October 27th, 2008

Sentencing under the Youth Criminal Justice Act: Are Kids Really Getting Away with Murder?

By Greg Francis

Cases Considered:

R. v. T.W.T., 2008 ABCA 306;
R. v. Williams, 2008 ABCA 317.

The *Youth Criminal Justice Act*, S.C. 2002, c. 1 (YCJA), has been the subject of a great deal of comment and discussion in recent months. Critics argue that the legislation does not adequately respond to youth crime, and the Conservative government has proposed an overhaul of the *Act* (see http://www.conservative.ca/EN/1091/106115). In the spring, Justice Minister Rob Nicholson toured the country conducting roundtable discussions with stakeholders, seeking feedback on the need to tighten bail provisions and impose automatic adult sentences for youth found guilty of serious and violent crime and repeat offences.

The *YCJA* is a much more complicated and hard to follow statute than its predecessor, the *Young Offenders Act*. As a result, it is not easy to discuss specific provisions, their application to current and relevant scenarios, and their measurable effectiveness in addressing youth crime. On a general level, the debate as to whether the *YCJA* is effective can be rather facile, amounting to a childishly simple back and forth "Yes it is - no it's not", depending on one's ideological bent. Two recent decisions of the Alberta Court of Appeal provide the opportunity, however, to assess whether the *YCJA*, as currently written, is capable of addressing the most serious crime in society - murder.

R. v. T.W.T. concerns the appeal of the sentence given to a young person convicted of second degree murder after he killed the victim by running him over with a car. T.W.T. was 15 years old at the time of the offence, and had been in a "verbal altercation" with the victim beforehand. The Crown consented to the appellant being sentenced as a young person but argued that he should receive the maximum sentence provided for in section 42(2)(q)(ii) of the *YCJA*, i.e. "in the case of a second degree murder, seven years comprised of (A) a committal to custody…for a period that must not…exceed four years from the date of committal, and (B) a placement under conditional supervision to be served in the community in accordance with section 105." The sentencing judge, Judge J.H. Goss, agreed with the Crown's position and sentenced the appellant to three years in custody and four years of community supervision.

On appeal, the Crown argued that "the appellant did not really receive the maximum penalty available, because he could have been sentenced as an adult" (at para. 5). The Court of Appeal (per Justices Frans Slatter, Paul Belzil and Dennis Thomas) dispensed with this argument quickly, noting that the Crown consented to the appellant being sentenced as a young person. More importantly, however, the Court declared that "…the decision to sentence an accused as a

young offender, rather than as an adult, does not create any presumption that the maximum youth sentence should be imposed" (at para. 5). As noted by the Court, each case must be assessed on its own unique circumstances, with a reasoned assessment of all relevant mitigating and aggravating circumstances.

Unfortunately, the sentencing judge did not adequately explain why the maximum sentence was required in this case, or why a lesser sentence would not hold the appellant "fully accountable" (at para. 3). In addition, many of the aggravating factors she cited were "of questionable relevance", and no account was taken of the numerous mitigating factors she identified (at paras. 6-7).

In allowing the appeal, the Court concluded (at paras. 8-9):

> This murder was an impulsive act by an immature person, followed by a guilty plea, genuine remorse and meaningful steps towards rehabilitation. Neither the crime nor the appellant rise to the level of gravity or culpability that would justify the maximum sentence. The reasons of the trial judge disclose errors of principle, and the sentence is demonstrably unfit.

The Court allowed the appeal and substituted a sentence of three years in custody, followed by two years of community supervision. As is the usual practice, the young person was also found to be entitled to one-for-one credit for the 476 days he spent in pre-trial custody, and a 10-year weapons prohibition was ordered.

As a precedent, this case simply reinforces the principle that maximum sentences are reserved for the worst offenders and/or the worst circumstances. T.W.T. was neither. Nonetheless, the sentence imposed provides a useful scenario around which a rational discussion can take place regarding the adequacy of the *YCJA*'s sentencing provisions.

The framework for such a discussion is set out in the other case that is the subject of this post. Released by the Court of Appeal (per Justices Slatter, Belzil and Jack Watson) the same day as *T.W.T.*, *R. v. Williams* reviews the principles that guide judges' decisions on appropriate sentences for youth crime as articulated in the *YCJA*. Section 3 of the Act sets out a general "Declaration of Principle":

> 3. (1) The following principles apply in this Act:
> (a) the youth criminal justice system is intended to
> (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
> (ii) rehabilitate young persons who commit offences and reintegrate them into , and
> (iii) ensure that a young person is subject to meaningful consequences for his or her offence in order to promote the long-term protection of the public;
> (b) the criminal justice system for young persons must be separate from that of adults and 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, ...

The Court further noted Part 4 of the *YCJA*, and in particular a section on the "Purposes and Principles" of sentencing:

> 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.
> (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: . . . . .

According to the Court, "section 38, which sets out the principles of sentencing, specifically refers back to s. 3, which sets out the general principles underlying the *YCJA*. Both s. 3 and s. 38 refer to "accountability" as being one, but not a predominate, principle to be observed" (*Williams* at para. 5).

Applied to T.W.T.'s circumstances, I would argue that a three year custodial sentence followed by two years of conditional supervision meets all of the *YCJA*'s requirements for sentencing. Three years in jail followed by two years of conditional supervision (essentially parole, revocable on breach of conditions, resulting in return to custody) is a significant amount of time for a teenaged boy to be denied his freedom. It provides a meaningful consequence that holds the young person accountable, but still provides for his rehabilitation and reintegration into society. The sentence is significantly less than the life imprisonment an adult would receive, however this recognizes the "greater dependency of young persons and their reduced level of maturity" (*YCJA*, s. 3(1)(b)(ii)). Assuming the young person's successful rehabilitation (and I am not aware of any empirical evidence that suggests this would not be the likely outcome), society is protected in the long-term. Given that T.W.T. was only 15 at the time of the crime, entered an early guilty plea, showed remorse and took early positive steps toward rehabilitation, there is reason to believe that this will be the result.

I suspect, however, that this outcome may be offensive and incomprehensible to some, and serve as an example of what's wrong with the *YCJA*. There is clearly a significant constituency in this country (though far from a majority) that believes that the YCJA does not adequately punish or denounce serious youth crime. There is likely no convincing the "tough on crime" crowd that three years in jail followed by two years on parole is a meaningful sentence for a 15 year old boy, or that society is well served by having provided for his rehabilitation and reintegration into society, rather than having focused on his punishment.

Consider, then, the case of *R. v. Williams*. Mr. Williams' appeal presents entirely different circumstances. His case is notorious:

> The Appellant, along with a number of others, lured 13-year-old Nina Courtepatte to a secluded area on a golf course, at night, whereupon she was brutally sexually assaulted and murdered. The Appellant admits to participating in both the sexual assault and murder (at para. 3).

Williams appealed the decision to sentence him as an adult under the *YCJA* (for the original decision see *R. v. W. (M.B.)*, 2007 ABPC 292). The Court of Appeal noted that he had entered a

guilty plea to first-degree murder, and was 17 years old at the time of the offence. He was sentenced to life imprisonment without parole eligibility for ten years, counted from the date of his arrest as per s. 745.1(b) of the *Criminal Code*. It was also noted that the sentencing judge had ruled that Williams should serve his sentence in an adult institution (see *R. v. W. (M.B.)*, 2008 ABPC 12). This ruling was not challenged before the Court of Appeal.

The grounds of appeal were what I would describe as technical and nuanced, having to do with the sentencing judge (Judge J.D. Franklin)'s application of the criteria for subjecting the young person to an adult sentence and her assessment of evidence presented at the sentencing hearing. The Court of Appeal's decision is unremarkable in its rejection of the appeal, however it is worth reading for its overview of the sentencing provisions that govern young persons charged with murder, and the criteria which govern whether a young person is sentenced as a youth or an adult.

In this case, the young person was convicted of first degree murder and sentenced as an adult. He received the maximum sentence under section 745.1 of the *Criminal Code*: life in prison with no chance of parole for ten years. This sentence is a direct result of the application of the *YCJA* to the young person's criminal behaviour. Further, Williams' name is known because the publication ban that typically applies to young persons is waived when they are sentenced as adults (*YCJA* s. 110(2)).

I am at a loss to understand how critics of the *YCJA* propose to "toughen" the Act and make it more punitive, and how any such change would have prevented the death of Nina Courtepatte. The Appellant is now serving time in an adult prison for life, yet this did not deter him from the premeditated sexual assault and murder of his victim. Nor did the publication of his name serve as a deterrent.

R. v. Williams demonstrates that adult sentences are available under the *YCJA* in appropriate circumstances. Still, however, critics of the Act argue that somehow it must be made more punitive. During the recent election campaign, the Conservatives declared their intention to make proposed changes to the *YCJA* a matter of confidence in the government, and now that they are elected we may conceivably see a government fall over its promise to "get tough" on youth crime. If only the government would expend as much energy and political capital trying to identify and address the conditions that contribute to a child growing into a young murderer.