumstances surrounding

the death of Lavinia Campbell. It must also include a consideration of who A.S. is, in both the immediate sense and in the broader sense.

Reports relating to A.S.:

[37] Dr. K. Ahmad a psychiatrist with the IWK Mental Health and Addictions Program reported that A.S. has shown signs of remorse.

He stated it was a very traumatic event for him and he was not only scared but had problems in sleeping visualizing this lady being on the floor with a lot of blood around. While he was describing the event he became teary eyed.

[38] That is consistent with what was reported by an experienced probation officer, Mark Crosby. Mr. Crosby described him in the Presentence Report as “a very personable young man, with strong natural intelligence”. He seemed to be open and genuine in his responses. He expressed what appeared to Mr. Crosby to be genuine remorse for what had happened. Mr. S. become choked up when talking about the offence. “After a few moments of quiet struggle he commented he still finds it hard to believe, when he looks back, that he became involved in such behaviour.”

[39] Laura Hall is the assigned worker for Mr. S. in the Nova Scotia Youth Facility at Waterville. She has worked with him regularly. She reported that he had not been a major concern within her unit. She described him as being a polite, mature young man who interacts in a positive manner with the staff. He is quiet, keeps to himself and tries not to get caught up with the immaturity of the group who

surround him. He has little difficulty following staff direction but will not be bullied by his peers.

[40] He has been involved with the Controlling Anger and Learning to Manage it (CALM) program. He was an active participant who demonstrates the tools and skills to deal with his emotions. He has participated in the Substance Abuse Program and shows an eagerness and willingness to learn. He is an active participant in recreation programs.

[41] One piece of information reported by Ms. Hall is particularly noteworthy. In one of their sessions, Mr. S. said to her, with his head bowed and crying, "I have to live with what I did for the rest of my life".

[42] Unlike many young people who have committed violent crimes, he has not tried to use that to gain status within the institution. Ms. Hall has never heard him speak of it to any other young person. She believed that no other staff person had heard him speak of it either.

[43] A.S. appears to be a young man who is capable of making changes if the circumstances are right. He spent two months in the Wood Street Centre. By the end of his stay there he reportedly showed a "marked reduction in the frequency of his defiant behaviour". He also showed a good ability to demonstrate compliance with staff expectations and with the routine of the Centre. Once released from that highly structured environment he was placed at Jubien House. His behaviour deteriorated quickly. It was reported that on his first night in the house he barricaded himself in the basement. During his two week stay in Jubien House there were nine incidents of suspected drug use, six incidents of physical

aggression, five incidents of being gone without permission and three incidents of threats. After these incidents he could no longer remain at Jubien House and was sent back to his mother's "care".

[44] The Assessment Report prepared by psychologists Dr. Lowell Blood and Mr. Steve Gouthro, suggests that there is a strong possibility that he would re-involve himself in the drug trade upon his release. While he is in a highly structured environment he can respond well. Without that structure and supervision it is likely that he would continue to seek out a negative peer group and high risk situations. As noted in the assessment his family history, social history and self-reports indicate previous association with the illegal drug trade.

[45] His statements during the assessment indicate that he has begun to justify higher levels of violent behaviour. "A. presented as at high risk to continue to engage in reactive and instrumental violence with civilian members of society that obstruct his desire for immediate gratification or with criminal associates with whom he is in conflict." While violence is not his preferred mode of dealing with conflict he is willing and able to resort to violence and intimidation.

[46] The Assessment Report notes that he is a "challenging candidate" for rehabilitation. When left without structure there is little indication that he will make use of resources that are offered to him.

[47] When an Intensive Rehabilitative Custody and Conditional Supervision ("IRCS") Sentence was discussed with him he was not willing to engage in that because he would be "too busy", and "won't have the time."

[48] Dr. Ahmed recommended him for referral to the IRCS program.

[49] Mr. Gouthro reports that he has consistently responded that he was not interested in an IRCS sentence. The consistent theme was that his focus was on achieving the earliest possible date for release. The consideration of an IRCS sentence would require a further three month adjournment for the preparation of an assessment. An IRCS sentence requires that the young person consent to that intensive program. Otherwise the sentence and the additional funding for counseling that it brings is not available. Counsel has agreed in this case that an IRCS sentence is not an available option.

[50] The comments in the Assessment Report by Stephen Gouthro, Registered Psychologist, are not encouraging. Without a highly structured and supervised placement he is likely to continue to seek out a negative peer group and high risk situations.

“A. has spent much of his life operating with few restrictions and engaged in a short sighted, narcissistic lifestyle with little consideration for the consequences his actions have on himself or others. In the past he has resorted to physical aggression when structure and age appropriate expectations interfered with his immediate gratification. He has shown compliance and cooperation for only the most highly structured and secure facilities available in the province of Nova Scotia, Wood Street and the Nova Scotia Youth Facility. Even then, A.’s compliance was only achieved after he tested the resolve and physical capabilities of the institutions. However, it was noted that once A. realized it was in his best interest to

cooperate he was able to shift strategies and engage in programming.”

[51] Mr. Gouthro reports that it will be challenging to engage A.S. in treatment and programming in a meaningful way. The best way to achieve that, in his view, would be by starting the interventions in a highly structured environment where compliance can be met with immediate rewards and consequences. He would then be able to be transitioned to a community setting once supports and relationships have already been established. At this point, his commitment to any treatment plan is “highly suspect’. He has no viable plan to manage his own risk. Mr. Gouthro noted that ,“His plans change as quickly as his circumstances change with his estranged girlfriend.” His goals and plans are short sighted and appear, in Mr. Gouthro’s view, to be based largely on the desire for immediate gratification.

[52] Mr. Gouthro’s summary describes a young man who has never really had a chance to learn some very basic values. That sense of right and wrong engrained in most people from a very early age is not there.

The current assessment would suggest that lack of accountability, poor acceptance of responsibility, narcissistic, self –serving and short sighted attitudes have been modeled for this young man from a young age. Socialization with a negative peer group then served to reinforce such characteristics and beliefs. A.’s antisocial attitudes have not been entirely inspired and supported by an antisocial peer group. Those attempting to address A.’s problematic attitudes and lifestyle need to do more than just help him identify and challenge

antisocial values. They need to engage him in a process where he can begin to build a foundation of the basic values and beliefs that are necessary to function and find success in a civilized society.

Sentencing principles:

[53] Sentencing under the provisions of the Youth Criminal Justice Act is not simply a matter of applying technical rules. It is a principled but also an individualized exercise. The principles that apply reflect common sense and our values as a society. There can be tension within that set of principles so that their application can never be mechanical.

[54] Society has to be protected from people who commit crimes and particularly crimes of violence. That is the case whether the person is 12 or 72. The temporary protection of society can be achieved by locking people in jail for long periods of time. Apart from offending our societal values of justice, that is a massively expensive solution. It is also temporary. They are eventually released, having been influenced, some for the better and many more for the worse, by their time in jail.

[55] Longer term protection of society is achieved by trying to treat, counsel, encourage, cajole and sometimes threaten people to change. For some people that takes a long time. For some it can't be done at all.

[56] Young people are not sentenced for the period of time required for their "treatment". A therapeutic model of sentencing would require people to be sentenced until they are "cured". Courts do not force cures on people convicted

of crimes on the assumption that all criminal acts are the result of some kind of disorder.

[57] Courts cannot sentence young people to custody as a way of addressing housing or social work needs. Jail is not a response to homelessness though it is often an indirect result.

[58] When people, even young people, offend against our fundamental values as a society we have an obligation to respond. That isn't for the purpose of deterring others. It is because our sense of justice demands it. Punishment, retribution, accountability and the imposition of just and meaningful consequences all have a place. The extent that they are reflected in a sentence should be restrained and measured to reflect what the young person has done and his or her level of responsibility, development and maturity.

[59] Most young people do not have the same capacity to exercise judgment and self-control that most adults possess. We recognize that young people are still in the process of developing both physically and psychologically. Each is at a different stage in that process. That means that they are both less responsible for what they do and more malleable. They can change. They can be helped and go on to be law abiding and productive citizens. They can also be influenced negatively, in an environment surrounded by people with antisocial values, such as jail.

[60] There are many who question whether general deterrence is of any value in the adult criminal justice system. In the youth criminal justice system it simply does not apply. Young people do not make a calculated assessment of risk and

reward when they engage in impulsive behaviour. A sentence for a young person is not intended as a “message” to others about the consequences of certain actions.

[61] A court should consider previous findings of guilt with respect to the young person and whether he or she has served time in detention as a result of the offence.

[62] In sentencing a young person a court has to consider not only what an appropriate sentence would be, but whether the sentence is indeed the least restrictive sentence that could be imposed that would reflect the purposes and principles of sentencing set out in the Youth Criminal Justice Act. There may be a range of sentences that could be imposed, all of which could be reasonable, proper and appropriate. The sentence that is imposed must be the least restrictive one. While in adult sentencing there can a number of appropriate sentencing options under the Youth Criminal Justice Act, in each case, there is only one.

Sentencing of Aboriginal Offenders:

[63] There are some other legal principles that have to be considered in A.S.’ case. He is a young person of Maliseet ancestry. The Criminal Code sentencing provisions at s. 718.2(e) require that for adult offenders all sanctions other than imprisonment should be considered for all offenders with particular attention to the circumstances of aboriginal offenders. While adult sentencing principles generally do not apply under the Youth Criminal Justice Act an exception is made under s. 50 of the Act so that s. 718(2)(e) of the Criminal Code does apply to

young people. Section 38(2)(d) of the Youth Criminal Justice Act, in effect, confirms this yet again.

[64] A judge must consider the unique systemic factors that may have played a part in bringing the person before the court. While that is the case in any sentencing, it is critically important when dealing with aboriginal offenders. The Supreme Court of Canada in *R. v. Gladue* [1999] 1 S.C.R. 688 said that in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e) Parliament intended to attempt to redress the sad and pressing social problem of overrepresentation of aboriginal people in the prison system.

[65] In *R. v. Ipeelee* [2012] S.C.J. No. 13, in March of this year, the Supreme Court of Canada elaborated further on those principles. The Court noted that *R. v. Gladue* did more than affirm existing sentencing principles but called upon judges to use a different method of analysis in determining a fit sentence for aboriginal offenders.

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather they provide the necessary context for understanding and evaluating the case specific information provided by counsel. Para 60

[66] In the decade since the *R. v. Gladue* decision, the statistics indicate that section 718.2(e) has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system. The Supreme Court has attributed this to a “fundamental misunderstanding and misapplication” of both the section and the Gladue decision.

[67] It is, to begin with, not a race based discount on sentencing. It is a methodology not a discount. It is not reverse discrimination and does not mandate better treatment for aboriginal offenders than for non-aboriginal offenders. It is a recognition that a sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions.

[68] That is not a view or methodology that is entirely foreign in Youth Justice Court. In the adult system where general deterrence is a sentencing principle that applies, and where the individual offender can sometimes be drawn into the vortex of increasingly severe sentencing to “send a message” to others, the result is not always strictly individualized. In Youth Justice Court, while sentences given to others in the region for similar offences is a consideration, sentencing is focused on the individual young person.

[69] In *R. v. Ipeelee* the court specifically said that systemic and background factors may bear on the culpability of the offender.

Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many aboriginal offenders find themselves in situations of social and economic deprivation with a

lack of opportunities and limited options for positive development. While this rarely...if ever... attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Geckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of R. v. Skani ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled". Failing to take these circumstances into account would violate the fundamental principle of sentencing ...that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Para.73

[70] Justice Geckol's trenchant words could have been directed to the circumstances of A.S.. He is responsible for his actions and must be held accountable for them. At the same time, justice requires that some humble humanity be brought to an inhumane situation. Few mortals indeed could honestly claim to have some mysteriously innate moral compass functioning at the age of 15. With virtually no parental guidance or stability, dysfunctional relationships, role models of criminality and drug dependency, constant dislocation and chaos, and life by 15 living between the streets and a crack den, it would take a singularly remarkable person to rise about it all. It doesn't excuse what he did. It helps to explain it.

[71] Once again, this is hardly some arcane rule of law but the application of fundamental fairness. The situation in this case makes it clear that the problem is not merely a matter of statistics but is both a large scale and intimate human tragedy.

[72] The Supreme Court has also noted that the kinds of sanctions that may be appropriate should be considered having a view to the background of the offender. Current concepts of sentencing have not responded to the needs, experiences and perspective of aboriginal people. Gladue principles direct sentencing judges to “abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different and alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.” para74

[73] There is no requirement that there be a causal link between the background factors and the current offence. There is no reason why those factors will not apply in the case of serious and violent offences as well as they do with respect to others.

[74] It would be wrong to sentence A.S. without fully considering the extent to which his culpability has been diminished by his youth, his personal circumstances and the broader cultural and social context. It is also important to remain open to the consideration of the kinds of sentences that may be more relevant to him as an aboriginal person and to his community.

[75] A comprehensive Gladue Report was prepared by the Mi'kmaq Legal Support Network addressing both cultural and personal factors. I have drawn extensively from that report.

Case law:

[76] One of the principles of sentencing young people is that a sentence should reflect sentences in the region imposed on similar youth involved in similar circumstances. That reflects the sentencing principle of parity. The challenge is that youth sentencing is both principled and highly individualized. It is impossible to find a case where the circumstances of the offence and the circumstances of the young person are the same as they are in this case. Judges apply the same principles to cases that are never quite the same.

[77] A.S. is being sentenced for manslaughter. There has been no application by the Crown to have him subject to an adult sentence. For most offences under the Youth Criminal Justice Act the maximum length of sentence is 2 years. When the sentence includes incarceration two thirds of the sentence is served in custody and one third under supervision in the community.

[78] Under s. 42(2)(o) of the Youth Criminal Justice Act, for manslaughter and other offences the maximum sentence is 3 years. In that situation, the court may adjust the portion of time spent in custody and under community supervision.

[79] Section 105(1) of the Youth Criminal Justice Act requires that when a young person is sentenced under s. 42(2)(o) and a portion of the sentence is to be served under community supervision, the young person be brought back to court at least one month before the expiry of the custodial portion of the sentence. At

that time, after giving the young person an opportunity to be heard, the court sets the terms of the conditional supervision.

[80] Consistent with the principles of the Youth Criminal Justice Act the court is left with a broad discretion with respect to available options for sentencing. Those options should reflect the principles of youth sentencing and should take into account the unique circumstances of each case.

[81] In cases involving young people case law can at best provide a very general guideline. Even when such a guideline can be defined within some broad parameters, there can be exceptions.

[82] As in any sentencing there is the risk that the issue of parity can be privileged over other factors because it is at least amenable to a more process oriented methodology. It is tempting to look through decided cases to find guidance. That can result in a process by which the significance of either the similarities or differences is exaggerated depending on the outcome. Given the highly individualized nature of sentencing in the context of the Youth Criminal Justice Act, judges are rarely able to articulate a value to be placed on each variable. It is often difficult or even impossible to fairly speculate on how a decision might have been different in the absence of a specific factor.

[83] The concept of parity requires that when there is a general range of sentences for a specific offence in the region, the sentence should usually fall within that range. Those ranges will appear more clearly defined for some offences than for others. It may well be that some less context driven offences lend themselves more readily to the definition of a range.

[84] The sentencing range for young people who are being sentenced for manslaughter, runs from a period of probation to the maximum three year sentence. That is a very broad range. That is because there are a very broad range of circumstances that come within the definition of manslaughter. It is also because the variations of the circumstances of the young people involved are for all practical purposes infinite. Trying to place this case at a specific point within that range would diminish the significance of principled and individualized considerations in favour of a more mechanical process that assigns arbitrary values to some variables while entirely disregarding others.

Application to A.S.:

Recommendations of Counsel

[85] In this case the Crown has recommended a sentence of 3 years going forward from today. The recommendation is that 2 years be served in custody and one year under conditional supervision in the community.

[86] The defence recommendation is for a 6 month Custody and Supervision Order. That would include 2 further months of custody followed by 4 months of supervision in the community. Following that he would serve 24 months of probation. The plan is that A.S. return to New Brunswick to live with his aunt, her family and his younger sister. He would be able to access culturally appropriate counseling services provided by his home reserve.

Remand time

[87] A.S. has been incarcerated at the Nova Scotia Youth Facility as a result of this incident since December 2011, almost a year ago. He has spent 345 days on remand. Of that period, 120 days relates to a custodial sentence imposed by the courts in New Brunswick. Ms. Longley has argued that the sentence from the New Brunswick court does not reflect the sentencing principles as they are applied in this court. While I cannot dismiss her argument as being without merit, it would not be appropriate for me to essentially recalculate the New Brunswick sentence. The fact is, he was sentenced to 120 days of custody from the New Brunswick court, based on a joint recommendation. He should not be given credit for those days.

[88] He should receive credit for 225 days of remand time. In this court, young people are usually given 1.5 credit for remand time. The principle of parity in that sense would suggest that this case should be treated the same way.

[89] The issue of credit for remand time is not simply a matter of applying arithmetic to come up with an exact amount. It is a matter of discretion, judicially applied. In the end result, A.S. should be credited for serving 337 days or between 11 and 12 months in custody.

Circumstances of the offence

[90] The crime for which he is being sentenced is one of the most serious. He was involved in the death of a woman who was murdered in a way that is shocking in its brutality. Lavinia Campbell's face was described by the medical examiner as "profoundly mechanically disrupted" due to the severe trauma to her

face, nose and jaw. Almost all of her ribs had been fractured, some multiple times.

[91] A.S. admitted that in the middle of the night he and Gallant left an apartment in Dartmouth and ended up at Lavinia Campbell's house. They planned to break into the house and steal cigarettes. Jamie Gallant had broken in and stolen things from that home once before. There was a car parked in the driveway. Gallant kicked in the door and he and A.S. entered the house. While in the small house Gallant believed that Ms. Campbell awoke in her bed. He hit her on the head with a flashlight, causing the flashlight to break. She started to moan. He punched her in the face. She continued to moan and said "help me". At that point Gallant kned her in the face. A.S. knew that Gallant had entered Lavinia Campbell's bedroom. He became aware that Gallant was assaulting her. At some point he came into the bedroom and saw Gallant assaulting Ms. Campbell. They left her to die. She was found in her home 2 days later.

[92] It was agreed that he knew or should have known that Ms. Campbell could be home and that Gallant would unlawfully cause bodily harm to her in the course of the break and enter.

[93] A.S. did not strike any actual blows. He uttered no words of encouragement. He was not a party to the murder of Lavinia Campbell.

[94] His actions, in breaking into her home with Jamie Gallant helped to lead to the death of Lavinia Campbell. She did nothing to bring herself into circle of Jamie Gallant and A.S.. This was not a settling of a drug debt or gang murder. It was not a situation in which a victim provokes an attack. It was not a fight that escalated

out of control. It wasn't even a robbery or break and enter where a victim is killed in the effort to fight back or even to resist. Lavinia Campbell just woke up. She was 79 years old. All she did to bring this on was to wake up in her own bed. She moaned. She cried for help. None came. While she was crying for help, A.S. was looking for stuff to steal. And it was all over some cigarettes. Ms. Campbell was a random, entirely helpless and vulnerable victim whose life was taken for some cigarettes.

[95] Serious crimes have serious consequences. Sentencing under the Youth Criminal Justice Act should not be mistaken for therapeutic exercise. It is not about what is best for the young person. His rehabilitation and reintegration into society are important considerations but they have not driven measured and legally restrained punishment from the field.

A.S.' circumstances at the time of the offence

[96] A.S. was 15 years old, approaching 16, when this offence was committed. He was living in an apartment with an adult man who was a crack addict. He was not going to school. He was smoking marijuana all day and venturing out at night. He supported himself by breaking into cars and working in the illegal drug trade.

[97] His relationship with both parents could be described most charitably as dysfunctional. As a 15 year old, he was not in a position to be able to rely on either of them for advice, guidance, support, direction, discipline, or even as some kind of distant and removed positive role model.

A.S.' background

[98] A.S.' life has been characterized by chaos and extreme parental neglect. He has never had the opportunity to learn basic values. It would seem that he has tried instead to acquire street survival skills. He is not immature. He is in some ways more mature than other people his age. He has had to be in order to survive. He has developed a personality that is highly self-centred and focused on immediate gratification. He has not had anyone in his life on a consistent basis, who has modeled anything else. In his situation, the development of an attitude that is best captured by the phrase, "looking out for number one", should hardly be surprising.

[99] His personal circumstances are difficult to separate from his aboriginal heritage. They are different lenses through which his life can be observed. In the larger perspective his paternal family has been subject for generations to systemic discrimination and neglect. On his mother's side, things are really no better. There are now three generations of children having children while themselves dealing with childhood alcohol or drug dependency issues and virtually no ability to act as parents.

[100] More directly, from the time of his birth A.S. has not been nurtured in any positive way. He is not merely the product of his chaotic life. Yet, at each stage of his life so far, he has not only had no advantages at all but has had multiple negative influences actively undercutting his chances of developing into a well-adjusted teenager.

[101] People are responsible for what they do. Yet, A.S. cannot be held to be as responsible for his actions as someone whose life experiences are more conducive to the development of moral judgment.

Criminal Record

[102] The Crown has not alleged a criminal record. At the time of this offence A.S. had not been found guilty of any offences.

[103] It would be strange however to treat him as a person whose actions in committing a criminal offence were entirely out of character. Prior to this incident he had committed other crimes. He had not yet pleaded guilty to them. At the time of his sentencing there had been no findings of guilt in respect of him, yet his actions up to that time had not been blameless. He has been involved with illegal drugs for a number of years, has admitted to stealing to support himself and has been involved in trafficking at a low level. He cannot be considered the same as a young person who has made one mistake that has led to a criminal conviction.

[104] His current criminal record, including those offences in respect of which findings of guilt were made only after the commission of this offence, is certainly not of the ponderously lengthy kind that is sometimes seen in youth court. His self-reported criminal behaviours do not involve acts of serious violence. The offence for which he is being sentenced is very far outside the range of his behaviours demonstrated up to that time.

Remorse

[105] A.S. is genuinely sad about what has happened. It is sometimes difficult to separate a self-centered concern from a more empathetic one. He does seem to appreciate the terrible significance of what he has done. He is disturbed by the memories. As he said in court on Monday, he would turn the clock back if he could, to a time before this happened.

[106] Yet, at the same time, he remains focused on his own immediate circumstances and what this has meant for him. That should come as no surprise given both his age and his background.

[107] While he does not appear to be a person who has been racked or overcome with guilt he is certainly not someone who could fairly be described as remorseless.

Rehabilitation

[108] A.S. has been described as a “challenging candidate” for rehabilitation. According the Presentence Report he has actively participated in the programming at the Nova Scotia Youth Facility at Waterville. The Assessment Report paints a bleaker picture of a person who has not taken advantage of counseling opportunities.

[109] As his counsel Ms. Longley noted, prior to his entering a guilty plea to manslaughter he was facing a murder charge. The advice from his lawyers at that time was to talk to no one about the circumstances. That made counseling

practically impossible during the bulk of the time he spent in custody, remanded for this offence.

[110] At this stage, he may well be eager to engage in the counseling that will be required. He has not been willing to delay the matter for 90 days in order to provide time to assess the availability of an IRCS sentence. The prospect of 3 more months in custody might well explain that.

[111] There is little doubt that A.S. needs counseling. While the need for that counseling goes back into his early childhood his chaotic life has meant that he has not received any counseling of any kind. During his time on remand he has had little practical opportunity to deal with issues that gave rise to this offence.

[112] He has spent his childhood and most of his adolescent years in an environment in which he has had little or no positive direction and support. He has been entrenched for some time in a criminal lifestyle. He has been involved in the culture of illegal drugs since he was a child. Upon release he will be under pressure to return to a life in which he can make use of the antisocial skills and attitudes that he has developed. As a young man with limited education, functioning at a Grade 4 to Grade 6 level, the potential for him to be dragged back into that world will be very real.

[113] He has to unlearn some attitudes and behaviours and the values that underlie and support them when those attitudes and behaviours to this point in his life could be perceived as contributing to his survival in a harsh environment. It is not simply a matter of learning new skills and coping strategies. He has to learn and adopt a new world view that considers those skills as being in some way

worthwhile having. He will have to begin to trust in the utility of some social values that are shared regardless of the cultural context when so far life has given him little reason to trust in anything or anyone. That is a challenge even for an intelligent young man who is willing to fully engage in the process.

Tension among those considerations

[114] There are tensions among the principles involved in sentencing a young person. Those tensions make the system difficult to understand at times. There is no checklist or decision tree or logical model. The principles seem, at times, to contradict one another. There are no hard and fast rules as to how much weight should be given to each one or as to how those apparent contradictions are to be reconciled.

[115] There is a tension between short term and long term protection of the public. Sending A.S. to jail will protect society in the short term. In the long term it may help to produce a more criminally sophisticated offender.

[116] There is a tension between acknowledging that A.S. is a responsible individual who acted voluntarily and taking into account the complex realities of both his personal and broader cultural circumstances that go back generations.

[117] There is a tension between the concept rehabilitation and the concern that people not be held in jail or remain under court supervision until they are deemed to have been “cured”. The sentence must reflect a consideration of all of the principles and purposes of sentencing not simply be calculated to extend until counseling can be completed.

[118] A.S.' background is considered in assessing his level of moral blameworthiness. Because of his background, including his Maliseet heritage, his sentence should reflect a lesser degree of moral blameworthiness. At the same time, because of his personal circumstances, rehabilitation will be a more substantial undertaking.

[119] Mr. S. does not have a plan to return to a stable childhood home with a guardian with whom he has spent years. The plan is to return to New Brunswick with his maternal aunt and her family. He has not lived with her for any extended period of time before this. The presence of supportive and high functioning parents ready to receive him and support him would have suggested a shorter period of custody. Yet, considering that would have the effect of penalizing him for the very circumstances that reflected a lesser degree of moral blameworthiness.

[120] There is a requirement to consider the protection of the public, which would militate toward a lengthier sentence. There is also the concern that a young person not be incarcerated for a period that will lead to his or her becoming dependent on the regimented life within an institution.

[121] There is a tension between the consideration of the offence and the consideration of personal context. While that background has to be considered even in the most serious and violent of cases, it cannot erase the reality of what happened. A long and complicated set of circumstances brought A.S. to the point where he was together with Jamie Gallant on the night that Lavinia Campbell was murdered. The appreciation that what was happening to a vulnerable 79 year old

woman was more than merely wrong did not require any kind of highly sophisticated moral judgment.

[122] Finally there is a tension between the horrific reality of what the young person has done and the hope of what he can be capable of becoming. There is, simply put, a tension between consideration of the at least somewhat known past and the entirely unknown future.

Least Restrictive Sentence:

[123] The sentence imposed must be the one that is the least restrictive sentence that is consistent with the purposes and principles of sentencing. It must also resolve those various tensions among the principles and purposes of sentencing as they apply to A.S. and this case.

[124] The maximum sentence that could be imposed in this case would be three years. That would include any period of probation.

[124] Mr. S. has served the equivalent of between 11 and 12 months in pretrial custody.

[125] This is a case in which the imposition of the sentence very close to the maximum available sentence under the provisions of the Youth Criminal Justice Act is appropriate, subject to credit for time served. In this case that would be a sentence of two years going forward from today. That is not inconsistent with the broad range of sentencing for similar offences by young people in similar circumstances.

[126] Ms. Longley has expressed the concern that a period of conditional supervision should be followed by probation to provide for a “step down”. I am satisfied that the terms of conditional supervision can be structured in such a way that restrictions on Mr. S. can be gradually reduced over the period of the supervision. The consequences of a breach will remain the same but the likelihood of such a breach will be reduced.

[127] It has been argued that the maximum sentence should be imposed only upon the worst possible offender. The concept of saving the maximum sentence for that hypothetical worst offender would fail to recognize three realities of youth sentencing as they relate to this case. First, adult sentencing is available for offenders when the circumstances require it. Some, but by no means all, of the “worst offenders” in that sense are dealt with in another way. Second, the custodial sentence under the Youth Criminal Justice Act for offences such as manslaughter permits the sentencing judge to set the period of time spent in custody and the period of time under conditional supervision. The “worst offender” might be required to spend the entire three year period in custody. Third, judges can either give enhanced credit, full credit, partial credit, or no credit for time spent on remand. In the actual “worst case” a young person may spend considerable time on remand and receive no credit for it, while being sentenced to the maximum three years from that time.

[128] A.S. did not go into Lavinia Campbell’s home to kill her. He didn’t strike her at all. Had he done so, he would have been guilty of murder. His guilty plea to manslaughter reflects his actions in going into the home with Jamie Gallant when he reasonably should have known that Ms. Campbell was there and that Gallant

would hurt her. Those are not the actions of a murderer but the actions of someone who just did not care what happened. Justice demands accountability and meaningful consequences for actions for that kind.

[129] Justice also demands a fair consideration of the circumstances of A.S.. To paraphrase Justice Geckol in *R. v. Skani*, few mortals could have gone through his childhood and young teenage years and been able to function on their own in society with values compatible with the larger community. Yet, what happened in Lavinia Campbell's house was so coldly vicious that the most basic and elementary sense of human decency and compassion should have begun to operate.

[130] The tension between the need for rehabilitation and the recognition of his diminished moral blameworthiness has to be resolved. That can be done by adjusting the period in which he will spend in custody and on conditional supervision.

[131] I am not satisfied that any period less than one year in custody, followed by one year of conditional supervision would hold A.S. accountable for his actions, reflect a meaningful consequence and at the same time provide for sufficient time to prepare him for the challenges and pressures he will face in the community. Any shorter period of time would have the effect of discounting his sentence to reflect his circumstances, then perpetuating the problem by throwing him, ill prepared, back into those circumstances.

[132] He has had very little by way of counseling to date. He is delayed academically. He has a great deal to learn and a great deal to unlearn. He requires

a highly structured environment with immediate consequences in order to make the kinds of changes required. If he fails to make those changes, he will be drawn back into the subculture of drugs and crime.

[133] There is, of course, no guarantee that by that time he will be entirely prepared to face the realities of life in the community. The period of one year is a compromise. It is reduced to reflect his remorse, his guilty plea, and his diminished moral blameworthiness or responsibility arising from his personal and cultural circumstances.

[134] That period is also intended to address the concern that he not be “institutionalized”. He will have spent his 16th and 17th years in custody. While some other factors, including the challenges of rehabilitation and seriousness of the offence might have militated toward a longer period of incarceration, that period has been reduced in part because of that concern.

[135] The proposal for his reintegration into his home community in New Brunswick with culturally appropriate counseling and support represents an innovative approach that also helps to justify a shorter period of incarceration. He needs only to be at a point in his rehabilitation at which he can accept and engage in that counseling in a less regimented environment.

[136] By operation of s. 105(1) of the YCJA the provincial director will be required to cause Mr. S. to return to court at least one month prior to the expiry of the custodial portion of this sentence. At that point, after giving Mr. S. an opportunity to be heard, the conditions for his conditional supervision will be determined.

[137] A DNA order will be signed as well as a weapons prohibition for a period of ten years.