# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

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| ***Docket AY16-30-08665*** | ) | |
| ***B E T W E E N:*** | ) | |
| | ) | |
| ***HER MAJESTY THE QUEEN*** | ) | |
| | ) | |
| *Appellant* | ) | |
| | ) | ***C. T. St. Croix*** |
| *- and -* | ) | *for Her Majesty the Queen* |
| | ) | |
| ***JARED MADISON OKEMOW*** | ) | |
| | ) | ***K. I. Dowle*** *and* |
| *(Young Person) Respondent* | ) | ***A. M. Kravetsky*** |
| | ) | *for J. M. Okemow* |
| *- and -* | ) | |
| | ) | |
| ***Docket AY16-30-08673*** | ) | *Appeals heard:* |
| ***B E T W E E N:*** | ) | ***March 6, 2017*** |
| | ) | |
| ***HER MAJESTY THE QUEEN*** | ) | |
| | ) | *Judgment delivered:* |
| *Respondent* | ) | ***June 20, 2017*** |
| | ) | |
| *- and -* | ) | |
| | ) | |
| ***JARED MADISON OKEMOW*** | ) | |
| | ) | |
| *(Young Person) Appellant* | ) | |

**NOTICE: Pursuant to section 110(2)(a) of the *Youth Criminal Justice Act*, the prohibition on publication set out in section 110(1) does not apply when the young person received an adult sentence.**

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**MAINELLA JA**

Introduction

[1] The young person pleaded guilty to 14 offences that occurred when he was 14 years old. The most serious of the offences related to two armed robberies: one was of a convenience store; the other was a street mugging of two university students that resulted in serious injuries to one student.

[2] The background of the young person is challenging. He has a Fetal Alcohol Spectrum Disorder (FASD), namely, Alcohol-Related Neurodevelopment Disorder (ARND); as well, he suffers from Attention Deficit Hyperactivity Disorder (ADHD). Despite his youth and the efforts of some family members and professionals, his prospects for rehabilitation and reintegration are, sadly, illusory.

[3] The youth justice court judge (the judge) imposed an adult sentence under the *Criminal Code* (the *Code*) for the offences relating to the two armed robberies and a youth sentence under the *Youth Criminal Justice Act* (the *YCJA*) for the other offences. She blended the adult and youth sentences together to reach a combined sentence of 48 months' imprisonment which she then reduced for the purposes of totality (see section 718.2(c) of the *Code*) to 36 months' imprisonment. She then credited the young person with having served the equivalent of 29 months' pre-sentence custody to leave him with a go-forward sentence of seven months' imprisonment to be followed by three years of supervised probation.

[4] Both the Crown and the young person seek leave to appeal and, if

granted, appeal the sentence. Both parties agree that aspects of the sentence are illegal and require appellate correction.

[5] In the appeal brought by the young person, he argues that he should have received a youth sentence on all of the 14 offences in the form of no credit for his pre-sentence custody and a seven-month custody and supervision order (CSO) to be followed by two years and five months of probation. His appeal focusses on the judge's decision under section 72(1) of the *YCJA* to sentence him as an adult on the offences related to the armed robberies. Essentially, he submits that the judge failed to properly consider the relevance of him having ARND.

[6] In the appeal brought by the Crown, it argues that the adult sentence of the young person should be increased. It says that the judge's findings on moral blameworthiness in imposing sentence were inconsistent with her earlier findings in deciding to impose an adult sentence. It argues that she improperly relied on the young person's ARND condition as a mitigating factor when it did not impact the commission of either armed robbery. It submits that she failed to consider the objectives of denunciation and deterrence. It says that the judge placed undue emphasis on rehabilitation at the expense of public safety. Finally, it argues that the judge committed the "double-credit error"; she took into consideration his ARND condition twice: first in determining a fit sentence and second in applying the principle of totality.

[7] There is one further aspect to this case. The *YCJA* creates a statutory requirement for timely proceedings (see sections 3(1)(b)(iv)-(v)).

Proceedings here were anything but timely. The sentencing process consisted of 31 court appearances over the course of approximately two years. That is an unsatisfactory state of affairs requiring comment.

[8] For the following reasons, I would dismiss the appeal of the young person and allow the appeal of the Crown.

Background

*Circumstances of the Offences*

[9] The 14 offences the young person pled guilty to were as follows:

1. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—May 27-June 2, 2014;

2. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 10, 2014;

3. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 22, 2014;

4. section 137 *YCJA*—Curfew Breach—June 25, 2014;

5. section 334(b) *Code*—Theft Under $5,000—June 25, 2014;

6. section 267(a) *Code*—Assault with a Weapon—June 26, 2014;

7. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 26, 2014;

8. section 88 *Code*—Possession of Weapon for Dangerous Purpose—June 26, 2014;

9. section 351(2) *Code*—Disguise with Intent—June 26, 2014;

10. section 137 *YCJA*—Reside as Directed Breach—June 29, 2014;

11. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 29, 2014;

12. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 29, 2014;

13. section 88 *Code*—Possession of Weapon for Dangerous Purpose—June 29, 2014; and

14. section 145(3) *Code*—Failure to Comply with Condition of Undertaking—June 29, 2014.

[10] The young person's parents have played a sporadic role in his life due to their own substance abuse issues and repeat involvement in the criminal justice system. Since his infancy, the young person was raised by his maternal grandparents until February 2014 when they voluntarily placed him with child welfare officials because he was unmanageable.

[11] Child welfare officials eventually decided to temporarily place him in a motel with other troubled youths near the University of Manitoba. The young person was the subject of probation orders, as well as an intensive support and supervision program order (see section 42(2)(l) of the *YCJA*).

After several weeks, the young person began to become non-compliant with the conditions of these court orders (obey a curfew, attend school and perform community-service work). He was arrested, charged under the *YCJA* and released on an undertaking. After his release, he continued to be non-compliant with his various court orders. As well, he stole the mobile phone of a supervisor of the youths at the motel.

[12] In the early hours of June 26, 2014, he committed the offence of assault with a weapon. That incident involved him and other youths prowling around parked cars looking to break into one. When confronted by a car owner, the young person brandished a knife. The car owner picked up a metal pipe. The young person then directed the others by stating, "There are six of us and we all have knives, surround him." The car owner fled. The young person slashed the tires of the car while mocking its owner.

[13] Approximately one hour later, the young person committed the first armed robbery. At just before 4:00 a.m., he and a female accomplice (who was never apprehended) walked into a 24-hour convenience store. The young person was attempting to disguise his identity with sunglasses, a hat and a hoodie. He brandished a knife with a six-inch blade to the clerk, demanded money and cigarettes, and said, "Open the till, I'll kill you." The clerk provided him with $90 cash and $150 worth of cigarettes. When the young person was arrested well after the incident, he told police he was drunk and decided to rob the convenience store. He said he felt bad for the clerk who had "pissed himself out of fear".

[14] The second armed robbery occurred in the early morning hours of

June 29, 2014. The young person, together with S.M. (age 16) and Z.H. (age 14), had left the motel and were roaming the campus of the University of Manitoba at 12:30 a.m., armed with a knife and an airgun. The group approached two university students, V.S. and V.K., and demanded their property. One of the students said, "yeah, right, not today, buddy". The young person, S.M. and Z.H. then surrounded the two students. The young person demanded that V.S. take off his shirt and give it to him. V.S. refused. The young person then took the airgun and swung it like a bat, striking V.S. in the face between the eyes, breaking his nose. Z.H. then stabbed V.S. in the rib cage. The two students fled in terror, dropping a credit card and a few hundred dollars worth of property, which the young person and his accomplices seized.

[15] While V.K. was unharmed, his cousin, V.S., suffered serious injuries that required hospitalization. He sustained a four-inch deep stab wound to his ribcage and the knife punctured his liver. He had internal bleeding into his lung. He also sustained a contusion and swelling to his face, as well as a broken nose. He will require future surgery to his nose to re-align it.

[16] Both V.K. and V.S. were seriously traumatized by the robbery. They were international students from India about to return home for a family visit. Their victim impact statements reveal that the two men have psychological scars from the robbery and are particularly fearful of strangers.

[17] The young person and his two accomplices were arrested by police

within an hour of the robbery. The young person told police that it was his idea to rob the students. He then volunteered that he enjoyed the screaming of the victims. He said he didn't care if the victim died. When an officer expressed shock, the young person said, "if he dies, he dies". When he was asked a second time about the victim dying, the young person said, "if the victim dies, I'll laugh". Throughout his interview by police, the young person was highly abusive and demeaning to officers.

[18] The young person told his probation officer that he "was high on drugs and intoxicated" when the offences occurred. There is no evidence from the police that, when they arrested the young person shortly after the commission of the second armed robbery, he was intoxicated.

[19] Robbery is a crime of specific intent (see *The Queen v George*, [1960] SCR 871 at 877-79). By virtue of his plea to the three robbery offences arising from the two armed robberies, he formally admitted that, whatever the degree of his intoxication was, if any, it did not impair his foresight of the consequences of his actions.

[20] In his interview with his probation officer about the two armed robberies, the young person expressed no remorse for the crimes and did not regret the role he played in their commission. He described them as "fun". The probation officer, who has been dealing with the young person for several years, describes him as a "very street-wise young man" who tends "to gravitate towards negative influences".

[21] S.M. and Z.H. pled guilty to their involvement in the street mugging of the two university students. The Crown did not move to have

them sentenced as adults. Unlike the young person, S.M. and Z.H. were not subject to any court orders at the time of the armed robbery.

[22] S.M. had no prior youth record and his behaviour while in pre-sentence custody had been exemplary. He received a youth sentence of two years' probation in addition to having been in pre-sentence custody for 415 days.

[23] Z.H. had a limited youth record. He received a three-year CSO.

*Circumstances of the Young Person*

[24] Extensive material was filed at the sentencing as to the young person's background and psychological profile, as well as a *Gladue* report (see *R v Gladue*, [1999] 1 SCR 688). The materials included three assessments of the young person by two psychologists, Dr. Fisher and Dr. Therrien. One of the assessments was from a prior sentencing of the young person in 2014 that pre-dated the two armed robberies.

[25] By age 14, the young person had accumulated a lengthy youth record with 13 prior sentences for offences including breaching court orders, property crimes and assault with a weapon. In the assault incident, the young person and three others were asked to leave a shopping mall after a fire alarm was activated because the group was smoking in a stairwell. When the mall's security guard asked the group to leave, the young person took out a can of bear spray and sprayed the guard in the face.

[26] There are some *Gladue* factors in this case. The young person's maternal grandmother is from the Garden Hill First Nation. As a child, she

taught him to speak Saulteaux. The family does not participate in any Aboriginal traditional activities or believe in traditional teachings. The young person's grandparents provided him and his two siblings with a loving and stable environment during his childhood, free from any form of abuse. The grandparents' ability to parent him declined to the point of the voluntary placement in 2014. The grandparents had to parent their daughter's two other children and, due to their advancing age and own health issues, they had a diminished capacity to parent the young person.

[27] At age six, the young person was diagnosed with ARND based on his mother's documented substance abuse during pregnancy and an evaluation of him done at the Clinic for Alcohol and Drug Exposed Children at the Children's Hospital in Winnipeg. According to that assessment, his brain-domain impairments were noted to be attention/hyperactivity, communication/language, memory, executive function and social adaptive.

[28] Dr. Fisher explains that the young person presents as an adolescent where there are some "inconsistencies". On one hand, he has cognitive limitations. His IQ falls below 75, thereby meeting the criteria of an intellectual disability of mild severity. However, he displays no confusion with his thought processes or speech. He has well-developed visual-processing skills but has greater difficulty in learning by verbal processing.

[29] According to Dr. Therrien, individuals with similar profiles are often unable to weigh the consequences of their actions, reflect little and struggle with problem solving. The young person's neurodevelopment disorders create challenges for his social, emotional and behavioural

functioning. According to both psychologists, the young person is at risk for impulsive behaviour. In the words of Dr. Fisher, the young person is a "high-risk and high-needs young adolescent".

[30] The young person began drinking alcohol at age 11 and likes to binge drink. He began regularly using marijuana at approximately the age of seven.

[31] Information provided from the young person's teachers is that he stopped regularly attending Grade 8 classes in January 2013. He displayed some abilities, particularly in English. The young person was a disruptive student, belligerent to both teachers and fellow students. After a break of over a year in his education, he continued formalized learning in custody after being arrested for the second armed robbery. He was assessed as reading at somewhere in the grade 6.5 to 7 level. His math skills were more basic. He was operating at the grade 1 to 2 level.

[32] According to a historical psychology assessment from November 2013 prepared by a school psychologist, the young person has various strengths and weaknesses. The school psychologist explained that his intellectual disability is manifest in weak performance in three of four areas of cognitive functioning (verbal comprehension, working memory and processing speed but not perceptual reasoning), as well as significant delays in adaptive functioning (social skills, self-direction, personal safety and communication, among others). His long-standing problems with attention regulation, self-control and ability to plan/predict consequences of actions create deficits for him in his executive functioning. The school psychologist

also noted certain strengths, such as academic skills when he is focussed and well-developed nonverbal problem-solving skills. She noted that "[h]e has the ability to think about things on a fairly abstract level and displays skills in inductive reasoning and conceptual thinking, when information is presented in visual format".

[33] The young person represented to Dr. Fisher and Dr. Therrien that he is quite vulnerable and is easily led astray by negative peers. Many of his associates are members of gangs. According to both Dr. Fisher and Dr. Therrien, the young person "demonstrated some insight" into the relationship between his reoccurring involvement in the criminal justice system and his negative peers, substance abuse issues, impulsivity and failure to take his prescription medicine for his ADHD. Both Dr. Fisher and Dr. Therrien viewed the young person as immature in relation to his age level. According to Dr. Fisher, the young person's "social environment needs to be carefully monitored" because, in an unstructured setting with negative influences, "he would be more vulnerable to engaging in delinquent behaviour with little forethought at that point with regard to the potential impact of his actions upon himself and others".

[34] Prior to the offences giving rise to this appeal, the young person's probation officer thought the young person would benefit from the Children's Disability Services program (the CDS program) which provides services to families caring for children with disabilities. The child must live with a parent or relative; respite care, counselling and therapy are provided. The young person was accepted into the program but, before he could receive the benefit of it, he was voluntarily placed by his grandparents with

child welfare officials. His criminal behaviour in the spring of 2014, combined with the fact that he was no longer living with a parent or relative, made involvement with the CDS program impossible.

[35] According to his probation officer, the young person presents as a very high risk to reoffend. His risk factors include difficulty in learning, susceptibility to negative peer influences, an aggressive personality and substance abuse.

[36] During his two-year period of pre-sentence custody, he was a disruptive inmate at the two youth facilities where he was held. There were numerous disturbances, including several occasions where he threatened staff and inmates that he would kill them and kill and rape their family members. While in custody, authorities had concerns that the young person had suicidal ideation and viewed him as a high risk for suicide.

[37] According to Dr. Fisher, the young person is not a good candidate for either community-based supervision or correctional programming. In a community setting, he is unlikely to exercise good self-control, as has been the experience with him historically. In an institutional setting, Dr. Fisher believes the young person would have difficulty translating information into pro-social habits when released from custody because the way he learns is more visual than verbal. Dr. Therrien believes the young person requires "a relatively comprehensive 24-hour management plan that will provide constant supervision, monitoring and guidance".

[38] The rehabilitative plan advanced by counsel for the young person was that, after completing the custody portion of either his adult or youth

sentence, the young person would get the necessary structure and support by living with his grandparents under conditions of probation. Application would then be made to the CDS program to provide assistance. On turning 18 years old, counsel suggested that the young person could then transfer from the CDS program to another provincial program, Adult Special Services, which provides similar services but to adults.

[39] The young person's post-sentencing conduct was put before the Court at the hearing of the appeal by the agreement of the parties. The young person was released from custody on completion of the imprisonment component of the adult sentence on December 7, 2016. Approximately two weeks later, he violated his curfew requirements of his probation and was later arrested and charged for failing to comply with a youth sentence (section 137 of the *YCJA*). He spent several weeks in custody and then pleaded guilty to the offence, receiving a one-day sentence taking into account the equivalent of 29 days of pre-sentence custody. He was released from custody on January 23, 2017. Over the course of the following month, he breached his curfew on several occasions and, as of the hearing of the appeal, was considered to be whereabouts unknown with an outstanding arrest warrant. The young person's probation officer had made multiple attempts to locate him without success.

[40] The young person did not attend his appeal despite knowing of the date. His counsel was prepared to proceed in his absence. The Court was advised that his grandparents have lost contact with him. The young person had also not been in contact with probation services for several weeks as he was required to do. Therefore, the young person's circumstances, as of the

hearing date of the appeal, are that he is a fugitive in breach of the conditions of his probation orders. He is not living with his grandparents, he is not attending school, he is not complying with his probation orders and he has essentially decided to live unsupervised in the community. He will turn 18 years old on November 3, 2017.

Standard of Review

[41] A sentence appeal may be taken of an order as to whether to impose a youth sentence or an adult sentence (see sections 37(4), 72(5) of the *YCJA*). The decision pursuant to section 72(1) of the *YCJA* whether to impose an adult sentence on a young person is governed by the same standard that applies to other sentence appeals (see *R v H (CT)*, 2015 MBCA 4 at paras 18-20; *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 73; *R v Anderson*, 2015 MBCA 30 at para 9; and *R v DB*, 2008 SCC 25 at para 101). In *R v Houle*, 2016 MBCA 121, the standard of review for sentence appeals was stated as follows (at para 11):

> The law affords a sentencing judge great latitude in tailoring a sentence to the offence and the offender (*R v Ipeelee*, 2012 SCC 13 at para 38, [2012] 1 SCR 433; and *R v Nasogaluak*, 2010 SCC 6 at paras 43-46, [2010] 1 SCR 206). Accordingly, the threshold for appellate intervention with a sentence is "very high" and limited only to situations of material error or where the sentence is demonstrably unfit (section 687(1) of the *Code* and *R v Lacasse*, 2015 SCC 64 at para 52, [2015] 3 SCR 1089). A material error has two qualities beginning with demonstration of an error in principle, such as an error in law, a failure to consider or give sufficient weight to a relevant factor, consideration of an irrelevant factor or an overemphasis of an appropriate factor. The second aspect is that the error must have impacted the sentence in more than just an incidental way (see *Lacasse* at para 44). Where the error is harmless, as it has "no real effect" on the

> sentence, appellate intervention is not permitted (*Lacasse* at para 45). A sentence will be demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender and the acceptable range of sentence for similar offences committed in similar circumstances (see *Lacasse* at paras 52-55; and *R v Ruizfuentes (HS)*, 2010 MBCA 90 at para 7, 258 ManR (2d) 220).

The Young Person's Appeal

*Adult Sentences for Young Persons—General Principles*

[42] The underlying purpose of the *YCJA*, as it was originally crafted by Parliament, was to restrict the use of custody in sentencing a young person (see *R v CD; R v CDK*, 2005 SCC 78 at paras 34-37). Parliament intended that there be a reduction in reliance on custodial sanctions for non-violent young persons. The custodial sanction was reserved only for violent or serious repeat offenders (see *R v BWP; R v BVN*, 2006 SCC 27 at paras 35-36; and *DB* at para 44). On October 23, 2012, amendments to the *YCJA* came into force based on the *Safe Streets and Communities Act*, SC 2012, c 1. Three aspects of those amendments are relevant to this appeal.

Relevant 2012 Amendments to the *YCJA*

[43] First, the previous wording of section 3(1)(a) of the *YCJA* viewed the goal of the youth criminal justice system to be the "long-term protection of the public" by preventing crime, rehabilitating and reintegrating young persons, and ensuring that they are subject to meaningful consequences for an offence. The amended version of section 3(1)(a) provides:

**Declaration of Principle**

**Policy for Canada with respect to young persons**
**3(1)** The following principles apply in this Act:

> **(a)** the youth criminal justice system is intended to protect the public by
>
> > **(i)** holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
> >
> > **(ii)** promoting the rehabilitation and reintegration of young persons who have committed offences, and
> >
> > **(iii)** supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

[44] The statutory responsibility of youth justice court judges is to ensure that the public is protected in both the short and long term. This is to be done by holding young persons accountable through proportionate measures, promoting their rehabilitation and reintegration, and referring them to local resources to address the circumstances underlying their offending behaviour.

[45] It is important to note, however, that section 3(1)(a) of the *YCJA* is not the equivalent of section 718.1 of the *Code*, which defines proportionality as the fundamental principle in adult sentencing. While Parliament has considered enacting a hierarchy of sentencing principles under the *YCJA*, it has never done so; rather, protection of the public is but one of four conflicting sets of principles set out in section 3. It must also be

read in conjunction with the preamble and Parts 1, 4 and 5 of the *YCJA* and the overall objective of the *YCJA* as discussed in *CD*; *CDK*.

[46] The effect of the language of the *YCJA* is that it should be presumed that Parliament intended that the various parts of section 3 of the *YCJA* would work together coherently and harmoniously (see *R v LTH*, 2008 SCC 49 at para 47). Because there are several sentencing principles encapsulated in section 3, it is legally insignificant that protection of the public is the first principle mentioned in section 3 of the *YCJA* (see Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin Law, 2012) at 102, 115). There is no text in the legislation suggesting that protection of the public has prominence over other parts of section 3 or other relevant parts of the *YCJA*, such as section 38. To give special status to section 3(1)(a) of the *YCJA* would run contrary to the modern principle of statutory interpretation that, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21). Therefore, section 3(1)(a) cannot be interpreted in isolation; rather, the meaning of the provision must come from its text, its context to the rest of the statute and the objective of the *YCJA* (see *Quebec (Minister of Justice) v Canada (Minister of Justice)*, (2003) 175 CCC (3d) 321 at paras 139-151 (QCA)).

[47] Because there is no fundamental principle in the sentencing of young persons, the effect of the 2012 amendments to the *YCJA* should not be overstated. The focus of sentencing under the *YCJA* remains about

balancing conflicting principles to arrive at a sentence tailored to the individualized circumstances (see *R v P (LR)* (2004), 200 CCC (3d) 472 at para 3 (NBCA); and *Quebec (Minister of Justice)* at para 131). To some degree, the 2012 amendments represent a philosophical shift in the *YCJA*, but it is not a tectonic one for sentencing non-violent and non-repeat offenders. The Hon Rob Nicholson, Minister of Justice and Attorney General of Canada, advised Parliament that the intent behind the 2012 amendments to the *YCJA* was "to strengthen its handling of violent and repeat young offenders" (*House of Commons Debates*, 41st Parl, 1st Sess, No 017 (21 September , 2011) at 1525). In my view, the revised wording of the *YCJA* still has at its core the philosophy that the custodial remedy is a last-resort option (see section 39(2) of the *YCJA*), reserved for a discrete type of offender and, when used, it must be for the shortest duration possible in the circumstances.

[48] A second relevant aspect of the 2012 amendments to the *YCJA* is that Parliament codified the principle of the presumption of diminished moral blameworthiness of young persons, which was recognized as a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms* in the *DB* decision. Section 3(1)(b) of the *YCJA* provides:

> **Declaration of Principle**
>
> **Policy for Canada with respect to young persons**
> **3(1)** The following principles apply in this Act:
>
> . . .

> **(b)** the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
>
> **(i)** rehabilitation and reintegration,
>
> **(ii)** fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> **(iii)** enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
>
> **(iv)** timely intervention that reinforces the link between the offending behaviour and its consequences, and
>
> **(v)** the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

[49] The common theme that distinguishes the differing features of the criminal justice system for adults from that which applies to those between the ages of 12 and 18 is that young persons are presumed to have diminished moral blameworthiness or culpability (see *DB* at paras 41-45). As was explained in *DB*, a separate criminal justice system for youths is based on the concept that, "because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment" (at para 41). Accordingly, the sentencing of young persons must begin from the presumption of diminished moral blameworthiness or culpability, but that presumption is rebuttable (at para 45).

[50] The principles in section 3(1)(b) of the *YCJA* work to qualify the

operation of the principle of accountability in section 3(1)(a)(i) of the YCJA (see Bala & Anand at 120). A young person is presumed to be less accountable for his or her offending behaviour than would be an adult committing the same crime. Accordingly, ascertaining fair and proportionate accountability is an exercise of judicial discretion that requires consideration of the presumption of diminished moral blameworthiness or culpability in light of the circumstances of the offence and offender to decide to what degree, if at all, the presumption has been rebutted. The practical effect of Parliament's use of this statutory language is that the starting point in sentencing young persons is that they will receive a less severe sentence than would a similarly situated adult offender (see Sherri Davis-Barron, *Youth and the Criminal Law in Canada*, 2nd ed (LexisNexis, 2015) at 162-63).

[51] The other 2012 codification of the principle of the presumption of diminished moral blameworthiness of young persons as a result of the *DB* decision was in a revised version of section 72(1) of the *YCJA*, which sets out the test for a youth justice court judge to apply in deciding whether to sentence a young person as an adult:

> **Order of adult sentence**
> **72(1)** The youth justice court shall order that an adult sentence be imposed if it is satisfied that
>
> **(a)** the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
>
> **(b)** a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be

> of sufficient length to hold the young person accountable for his or her offending behaviour.

[52] The amended version of section 72(1) of the *YCJA* has created some controversy as to whether a youth justice court judge is to take a blended analysis of moral blameworthiness and accountability, as opposed to the inquiry being a two-pronged test. At the hearing of the appeal, the Crown argued for the former approach while the young person said it was the latter. In my view, the position of the young person is the correct interpretation of the legislation post-amendment. The Crown's onus under section 72(1) of the *YCJA* is a two-pronged test involving separate inquiries but where there is some overlap in the relevant factors to consider. I agree with the following comments of Epstein JA in *R v MW*, 2017 ONCA 22 (at paras 94-95):

> As previously indicated, in 2012, the wording of the test for an adult sentence in s. 72 of the *YCJA* changed to incorporate the holding in *D.B.* The two parts of the test were left unchanged. Since *D.B.*, to sentence a youth as an adult, the Crown must overcome the Presumption and must satisfy the youth court judge that a sentence under the *YCJA* would not be sufficient to hold the offender accountable for his or her criminal conduct. What did change is that the pre-2012 test was set out in a way that allowed for a blended analysis of the Presumption and of accountability, whereas the new test is expressly structured as a two-pronged test in which the Crown must satisfy both prongs.
>
> I have made a point of returning to the change in the legislation, with particular focus on the two separate prongs, as it provides the foundation for my view that the analysis of whether the Crown has overcome the Presumption and has satisfied the accountability test are best dealt with as separate inquiries. As I will explain, undertaking separate analyses of each prong is important. The two prongs address related but distinct questions

> and, although similar factors are applicable to both, there is not a complete overlap. It is not necessarily the case that every factor relevant to an assessment of whether a youth sentence would hold a young person accountable is relevant to the question of whether the Crown has rebutted the Presumption.

See also *R v BJA*, 2016 MBQB 207 at paras 11, 17.

[53] The risk of engaging in a blended analysis of moral blameworthiness and accountability, as opposed to a two-pronged approach, is that an adult sentence could be imposed where a serious offence is committed that may warrant an adult sentence to hold the young person accountable but his or her exercise of judgment in committing the offence was not sufficiently adult-like, or the reverse scenario where the young person displayed a high degree of moral blameworthiness but the offence is less serious and a youth sentence would hold him or her accountable (see *MW* at para 105). As Epstein JA explained in *MW* (at para 106):

> However, as closely connected as the two prongs — the Presumption and the issue of accountability — are, there is a risk associated with considering the Crown's application to have the young person sentenced as an adult in a blended analysis in which the Presumption and accountability are dealt with together. The risk is that a factor relevant only to one of the two prongs may be relied upon to support a finding in relation to the other.

[54] The two-pronged test approach also ensures that a *Charter* right is properly respected and given priority in the adult sentencing hearing as it must be. If the Crown cannot rebut the presumption of diminished moral blameworthiness, a youth justice court judge's task is completed; the Crown's application for an adult sentence must be dismissed and a youth

sentence imposed (see section 72(1.1) of the *YCJA*). The Crown's application cannot be "saved" by the fact that a youth sentence may not seemingly hold a young person accountable for a very serious offence. There are no excluded offences, including murder, from the operation of the *YCJA*. Proper respect would not be shown to the young person's *Charter* rights simply on the basis that there is a perception that he or she is being treated more leniently by the law than would be the case for an adult. Accountability for a young person is reached by a different approach, but the law does not view young persons as less accountable for their behaviour than an adult (see *DB* at para 93).

[55] The third 2012 amendment to the *YCJA* relevant for this appeal is in relation to sentencing principles of denunciation and specific deterrence. As was explained in *R v Proulx*, 2000 SCC 5, "[d]enunciation is the communication of society's condemnation of the offender's conduct" (at para 102). See also *R v T (C)*, 2006 MBCA 15 at para 24. Specific deterrence is the principle of sentencing concerned with the necessity of discouraging the offender in question from criminal conduct in the future (see *BWP; BVN* at para 2; and *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 52).

[56] Previously, the sentencing principles of denunciation and deterrence played no role in sentencing a young person given the former wording of the *YCJA* (see *BWP; BVN* at para 40; and *R v AAZ*, 2013 MBCA 33 at para 49). That has now changed. Specific deterrence (but not general deterrence) and denunciation now are sentencing objectives under the *YCJA* subject to the principle of proportionality. Section 38(2) provides that:

> **Sentencing principles**
> **38(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:
>
> . . .
>
> **(c)** the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
>
> . . .
>
> **(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.

[57] The language of section 38(2)(f) of the *YCJA* is important. Not only are the sentencing objectives of specific deterrence and denunciation subject to the principle of proportionality, but reliance on those two considerations is not mandatory, it is discretionary (see Davis-Barron at 365-66). A youth justice court judge may take into account the objectives of denunciation and specific deterrence, but he or she is not mandated to do so (see *R v TRK*, 2016 MBCA 14 at paras 15-16).

[58] Resort to the objectives of denunciation and specific deterrence in section 38(2)(f) in sentencing a young person must also be consistent with the principle of diminished moral blameworthiness or culpability (see section 3(1)(b) of the *YCJA*). Again, when the impact of the 2012 amendments to the *YCJA* is properly assessed, it does not signal a departure

from the historical purpose of the legislation being a limited use of custodial sanctions for offending behaviour. The relevance of these amendments is focussed on a very narrow set of violent and/or repeat offenders.

The Test for Imposing an Adult Sentence

[59] Section 64 of the *YCJA* governs the procedure for an application to seek the imposition of an adult sentence for a young person. The provision sets out a limitation period for making the application, requires prior notice be given of the intention to make the application, and restricts the application to young persons who are at least 14 years old and who are charged with an offence that, if they were adults, would make them potentially liable to a term of imprisonment of more than two years. Once the application for an adult sentence is made, a youth justice court judge must hold a hearing on the application unless the application is not opposed (see section 71 of the *YCJA*).

[60] The onus to satisfy both requirements of section 72(1) rests on the Crown (see section 72(2) of the *YCJA*). As previously mentioned, if the judge is not satisfied that both requirements of section 72(1) have been satisfied, a youth sentence must be imposed (see section 72(1.1) of the *YCJA*).

[61] The task placed on a youth justice court by Parliament under section 72(1) of the *YCJA* is a difficult and delicate one. In *R v BL*, 2013 MBQB 89, I explained the nature of the onus on the Crown under section 72(1) of the *YCJA* in the following manner (at para 36):

> The Crown bears the onus of proof in this application. See s. 72(2) of the ***YCJA***. The onus to order a young person liable for an adult sentence is neither proof beyond a reasonable doubt nor proof on a balance of probabilities. Rather, the standard is one of satisfaction after careful consideration by the court of all the relevant factors. See ***R. v. O. (A.); R. v. M. (J.)***, 2007 ONCA 144, 84 O.R. (3d) 561 at paras. 34-38 (C.A.), and ***R. v. D.D.T.***, 2010 ABCA 365, 265 C.C.C. (3d) 49 at para. 7 (C.A.). However, the Crown must prove beyond a reasonable doubt any underlying aggravating factors relied on for the court's ultimate determination. See ***D.B.*** at para. 78.

See also *H (CT)* at para 26; and *Anderson* at para 11.

[62] On the question of the first requirement of section 72(1) of the *YCJA*, rebutting the presumption of diminished moral blameworthiness, "the Crown must demonstrate to the court's satisfaction that the young person had the moral capacity of an adult at the time of the offence(s). Relevant are the circumstances of the offence(s) and the young person" (*BL* at para 38) as to whether adult-like judgment was exercised (see *DB* at para 77; *MW* at paras 96-98; and *R v JFR*, 2016 ABCA 340 at para 25).

[63] The comments of Abella J in *DB*; and *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, are helpful in determining whether a young person engaged in adult moral judgment when committing an offence. The starting point is of course the presumption that he or she did not. The law presumes that, "because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment" (*DB* at para 41). That said, the presumption in section 72(1)(a) of the *YCJA* is a rebuttable one. Whether a young person has exercised adult moral judgment in a particular instance in his or her life is a case-specific

and contextual exercise (see *AC* at para 4). Assessment of the decision-making of young persons is a situation where the youth justice court judge must engage in careful fact finding relating to the offence and the offender.

[64] The second aspect of the inquiry under section 72(1) of the *YCJA* relates to accountability. The overarching concern of the youth justice court judge is the relationship between the concepts of proportionality and rehabilitation in the given case (see *AAZ* at paras 56-57, 65). The relevant legislative provisions of the *YCJA* to consider are as follows:

> **Policy for Canada with respect to young persons**
> **3(1)** The following principles apply in this Act:
>
> . . .
>
> **(b)** the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
>
> . . .
>
> **(ii)** fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> **Sentencing**
>
> **Purpose and Principles**
> **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**

**38(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.
>
> **Factors to be considered**
> **38(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.

[65] The consequence of the fact that section 72(1)(b) of the *YCJA* asks the youth justice court judge to consider the principles in sections 3(1)(b)(ii) and 38 is that there is a weighing of factors in the decision to impose an adult sentence similar to what also occurs in the imposition of a youth sentence.

[66] In *R v ZTS*, 2012 MBCA 90, this Court accepted the Ontario Court of Appeal's definition of accountability under the *YCJA* as being the equivalent of the adult sentencing principle of retribution (see para 65). In *R v O (A); R v M (J)*, 2007 ONCA 144, the Court explained the concept of

accountability in the following manner (at paras 47-50):

> In our view, for a sentence to hold a young offender accountable in the sense of being meaningful it must reflect, as does a retributive sentence, "the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" (underlining omitted). We see no other rational way for measuring accountability.
>
> The need to consider the normative character of an offender's behaviour necessarily requires the court to consider societal values. But what the court cannot do is add on to a youth sentence an element of general deterrence or denunciation. This concept of accountability is consistent with this court's decision in R. v. W. (R.E.) (2006), 79 O.R. (3d) 1, [2006] O.J. No. 265, 205 C.C.C. (3d) 183 (C.A.), at paras. 40-42, where the court noted the focus of the YCJA on the best interests of the young person, and at para. 43, in which it considered the exceptional circumstances in which a court can impose a custodial disposition under s. 39(1)(d) of the Act:
>
> > The scheme of the YCJA suggests that the exceptional case gateway can only be utilized in those very rare cases where the circumstances of the crime are so extreme that anything less than custody would fail to reflect societal values. It seems to me that one example of an exceptional case is when the circumstances of the offence are shocking to the community.
>
> This view of the meaning of accountability is also consistent with the other principles of sentencing to which the youth court judge is directed under s. 38, especially those set out in ss. 38(3)(a) and (b): degree of participation, harm to the victim and whether the harm was intentional or reasonably foreseeable. These principles speak to retribution as defined by Chief Justice Lamer in R. v. M. (C.A.), supra.
>
> Youth Court judges have reached similar conclusions as to the meaning of accountability in s. 72. As Blacklock J. said in R. v. J.M., [2004] O.J. No. 2796, 62 W.C.B. (2d) 404 (C.J.), at

> para. 26, the sentence must "be long enough to reflect the seriousness of the offence before the Court and the accused's role in it", even taking into account the offender's increased dependence and decreased maturity. We read this as recognition of the need to take into account the normative character of the offender's conduct. And in R. v. Ferriman, [2006] O.J. No. 3950, 71 W.C.B. (2d) 139 (S.C.J.), at para. 38, McCombs J. said that for a sentence to hold a young person accountable it must achieve two objectives:
>
> > It must be long enough to reflect the seriousness of the offence and the offender's role in it, and it also must be long enough to provide reasonable assurance of the offender's rehabilitation to the point where he can be safely reintegrated into society. If the Crown proves that a youth sentence would not be long enough to achieve these goals, then an adult sentence must be imposed.

[67] The approach taken in *O (A); M (J)* is an "offender-centric" perspective to accountability. However, it would be too drastic to say that the interests of society were irrelevant in the assessment of accountability before the 2012 amendments to the *YCJA.* It has always been a facet of the concept of accountability that, for serious offences involving violent crime, a youth sentence must promote, not undermine, public respect for the administration of justice (see *BL* at paras 81-83).

[68] In light of the 2012 amendments to the *YCJA*, youth sentencing is now "not entirely 'offender centric'" (*R v SNJS*, 2013 BCCA 379 at para 28). A youth justice court judge *may*, but not must, consider the sentencing objectives of denunciation and specific deterrence.

[69] In some cases, where there is not diminished moral blameworthiness, due to the serious nature of the offence or the lengthy

criminal history of the young person, it may be very difficult for the youth justice court judge to impose a proportionate sentence without giving appropriate weight to the objectives of denunciation and/or specific deterrence. This new feature of the *YCJA* must, however, be understood properly in its limited context and applied cautiously in practice. Parliament has not called for increasing the rate of incarceration of young persons or changing its approach to sentencing for the vast majority of young persons who fall into trouble with the law. Rather, it has built measures into the *YCJA* to address deficiencies in the process that it perceived existed in relation to a small but important subset of offenders, those committing serious crimes or serial offenders, where the presumption of diminished moral blameworthiness is rebutted in relation to the particular offence(s). This is entirely in keeping with this aspect of the preamble of the *YCJA*:

> AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

[70] The other factor to consider is that proportionality is not the only consideration in determining accountability. As previously stated, accountability is about the relationship between proportionality and rehabilitation (see *AAZ* at paras 54-55).

[71] Recently, Steel JA in *H (CT)* explained the approach that youth justice court judges should take in making a determination as to

accountability (at para 26):

> For a sentence to hold a young person accountable, it must achieve two objectives: it must be long enough to reflect the seriousness of the offence and the offender's role in it; and it also must be long enough to provide reasonable assurance of the offender's rehabilitation to the point where he can be safely reintegrated into society. Reasonable assurance does not mean proof beyond a reasonable doubt or absolute certainty. It means a reasonable prediction of future behaviour based on an evaluation of all the evidence. If the sentencing judge finds that a youth sentence would not be long enough to achieve both of these goals, then an adult sentence must be imposed (see *R. v. Z.T.S.*, 2012 MBCA 90 at para. 65, 284 Man.R. (2d) 55).

*The Young Person's Moral Blameworthiness*

[72] Central to this appeal is the question of the legal effect of the young person's cognitive limitations; particularly the fact he suffers from ARND. A reduction of moral blameworthiness for the purposes of sentencing, either for an adult or a young person, due to a recognized and properly diagnosed mental illness or other condition where the functioning of the human mind is impaired, is a "fact-specific" case-by-case determination as opposed to an automatic rule that the mental illness or cognitive limitation necessarily impacted the commission of the offence in question (see *R v Roulette*, 2015 MBCA 102 at para 7; *R v Friesen*, 2016 MBCA 50 at para 23; *R v Manitowabi*, 2014 ONCA 301 at paras 55-57; *R v Ellis*, 2013 ONCA 739 at paras 107-127; *R v Ramsay*, 2012 ABCA 257 at paras 33-39; *R v Branton*, 2013 NLCA 61 at para 35; and *R v MJH*, 2004 SKCA 171 at para 29).

[73] Ascertaining the moral blameworthiness of an offender with a

mental illness or some other form of cognitive limitation is a tactful and considerate exercise. Sentencing judges must avoid committing one of two obvious errors in principle. The first is being indifferent to the question of whether an offender's mental circumstances affected his or her degree of responsibility. The other error in principle is the reverse situation, namely, assuming an offender's moral blameworthiness for an offence is reduced automatically because he or she has a mental illness or other cognitive limitation. It is suggested that, when sentencing offenders with a mental illness or some other form of cognitive limitation, such as a form of FASD, sentencing judges keep separate and properly assess the following questions:

1. Is there cogent evidence that the offender suffers from a recognized mental illness or some other cognitive limitation?

2. Is there evidence as to the nature and severity of the offender's mental circumstances such that an informed decision can be made as to the relationship, if any, between those circumstances and the criminal conduct?

3. Assuming the record is adequate, the sentencing judge must decide the offender's degree of responsibility for the offence taking into account whether and, if so, to what degree his or her mental illness or cognitive limitation played a role in the criminal conduct.

See *R v Ramsay*, 2012 ABCA 257 at paras 19-39; *R v Draper*, 2010 MBCA 35 at para 20; and *Manitowabi* at para 64.

[74] Inadequacies in the record may be remedied by the sentencing judge requiring production of evidence to assist him or her in making an informed judgment about the relevance of the offender's mental circumstances (see section 723(3) of the *Code* or section 34 of the *YCJA*) or, failing that, fact finding based on the record that does exist in light of the requisite burden of proof (see section 724(3) of the *Code*; and *R v Kunicki*, 2014 MBCA 22 at paras 21-26). What becomes important from the perspective of an appellate court is did the sentencing judge make an evaluation of whether the offender's degree of responsibility for the offence was affected by his or her mental illness, or some other form of cognitive limitation, and, if so, does the record reasonably support the sentencing judge's conclusions?

[75] In this case, after reviewing the background of the young person in great detail, the judge noted that he has a pattern of violent behaviour where he is the "instigator or a leader" of the criminal activity. She distinguished a number of cases where the presumption of diminished moral blameworthiness had not been rebutted by the Crown and then stated:

> Jared Okemow is a very different offender. He had a supportive and stable upbringing, although certainly not one without its challenges. His behaviour has been violent and problematic from a very young age and he had a criminal record at the time of these offences. His criminal behaviour has escalated and continues even in the custodial setting. He was a leader in the offences before the court, offences that involved some degree of planning. He has shown very little victim empathy or remorse over and above his guilty plea and the remark that he felt badly that the store clerk lost control of his bladder out of fear. And Jared Okemow has not shown improvement while in custody.

[76] The judge turned her mind to the young person's mental circumstances at the time of the armed robberies. She dealt with the opinion of Dr. Fisher that, in his view, the young person does not always appreciate the impact of his actions by concluding that does not necessarily mean he had diminished moral blameworthiness or culpability all of the time. She stated: "Whether he always appreciates the impact or consequences of his actions, I am satisfied that he is nonetheless capable of choosing to engage in serious and violent criminal behaviour."

[77] The judge determined that the key evidence as to the young person's moral blameworthiness or culpability came from the young person himself. In her view, during the commission of the offences, "he acted with confidence and determination". She reviewed the record and then stated: "All of this evidence satisfies me that despite the ARND and ADHD and the other real and not insignificant challenges he faces, the presumption of diminished moral blameworthiness or culpability in this specific context for this offender has been rebutted."

[78] The judge's reasons here demonstrate that she took into account the voluminous evidence before her as to the young person's background, including the various assessments that indicated that he is generally immature for his age, his ARND and ADHD diagnoses, and his general cognitive limitations.

[79] The young person's submission that he should not have received an adult sentence simply because of his cognitive limitations, such as ARND, is unpersuasive. There have been many cases where adult sentences

for serious violent crimes have been given to young persons having significant mental disabilities or cognitive limitations where the facts warrant such a sentence (see *H (CT)*; *BL*; *R v MJM*, 2016 MBQB 36; *R v BKTS*, 2009 MBQB 56; and *R v DVJS*, 2013 MBPC 34).

[80] Moreover, the judge's findings that the young person planned, instigated and was the leader in the two armed robberies are reasonably supported on the record. He advised his probation officer that the robberies were his idea, he did not regret the role he played in the crimes and that it was "fun". The attempt to disguise his identity during the first armed robbery also demonstrates a degree of planning and premeditation as opposed to spontaneity (see *R v BKTS* at para 23; and *R v RL*, 2009 MBQB 137 at para 22).

[81] The facts here are quite different than *R v Laquette*, 2015 MBQB 79, which the young person relies on, where the accused (who was a schizophrenic, was borderline mentally retarded and who also suffered from a form FASD) was not the individual who orchestrated a violent attack; rather, that accused, because of his large size, was used by others as a weapon to further their plan to harm the victim.

[82] Another important piece of evidence that the young person planned these offences is that he armed himself with a weapon in each of the robberies and pled guilty in relation to each robbery to an offence of possession of a weapon for a dangerous purpose contrary to section 88 of the *Code*. Lamer J (as he then was) explained that offence in *R v Cassidy*, [1989] 2 SCR 345 this way (at p 351):

> Section [88] requires proof of possession and proof that the purpose of that possession was one dangerous to the public peace. There must at some point in time be a meeting of these two elements. Generally, the purpose will have been formed prior to the taking of possession and will continue as possession is taken.

[83] It is not uncommon for the young person to be armed. According to the assessments of Dr. Fisher and Dr. Therrien, the young person feels "quite vulnerable in the community" and normally carries weapons for the purpose of "self-protection". However, possession of a weapon for defensive purposes is not necessarily the offence of possession of a weapon for a dangerous purpose contrary to section 88 of the *Code* (see *R v Kerr*, 2004 SCC 44).

[84] When the guilty pleas to the two section 88 offences were entered, the presiding youth justice court judge inquired as to whether the knife used in the convenience store robbery was possessed "for a purpose other than robbery". Counsel for the young person advised that the "agreement" was that the knife was possessed for the purpose of robbery and not some other purpose. The same admission was made in relation to possession of the air gun for the armed robbery of the university students.

[85] Accordingly, on the record that was before the judge, the intention of the young person for possessing the weapons was not for a defensive purpose because he felt vulnerable and wanted to defend himself; in fact, the situation was quite the opposite. The young person decided to arm himself and then use the weapons for the dangerous purpose of facilitating robberies

through either intimidation (in the case of the armed robbery of the convenience store) or gratuitous violence to defeat resistance (in the case of the armed robbery of the university students). That offensive mindset cannot be described as impulsive or spontaneous. This fact evidences planning and calculation of the consequences of criminal behaviour. Moreover, in the case of the second armed robbery, rather than retreat at the first sign of resistance, he chose to escalate the situation by using a weapon. All of these facts are evidence of the exercise of adult-like judgment which supports the decision of the judge.

[86] The young person also blames his placement by child welfare officials in a motel with minimal supervision as an extenuating factor. It is self-evident that the placement of an adolescent by child welfare authorities in a motel, for anything beyond a very brief amount of time (as opposed to the placement here that went on for weeks), is an unsound practice. That said, the circumstances here are that, prior to the temporary motel placement, the young person already had a well-established criminal lifestyle of using drugs, carrying weapons, engaging in crime and associating with gang members. As previously mentioned, he also had "some insight" into the relationship between his anti-social behaviour and reoccurring involvement in the criminal justice system. While I agree with defence counsel that the temporary placement in a motel with minimal supervision was a relevant factor for the judge to consider, I am not persuaded that she placed too little weight on the risks associated with the young person's temporary housing placement.

[87] There is no question here that the record before the judge was

conflicting. The judge was alive to the young person's argument that much of what he said about his behaviour was bravado and what he did was impulsive. Indeed, his discussions with the psychologists paint the picture of an immature adolescent suffering from a cognitive limitation who would present as someone who would be an example of possessing diminished moral blameworthiness. However, there was also evidence to the contrary that came from his probation officer and the young person's behaviour outside a clinical environment, both on the street and in custody, that painted a different picture of the young person being a violent criminal prepared to prey on others as opportunities arose.

[88] The art of sentencing is all about the careful weighing of relevant factors. An appellate court cannot interfere "simply because it would have weighed the relevant factors differently" (*Lacasse* para 49). In my view, when the judge's reasons are considered in light of the record, the relevant provisions of the *YCJA* and the standard of review, there is no basis to interfere with her conclusion that the Crown had satisfied its burden to rebut the presumption of diminished moral responsibility (see section 72(1)(a) of the *YCJA*).

*Adequacy of a Youth Sentence to Hold the Young Person Accountable*

[89] The maximum combined youth sentence that could be imposed for the three robbery offences relating to the two armed robberies, if consecutive sentences were imposed for the different offences, would be three years on top of the two years of pre-sentence custody (see sections 38(3)(d), 42(15) of the *YCJA*; *R v P (NW)*, 2008 MBCA 101 at para 23; *R v IRN*, 2011 MBCA

31 at paras 18-19; and *AAZ* at para 147).

[90] In her reasons, the judge referred to the principles in sections 3(1)(b)(ii) and 38 of the *YCJA* and then made the following statement of the importance of the relevant factors as to accountability:

> Jared Okemow's charges are serious, as the range of available adult sentences illustrates. His moral blameworthiness for those offences is high.
>
> I am satisfied that his behaviour, attitude, character, maturity and degree of responsibility are significant problems for the prospect of any easy rehabilitation and reintegration into the community. Drug and alcohol use have also been factors in his young life, but the troubling and violent behaviour has continued even while he is in custody and sober. And while I agree with defence counsel that he is more dependent on others than other youths his age may be, he shows no willingness to accept that reality and, in fact, responds to all such attempts with aggression and defiance. That pattern of behaviour has been seen by his caregivers, his schoolteachers and his assessors since he was very young, and given his behaviour in the Youth Centre, continues even now. Counselling has been suggested, but it is clear that his cognitive difficulties will significantly complicate that process should Jared even agree to attend.

[91] The judge then made the following comments about the sentencing principle of protection of the public:

> Protection of the public is an important consideration as well, and it is the overall goal of the Youth Criminal Justice Act as stated in Section 3. The court is satisfied that the public is at risk now from Jared Okemow and I am not assured that these risk factors will have been addressed at the end of two years in custody, given the evidence of Dr. Fisher and the probation officer and the behaviour of Jared himself.

> Also, because the serious offences took place three days apart, consecutive sentences and not concurrent sentences will be a consideration in sentencing. I am therefore satisfied that a youth sentence would not be sufficient to hold Jared Okemow accountable for his offending behaviour.

[92] The judge's reasons show that, on the question of proportionality, she was concerned about the serious nature of the offences and the young person's high moral blameworthiness. On the question of rehabilitation, she was concerned that his aggressive personality, other risk factors and lack of progress despite a lengthy period of pre-sentence custody made his prospects for rehabilitation and reintegration into the community dim. Taking these considerations together, she concluded that protection of the public could not be achieved by a youth sentence.

[93] The young person's argument as to the importance of the principles of rehabilitation and reintegration under the *YCJA* glosses over the important fact that those principles always begin on the assumption that rehabilitation and reintegration are realistic in the circumstances. As Professor Bala and Anand PJ explain (at 133-34):

> While prevention of crime, rehabilitation, and reintegration are important guiding principles for the youth justice system, their application must be realistic. Beyond the issue of whether access to appropriate rehabilitative resources, programs, and facilities is available (discussed more fully below), it is necessary to recognize that not all young offenders can be rehabilitated. Some youths lack the motivation, at least at some points in their lives, to engage in rehabilitative efforts. Treatment professionals can try to engage a youth, but a resistant offender cannot be rehabilitated. Further, no program or facility can rehabilitate all young offenders. Some youths will reoffend despite their participation in any available rehabilitative regime.

[94] The difficulty here is that it is unrealistic, given the record, to place much weight on factors such as rehabilitation and reintegration. The idea of giving the young person a custodial youth sentence and no credit for his pre-sentence custody, which is a possibility under the *YCJA*, is not appropriate in the circumstances because, during his pre-sentence custody, the young person has made no positive efforts towards rehabilitation and reintegration that could support a decision to allow him to continue on his path towards a pro-social lifestyle through a youth, as opposed to an adult, sentence.

[95] In my view, the judge's prediction as to the young person's future behaviour is reasonably supported by the record. In this case, the factors of proportionality outweighed those of rehabilitation on the accountability assessment. I see no basis to interfere with the judge's decision regarding section 72(1)(b) of the *YCJA*.

[96] Accordingly, while leave to appeal is granted, I would dismiss the appeal of the young person.

The Crown's Appeal

*The Sentence Imposed*

[97] The formula the judge used to reach a total of 29 months of pre-sentence custody was credit on a 1:1.2 basis. No issue is taken with the calculation of pre-sentence custody by either of the parties. I propose to adopt that calculation for the purposes of my decision.

[98] The sentence the judge arrived at before totality amounted to a

combined sentence of 48 months' imprisonment calculated as follows:

**Youth Sentence—6 Months:**

1. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—May 27-June 2, 2014: **3 days**;

2. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 10, 2014: **7 days consecutive**;

3. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 22, 2014: **10 days consecutive**;

4. section 137 *YCJA*—Curfew Breach—June 25, 2014: **30 days consecutive**;

5. Section 334(b) *Code*—Theft Under $5,000—June 25, 2014: **10 days consecutive**;

6. section 267(a) *Code*—Assault with a Weapon—June 26, 2014: **90 days consecutive**; and

7. section 137 *YCJA*—Reside as Directed Breach—June 29, 2014: **30 days consecutive**.

**Adult Sentence—Total—42 Months:**

1. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 26, 2014: **18 months consecutive**;

2. section 88 *Code*—Possession of Weapon for Dangerous Purpose—June 26, 2014: **18 months concurrent**;

3. section 351(2) *Code*—Disguise with Intent—June 26, 2014: **18 months concurrent**;

4. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 29, 2014: **24 months consecutive**;

5. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 29, 2014: **24 months concurrent**;

6. section 88 *Code*—Possession of Weapon for Dangerous Purpose—June 29, 2014: **24 months concurrent**; and

7. section 145(3) *Code*—Failure to Comply with Condition of Undertaking—June 29, 2014: **30 days concurrent**.

[99] The final combined sentence after totality was 36 months' imprisonment before credit for pre-sentence custody. That was reached by a combination of making some of the sentences concurrent and reducing some of the sentences:

**Youth Sentence—3 Months:**

1. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—May 27-June 2, 2014: **3 days concurrent**;

2. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 10, 2014: **7 days concurrent**;

3. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 22, 2014: **10 days concurrent**;

4. section 137 *YCJA*—Curfew Breach—June 25, 2014: **30 days concurrent**;

5. section 334(b) *Code*—Theft Under $5,000—June 25, 2014: **10 days concurrent**;

6. section 267(a) *Code*—Assault with a Weapon—June 26, 2014: **60 days consecutive**; and

7. section 137 *YCJA*—Reside as Directed Breach—June 29, 2014: **30 days consecutive**.

**Adult Sentence—Total—33 Months:**

1. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 26, 2014: **13 months consecutive**;

2. section 88 *Code*—Possession of Weapon for Dangerous Purpose—June 26, 2014: **13 months concurrent**;

3. section 351(2) *Code*—Disguise with Intent—June 26, 2014: **13 months concurrent**;

4. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 29, 2014: **20 months consecutive**;

5. sections 343-344(1)(b) *Code*—Robbery with a Weapon—June 29, 2014: **20 months concurrent**;

6. section 88 *Code*—Possession of Weapon for Dangerous Purpose—June 29, 2014: **20 months concurrent**; and

7. section 145(3) *Code*—Failure to Comply with Condition of Undertaking—June 29, 2014: **30 days concurrent**.

[100] After the reduction of the combined sentence by 29 months for pre-sentence custody, the young person was, as mentioned previously, left with a further seven months to serve to be followed by three years' supervised probation. The probation order was made in relation to all 14 of the offences.

[101] The judge also made various ancillary orders in relation to the young person. None of those orders is appealed. They remain unaffected by the outcome of the appeals.

*Illegal Aspects of the Sentence Imposed*

[102] At the hearing of the appeal, the parties agreed that three aspects of the young person's sentence were illegal.

[103] First, all of the youth sentences did not comply with section 42(2)(n) of the *YCJA* (see *R v RIR M-M*, 2008 BCCA 273). The judge simply imposed a period of custody for the youth sentences without imposing a second period of community supervision. Section 42(2)(n) requires that a CSO consists of two periods: the first two-thirds to be served

in custody, followed by one third to be served under community supervision. When a CSO is pronounced, the judge must state the length of the two periods of the sentence (see section 42(4) of the *YCJA*). That did not occur in this case. The youth sentence imposed was entirely custodial (save for the period of probation). The effect of what the judge did is impose an adult sentence on the young person for the youth offences when many of the offences were not eligible for an adult sentence, nor did the Crown seek one for those offences.

[104] The second illegal aspect of the sentence imposed was that an adult sentence was imposed on the charge of failing to comply with a condition of an undertaking on June 29, 2014 (see section 145(3) of the *Code*). One of the conditions of an application for an adult sentence under section 64(1) of the *YCJA* is that the offence is one that an adult is liable to a term of imprisonment "of more than two years". The offence of failing to comply with a condition of an undertaking does not meet the criteria of section 64(1) of the *YCJA* because the maximum sentence for that offence for an adult is "imprisonment for a term not exceeding two years" (see section 145(3) of the *Code*). A youth sentence was mandatory for the offence based on the wording of section 64(1).

[105] The third illegal aspect of the sentence imposed was that the period of probation set in relation to the youth offences was for a period of three years. A probation order made under the *YCJA* can only be for two years and begins on the day on which it is made or the day on which custody and supervision ends (see sections 42(2)(k) and 56(5) of the *YCJA*). There is no other mechanism in the *YCJA* to delay the commencement of a probation

order while another one is running; therefore, it is impossible for a young person to face the prospect of more than two years of probation on any given day. Moreover, the *YCJA* lacks a provision, as did the *Young Offenders Act*, SC 1980-81-82-83, c 110, authorizing imposition of consecutive periods of probation all together (see *R v L (TS)* (1988), 46 CCC (3d) 126 at 127 (NSCA); and *R v AJA*, 2002 NSCA 54).

*Analysis of the Young Person's Adult Sentence*

[106] I agree with the Crown that, because of the judge's material errors in arriving at the sentence, it is necessary for this Court to re-sentence the young person. In addition to imposing a sentence that was, in part, illegal, the judge made a reversible error as to how she dealt with the mental circumstances of the young person in crafting the sentence. In her reasons, she stated:

> Decisions like Laquette, 2015, Manitoba QB decision from — QB 79 and Friesen 2016 [M]BCA 50, emphasize the importance of balancing conflicting interests. The need to recognize the disability and any resulting diminished moral culpability while at the same time protecting the public.

[107] As previously explained, there is no question that a mental illness or some other form of cognitive limitation can impact a sentence by diminishing an offender's moral culpability or, alternatively, justifying less emphasis on the principle of deterrence. The difficulty here is that the judge proceeded on the basis that the young person had diminished moral culpability for the two armed robberies simply because he suffered from ARND and ADHD.

[108] The error in principle here was the judge's failure to make a finding of fact that there was a causal link between the young person's mental circumstances and his commission of the two armed robberies. Absent that finding, the judge could not proceed on the basis that the young person had diminished moral culpability for the armed robberies.

[109] It is difficult to read into the judge's reasons that she implicitly made the necessary link between the young person's mental circumstances and his commission of the offences because, when she carefully reviewed his mental circumstances in light of the circumstances of the armed robberies at the adult sentencing hearing, she came to the conclusion that his moral blameworthiness for the offences was "high". Also noteworthy is the fact that the accused explained his behavior to his probation officer by saying that he made $350 on the robberies, suggesting a motive commensurate with high moral blameworthiness.

[110] I am satisfied that this error in principle is material because it impacted the sentence (see *Lacasse* at para 44). The judge improperly used the young person's mental circumstances as a mitigating factor in determining a fit sentence. Moreover, the sentences she arrived at before consideration of totality (18 months for the first armed robbery and 24 months for the second one) indicate that she believed there was a good reason to impose lenient sentences on the young person.

[111] The offence of robbery is a serious offence punishable by up to life imprisonment. It is, unfortunately, a common crime; accordingly, it is well accepted that the sentencing objective of general deterrence is of paramount

importance. When a young person is sentenced as an adult for a robbery, consideration of general deterrence is necessary and appropriate despite the fact it is a sentencing factor not applicable under the *YCJA*. That said, the sentencing court must take care in reliance on the objective of general deterrence to give due regard to competing interests, such as the extreme youth of an adolescent being sentenced as an adult and his or her decreased maturity and rehabilitative potential (see *O (A)* at paras 79-80).

[112] An armed robbery of a 24-hour retail location, such as a convenience store, gas station, pharmacy or fast-food outlet, is aggravating because the workers in those stores are vulnerable. They are often working alone and are in possession of cash or other valuable items, such as cigarettes. As Carlson PJ noted in *R v Mandzuk*, 2007 MBPC 34, such locations are "soft targets" and the victims of such robberies "are deserving of special protection of the law" (at para 34). Historically, there has been an inconsistency in approach, in all levels of Court in this province, as to the length of sentences for such robberies. Making sense of the jurisprudence is challenging and perhaps a pointless exercise. The comments of Freedman JA in *R v Simon*, 2007 MBCA 97 are apposite (at para 19):

> Suffice to say that each of these cases turns on their particular facts, e.g., some of the accused had no records, some had lengthy records, and on the assessment by the sentencing judge of how the principles of sentencing should be applied in the particular case.

[113] More recently in *R v Charlette (JJ)*, 2015 MBCA 32, Hamilton JA reviewed the sentencing principles relevant to robberies of another type of vulnerable victim, taxi drivers. She drew a parallel between the

vulnerability of taxi drivers to the crime of robbery as being the same as for employees of convenience stores or gas bars. She stated (at para 46):

> I agree that the range of two to four years for a first offender is a fair statement of the sentencing jurisprudence for robbery of a taxi driver when armed with a weapon. In other words, the starting point for a judge's analysis when sentencing an offender with no previous criminal record for robbery of a taxi driver when armed with a weapon is a sentence between two and four years, depending on the circumstances of the offence and the offender, unless there are mitigating factors that call for an emphasis on rehabilitation rather than deterrence, denunciation and protection of the public.

[114] A case departing from the starting point of two to four years for an armed robbery where the victim is a vulnerable employee, which has some bearing on this case, is that of *Draper*. That case involved four different robberies of retail locations and a legion, one of which involved the use of a knife. The offender was 24 years old, had no criminal record and was on judicial interim release. He likely had a form of FASD and ADHD and was a drug addict. This Court accepted that the accused's mental circumstances and drug addiction played a link in the robberies and was prepared to accept he had diminished moral blameworthiness on that basis. A sentence of 18 months' imprisonment, before considerations of totality, was considered fit in the circumstances for the one incident of armed robbery.

[115] Obviously, in this case, if there had been a nexus between the young person's mental circumstances and his commission of the armed robbery of the convenience store, based on *Draper*, the judge's sentence could not be varied on appeal. However, that key causal link is missing in

this case.

[116] The circumstances of the second armed robbery here were a "street mugging"; a robbery conducted in a public place, typically where the parties do not know each other, and where the motive of the assailant or assailants is to steal the victim's property. It is a serious and unfortunately all-too-common crime that was described in one case as a "plague in our society" (*R v Carter*, 1992 ABCA 190 at para 1). Law-abiding members of a civil society share the expectation that they can safely walk in public places and the law will protect them.

[117] The Alberta Court of Appeal has identified a starting point of 12 to 18 months' imprisonment for such robberies where there is no serious injury to the victim and the proceeds of the robbery are modest (see *R v Bulat*, 1996 CarswellAlta 618 (CA); and *R v Saeed*, 2004 ABCA 384). A comparable range for this sort of crime has also been identified by the British Columbia Court of Appeal (see *R v Porter*, 1996 CarswellBC 282; *R v Thompson*, 2003 BCCA 308; *R v Ruckman*, 2003 BCCA 456; and *R v Labrash*, 2006 BCCA 357). Relevant factors that will aggravate sentence include the degree of planning, use of a weapon and vulnerability of the victim (see *R v Ridgeway*, 2012 ABCA 29 at para 9). A lengthy or related record will place the offender towards the higher end of the range. Where the violence used is particularly serious in terms of the injuries caused or those foreseeable from the force used, a longer sentence will be called for.

[118] In this case, the mitigating factors were the entering of a guilty plea and the extreme youth of the offender. The aggravating factors were:

1. A weapon was used.

2. The robbery was planned in the sense the young person armed himself on the evening for the purpose of robbing others as the opportunity presented itself.

3. The violence used here was serious. The physical injuries of V.S. amounted to wounding, maiming or disfiguring and would support a conviction for aggravated assault (see section 268(1) of the *Code*; and *R v Nambiennare*, 2013 MBCA 42 at para 5).

4. The negative psychological impact that the crime had on both V.K. and V.S. based on their victim impact statements.

[119] In my view, a street-mugging robbery where the victim is seriously harmed calls for emphasis on the sentencing objectives of denunciation and general deterrence and will, as a general rule, result in a penitentiary sentence, even for a youthful first offender with reasonable prospects for rehabilitation.

*Appropriate Sentence for the Young Person*

[120] There are several aspects of the judge's reasoning that should be respected as they were not arrived at by error and are reasonably supported by the record. In terms of the young person's degree of responsibility, her finding that he orchestrated the two armed robberies and was the leader during their commission is not contentious. There is also no question, in light of her reasons, that the gravity of the offences here was serious, particularly the second armed robbery. The judge appropriately rejected the

argument that the sentences for the two armed robberies should be concurrent. There was no nexus between the two armed robberies; the targets were different, as was also the manner of their commission. They were not a spree. She also properly gave little significance to parity in this case. The background and future prospects of S.M. and Z.H. were quite different and the sentences they both received under the *YCJA* are not helpful in determining an adult sentence for the young person. Finally, although the principle of restraint is always an important aspect of sentencing young persons, particularly if they are aboriginal, I see no reversible error in the judge's conclusion that the *Gladue* factors in this case did not call for a reduction of what would otherwise be a fit sentence.

[121] Quite properly, the judge was also sensitive to the fact that, although she was imposing an adult sentence, she still had to do so mindful of certain sentencing principles in section 3 of the *YCJA* (see *R v Pratt*, 2007 BCCA 206 at para 53). As Frankel JA explained in *R v Nguyen*, 2008 BCCA 252 (at para 33):

> The interplay between the principles of sentencing set out in the ***Criminal Code*** and the ***Youth Criminal Justice Act***, when a youth is sentenced as an adult, is discussed in ***R. v. Pratt***, 2007 BCCA 206, 218 C.C.C. (3d) 298. In that case Madam Justice Saunders held that, in addition to the principles set out in Part XXIII of the ***Code***, a court sentencing a youth as an adult must have regard to the "Declaration of Principle" in s. 3 of the ***Youth Criminal Justice Act***. What this means is that a court must consider adult sentencing principles which would otherwise be inapplicable to a youth: para. 55. <u>At the same time, regard must be had to the youth sentencing principles such as rehabilitation and reintegration, and "fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity": para. 56</u>.

> However, although "the fact of youth creates a 'discount' from the adult tariff of sanctions", the likelihood of such a discount is reduced the closer the offender is to the cut-off age in the definition of "young person": para. 57.
>
> [emphasis added]

[122] The effect of this reasoning is that, even when imposing an adult sentence, the consequences of the extreme youth of an offender must be taken into account. This is hardly controversial. Youth is generally considered a mitigating factor because young people have the greatest potential to change their ways and be rehabilitated and criminal conduct of such offenders typically bears the hallmarks of immaturity (see *R v Leask* (1996), 112 CCC (3d) 400 (Man CA)).

[123] The interplay of sentencing factors under the *Code* and *YCJA*, such as denunciation, deterrence, rehabilitation, reintegration, and fair and proportionate accountability, that is consistent with the greater dependency of young persons and their reduced level of maturity and restraint is a case-specific exercise (see *R v Smith*, 2012 NSCA 37 at para 24). For example, in some cases, the facts will require an emphasis on deterrence. In others, deterrence will be tempered by the immaturity of the offender. What is important is that, in sentencing a young person as an adult, the court must take great care in determining the rehabilitative prospects of the offender and fostering those prospects as best as is realistically possible.

[124] In this case, I would respect the judge's decision to temper reliance on general and specific deterrence based on both the extreme youth of the young person at the time of the offences and the nature and severity of his

cognitive limitations. With an older adolescent who did not have similar mental circumstances, an adult sentence for such behaviour would be more heavily influenced by the principle of deterrence.

[125] In my view, the application of the principles of denunciation and fair and proportionate accountability, in light of the adult-like maturity the young person displayed while committing the two armed robberies, are factors which strongly favour increasing the adult sentence. The offences were serious and must be strongly denounced. In each case, the victims were vulnerable, defenseless and outnumbered. Significant violence was either threatened or used by the young person. The young person has high moral blameworthiness for his criminal behaviour despite his displayed immaturity in a clinical setting and his mental circumstances.

[126] On the question of the young person's rehabilitative and reintegration prospects, the judge was careful to take into account both the negative (prior record, lack of remorse and poor institutional behavior) and positive (willingness to cooperate with psychologists and supportive grandparents) factors placed before her. She also properly recognized that the young person's mental circumstances are not curable and require careful management with the assistance of others.

[127] Post-sentencing conduct is a relevant factor that can either ameliorate or aggravate a sentence in an appeal court's review of the fitness of a sentence (see *Simon* at para 30). The difficulty here is that the post-sentencing conduct of the young person has eroded any evidentiary basis for significant weight to be placed on factors, such as rehabilitation and

reintegration, which would mitigate the sentence. The risk to public safety in this case is acute and there is no plan whatsoever to manage the risk the young person presents. The young person has chosen to abandon the support of his grandparents and those in the community, such as his probation officer and the CDC program, who would help him maintain pro-social habits. Accordingly, this change in circumstances requires that his sentence be imposed from a different perspective than that of the judge who commented, on the facts that were before her at the time, that "there is a prospect [of] some rehabilitation". It is unnecessary to decide on the Crown's challenge to the reasonableness of that finding on the record at the time because that conclusion can no longer be supported on any reasonable review of the record. In summary, the young person is simply not amenable to rehabilitation at this point in his life, making his prospects for successful reintegration into society remote.

[128] When young persons with FASD disorders are not making efforts to manage their conditions despite adequate programming and supervision being made available to them and, instead, become involved in violent criminal behaviour, in the absence of a reasonable structure to protect the public through rehabilitation, a sentencing court should favour the interests of public safety through custodial sanctions (see *H (CT)* at para 62; and *R v RE*, 2003 BCCA 303 at para 6). That said, when a sentencing court is faced with that unsatisfactory situation, the Court must be careful to not entirely abandon the principles of rehabilitation, reintegration and restraint.

[129] In my view, when the relevant sentencing objectives and principles under the *Code* and the *YCJA* are taken into consideration in light of the

circumstances of the offences and the young person, a fit sentence, before consideration of totality, would be as follows:

- on each of the three offences relating to the first armed robbery, 10 months concurrent (taking into account 14 months of the 29 months of pre-sentence custody), to be followed on his release from prison by three years' supervised probation on the terms previously ordered by the judge; and

- on each of the three offences relating to the second armed robbery, 15 months concurrent (taking into account the remaining 15 months of the 29 months of pre-sentence custody), but consecutive to the sentences for the first armed robbery, to be followed on his release from prison by three years' supervised probation on the terms previously ordered by the judge.

[130] The effective combined adult sentence for the two armed robberies, before considering totality, would be one of 4.5 years' imprisonment.

[131] I would impose, in essence, the same sentences as the judge did for the youth offences with the two exceptions. An adjustment is necessary to the youth sentences previously imposed to comply with the requirements of a CSO under section 42(2)(n) of the *YCJA* and, second, a youth sentence for the June 29, 2014 breach of the conditions of an undertaking (section 145(3) of the *Code*) is required. In my view, a fit sentence on the eight youth offences, before consideration of totality, would be:

1. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—May 27-June 2, 2014: **2 days' secure custody, 1 day's community supervision**;

2. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 10, 2014: **6 days' secure custody, 3 days' community supervision, consecutive**;

3. section 137 *YCJA*—Fail to Attend, Participate and Complete Probation Program—June 22, 2014: **6 days' secure custody, 3 days' community supervision, consecutive**;

4. section 137 *YCJA*—Curfew Breach—June 25, 2014: **20 days' secure custody, 10 days' community supervision, consecutive**;

5. section 334(b) *Code*—Theft Under $5,000—June 25, 2014: **10 days' secure custody, 5 days' community supervision, consecutive**;

6. section 267(a) *Code*—Assault with a Weapon—June 26, 2014: **60 days' secure custody, 30 days' community supervision, consecutive**;

7. section 137 *YCJA*—Reside as Directed Breach—June 29, 2014: **20 days' secure custody, 10 days' community supervision, consecutive**; and

8. section 145(3) *Code*—Failure to Comply with a Condition of Undertaking—June 29, 2014: **24 days' secure custody, 12 days' community supervision, consecutive**.

[132] The combined youth sentence for the eight offences would be one of 148 days of secure custody and 74 days of community supervision. Given the young person is subject to a probation order on the adult offences, it would serve no purpose to impose probation orders in respect of the youth sentences.

[133] In this case, the merger of the young person's adult sentence and his youth sentence is governed by section 743.5 of the *Code* and section 139(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (see *Erasmo v Canada (Attorney General)*, 2015 FCA 129, leave to appeal to SCC refused, 2015 CarswellNat 5472). The practical effect would be that, once the young person is taken into custody by operation of law, his combined youth sentence of a 222-day CSO would be converted into an adult sentence of imprisonment that would be added onto the young person's adult sentence for the two armed robberies.

[134] The principle of totality is premised on avoiding a crushing sentence based on an offender's record and rehabilitative prospects (see *R v M (CA)*, [1996] 1 SCR 500 at para 42). Here, the judge made the following comments as to her application of the principle of totality:

> I am satisfied that it is appropriate to reduce the sentences to reflect your youth, your special needs and the need to protect the public by ensuring a good plan for your release that includes the

> structure, support and supervision that Dr. Fisher says you need in order to stay out of trouble.

[135] The law is clear that mitigating factors are to be used by a sentencing judge to temper the length of the sentence when determining what is a fit sentence for an offence, not later in the sentencing process when applying the totality principle to reduce a combined sentence (see *H (CT)* at para 57; *R v Kozussek*, 2013 MBCA 52 at para 10; and *Charlette* at para 33).

[136] Because the judge took the very young age of the young person into consideration in determining what was a fit sentence, it was an error in principle for her to use that factor again to further discount his sentence for reasons of totality. The same is not the case with the young person's mental circumstances. While it was an error in principle, as I have explained, for the judge to take that factor into consideration to mitigate the sentence, as there was no causal link to the criminal behaviour, it is a factor that is relevant to take into consideration for the purposes of totality. The obvious reason is that, while a custodial sentence is difficult for any offender, it is particularly difficult for those suffering from cognitive limitations. History has shown that the young person's cognitive limitations lead him into conflict in custody with staff and other inmates and place him at greater risk of suicide. These facts satisfy me that some adjustment of his sentence for reasons of totality is necessary to ensure it does not become disproportionate to his criminal behaviour (see *R v Shahnawaz*, (2000) 149 CCC (3d) 97 (Ont CA) at para 34, leave to appeal to SCC refused, 2001 CarswellOnt 1378).

[137] Therefore, I am prepared to reduce the combined adult sentence for

reasons of totality by six months. I would achieve this by deducting three months from the sentences for each of the two armed robberies.

[138] Therefore, on each of the three offences relating to the first armed robbery, the sentence will be one of seven months concurrent (taking into account 14 months of the 29 months of pre-sentence custody), to be followed on his release from prison by three years' supervised probation on the terms previously ordered by the judge.

[139] On each of the three offences relating to the second armed robbery, the sentence will be one of 12 months concurrent (taking into account the remaining 15 months of the 29 months of pre-sentence custody), but consecutive to the sentences for the first armed robbery, to be followed on his release from prison by three years' supervised probation on the terms previously ordered by the judge.

[140] I would also adjust the combined youth sentence imposed on the young person. The youth sentences will run consecutively to each other but concurrently to the adult sentences. In my view, to do otherwise would be unfair to the young person and create a disproportional result in the circumstances as many of the offences for which he received a youth sentence could not otherwise result in an adult sentence given the wording of section 64(1) of the *YCJA*, nor did the Crown feel it appropriate that those that could result in an adult sentence should do so.

[141] The result of this variation of the young person's sentence is he would be reincarcerated. Before ordering reincarceration of an already released offender, it is necessary to consider whether it would be unjust to

do so in the circumstances. Chartier CJM discussed the issue in the following way in *R v McMillan (BW)*, 2016 MBCA 12 (at para 36):

> Suffice it to say that a non-exhaustive list of factors to consider on the issue of whether to stay the remaining custodial portion of the sentence on a successful Crown appeal against sentence were conveniently set out by the New Brunswick Court of Appeal in *R v Veysey (JM)*, 2006 NBCA 55, 303 NBR (2d) 290 (at para 32):
>
> > (1) the seriousness of the offences for which the offender was convicted; (2) the elapsed time since the offender gained his or her freedom and the date the appellate court hears and decides the sentence appeal; (3) whether any delay is attributable to one of the parties; and (4) the impact of reincarceration on the rehabilitation of the offender.
>
> As can be seen by these factors, the analysis as to whether the accused should not be reincarcerated is fact-sensitive in nature.

[142] In this case, a cumulative assessment of the relevant factors favours reincarceration. The offences in question are serious. Little time has elapsed since the young person has been released from custody and, since his release, he has already been reincarcerated for a period of a month. The delays associated with the two appeals are not material and, given that the young person has effectively divorced himself from any form of supervision in the community, I do not see the impacts of reincarceration on his future rehabilitation prospects to be material.

[143] Once the young person is taken into custody on his varied sentence, he is to be credited with having already served seven months of the 19 months to account for his time in custody as a sentenced prisoner on the original sentence, leaving him with a further 12 months to serve. A

placement hearing before another judge of the youth justice court should occur to decide where the young person serves the balance of his sentence.

[144] While these comments address the substance of the two appeals, at the hearing of the appeals, the submissions of the parties treaded into the topic of the significant delays in this case. Some comment is, in my view, warranted about delays in the sentencing process in this case.

Delay

[145] In its decision of *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada expressed concern that the Canadian justice system currently operates based on "a culture of complacency towards delay" (at para 40). Beyond the requirements of the *Charter*, proceedings under the *YCJA* must be conducted promptly to ensure a young person understands the relationship between his or her behaviour and the consequences for it and, therefore, those responsible for administering the *YCJA* have a legal obligation to ensure timeliness of the proceedings. Sections 3(1)(b)(iv) and (v) of the *YCJA* provide:

> **Declaration of Principle**
>
> **Policy for Canada with respect to young persons**
> **3(1)** The following principles apply in this Act:
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> . . .
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> **(b)** the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
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> . . .

> **(iv)** timely intervention that reinforces the link between the offending behaviour and its consequences, and
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> **(v)** the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

[146] Professor Bala and Anand PJ explain these provisions of the *YCJA* in the following fashion (at 145): "Sections 3(1)(b)(iv) and (v) are intended to remind court administrators, judges, lawyers, and others of the need to give priority to the expeditious resolution of youth court cases." See also *R v RDR*, 2011 NSCA 86 at para 14.

[147] The record here is that the requirements of the *YCJA* for the timely adjudication of this matter were not met.

[148] The young person made his first appearance on the two armed robberies in youth justice court on June 30, 2014. The matter was adjourned on three occasions until July 29, 2014, when a youth justice court judge directed that counsel for the young person be appointed pursuant to section 25(4)(a) of the *YCJA*. Counsel was subsequently appointed and then, after one further adjournment, the young person entered guilty pleas to the 14 offences on August 20, 2014.

[149] The pre-sentence report from the probation officer and the assessment report from Dr. Fisher and Dr. Therrien were both received by the court on September 19, 2014. The hearing for an adult sentence was set for January 29, 2015. The judge reserved her decision. The decision to impose an adult sentence was rendered on April 20, 2015. It is at this point

in the sentencing process that serious delay problems began.

[150] The judge heard sentencing submissions on May 20, 2015. During the sentencing, the judge, on her motion, raised the *Laquette* decision and asked for counsel's position as to how that decision may affect a sentence for an offender suffering from a form FASD. She decided to adjourn proceedings to request an update from the youth facility to see how the young person was behaving and to consider the *Laquette* decision.

[151] Nothing of note happened over the seven adjournments of the sentencing hearing over the summer of 2015 until an appearance on August 12, 2015. At that time, counsel for the young person advised for the first time that she wanted to call Dr. Fisher as a witness at the sentencing (which never actually occurred). Both counsel also advised the judge that they wanted to supplement their earlier submissions by filing further cases which would necessitate another date for sentencing. The judge expressed concern about the delays. She asked the young person how old he was. He replied that he was 15 years old. The judge then stated, "Okay. Okay. I'm starting to worry that you'll be 18 before we get this finished. Okay."

[152] Because of the difficulties in finding a full day to continue the sentencing, it was delayed until November 18, 2015.

[153] On November 18, 2015, the judge heard a contested adjournment request of the young person. The young person requested that the court order a further assessment in the form of a functional assessment to assess his day-to-day cognitive abilities. The Crown voiced its concern that the case had been dragging on too long and that, if counsel thought this evidence

was relevant, it should have been requested for the adult sentencing hearing. Crown counsel noted that Dr. Fisher did not think that such an assessment was relevant at the time. The record is clear that all parties were struggling with the relevance of another assessment to completing the sentencing hearing. The judge said this to the young person:

> I'm getting frustrated with the way things are proceeding because I'm hearing different things at different times and I am seeing that months roll by before I have you back, and I don't like that you have to wait this long for an answer. I don't like that your grandma and grandpa have to wait this long for an answer.

[154] The adjournment was granted. Dr. Fisher's functional assessment of the young person was provided to the Court on December 16, 2015. Sentencing submissions were then completed on December 17, 2015. The judge advised that she would give her decision on January 28, 2016.

[155] Unfortunately, that did not happen. The judge decided to wait for the release of the decision of this Court in *Friesen* (argued on October 2, 2015 and released on May 16, 2016) before sentencing the young person. The matter was adjourned a further 10 occasions until June 28, 2016 when sentence was imposed.

[156] In accordance with the *YCJA*, once an adult sentence was imposed, the question of placement had to be decided (see section 76 of the *YCJA*). A placement report was provided to the Court on July 25, 2016. Placement in a youth facility was by consent and the decision on that was made on August 4, 2016.

[157] What are the lessons about delay from this case?

[158] Medical, psychological or psychiatric assessments are an indispensible aspect of sentencing under the *YCJA* in serious cases or where the circumstances of the young person are complex. The expectation under the *YCJA* is that any assessment for a young person in custody will be completed within 30 days absent judicial extension (see sections 34(3)-(4), (6) of the *YCJA*).

[159] In this case, the youth justice court had the benefit of a proper clinical diagnosis of the young person having ARND *before* the sentencing process even began. It is also uncontentious that, in making the decision to sentence a young person as an adult or in determining the ultimate sentence, a youth justice court judge is required to take into account the fact that ARND, like other forms of FASD, is a recognized cognitive defect that may bear on a variety of legal issues such as moral blameworthiness.

[160] In my view, the key lesson in this case is that sentencing judges must carefully understand the limited role of expert evidence in exercising their sentencing function. Expert evidence, such as was provided by Dr. Fisher and Dr. Therrien, has limitations. It provides context but not the answer to a legal dispute. Whether, and if so, the degree to which a cognitive impairment of an offender impacted criminal behaviour is a question for a sentencing judge, not an expert witness. The role of Dr. Fisher and Dr. Therrien in this case was to allow the judge to make an "informed judgment" of the relevance of the young person's cognitive limitations in determining an appropriate sentence for him (see *White Burgess Langille*

*Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 18). Once they provided the necessary context for fact finding to occur, their role was complete.

[161] When one reads all of the forensic assessments in this case, the judge had all the necessary background information as to the nature and severity of the young person's cognitive limitations at the time she made her decision to sentence the young person as an adult in early 2015. The sentencing process should have been completed well over a year before it was in this case. In my view, the information the judge received from the psychologists thereafter was repetitive and unnecessary for her to decide the relevance, if any, of the young person's cognitive limitations.

[162] It will be in only very unusual cases, of which this is not one, where a further assessment would be ordered under section 34 of the *YCJA* *after* the adult sentencing decision has been already made. The obligation of lawyers, judges and expert witnesses is to ensure that the proper expert evidence about an offender's mental circumstances is before the court at the hearing to impose an adult sentence and not afterwards. Adding to the record with repetitive information is not a practice that should be followed going forward; justice resources are finite and the *YCJA* obligates timeliness.

[163] The large number of adjournments in this case where little occurred is noteworthy. The contemporary Canadian criminal justice system has a seemingly insatiable appetite for adjournments. The phenomenon that many criminal cases occasion dozens and dozens of adjournments where inconsequential progress is made on the resolution of a file is the most

obvious symptom of the culture of complacency that currently exists. Like any bad habit, the negative consequences of overuse of adjournments are not readily manifest until it is too late. When adjournments are excessively used, in many cases there is a negative systemic effect on the proper administration of justice. One aspect of ending the culture of complacency that permeates the criminal justice system is to adjust the approach to the adjournment of a criminal case (see *R v Cody*, 2017 SCC 31 at para 37).

[164] At its core, an adjournment of any criminal case is based on the interests of justice. Those interests must be broadly understood. Both the accused and the Crown are entitled to a fair process and an opportunity to be properly heard on the allegation, but there is also a public interest in the orderly and expeditious administration of justice. That public interest is wider than the Crown's role in prosecuting an individual crime on behalf of society. In the post-*Jordan* era, there is a need for greater judicial scrutiny of the rationale for any adjournment request, as well as its length. Short delays of individual cases are often required to ensure procedural fairness but repeated and excessive delays magnified by the phenomenon occurring in many cases are a threat to the justice system's ability to properly operate in a timely way. The days of criminal files sitting in a seemingly endless state of limbo on a court docket is a practice that is no longer tolerable. To "effect real change" at ending the culture of complacency in the criminal courts, a more critical and proportional use of the adjournment remedy is required from now on (*Cody* at paras 36-37).

[165] Finally, while I appreciate the fact that the judge wanted to have the benefit of the pending decision of *Friesen* from this Court when she

decided to delay the sentencing process further, over a year had passed *after* her decision to impose an adult sentence had been made. Also, the law as to the relevance of an offender's mental circumstances was not unclear at the time. Sentencing courts are not expected to delay their work for an extended period on the off-chance that a pending appellate decision might be of assistance to them. Such an approach should only occur in the rarest of cases and only when the law is unsettled. Moreover, youth justice court judges have a legal obligation under the *YCJA* to promptly enforce that Act because "responses to offending behaviour have the greatest impact on young persons if there is a short time period between the criminal conduct and the justice system response to that behaviour" (Davis-Barron at 164-65).

Disposition

[166] Leave to appeal on both appeals is granted. The sentence appeal of the young person is dismissed. The sentence appeal of the Crown is allowed and the sentence of the young person is varied in accordance with these reasons. A warrant for the arrest and committal of the young person will issue.

Mainella JA

I agree: Cameron JA

I agree: Burnett JA